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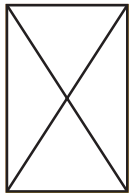

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(Containing cases determined by the High Court of Delhi)

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(CONTAINS GENERAL INDEX)

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HIGH COURT OF DELHI AT NEW DELHI

CIRCULAR No. 27/filing 2014

It is hereby circulated for information that vide order dated 21.03.2014 passed by Hon'ble Mr. Justice V. Kameswar Rao in W.P. (C) No. 1814/2014, it has been directed that in future as and when a writ petition is filed challenging the award/order of the Labour Court/Industrial Tribunal/Competent Authority under a Labour Enactment, complete record of the Labour Court/Industrial Tribunal/Authority be filed along with the writ petition.

A certificate alongwith the petition certifying that the complete record of the Labour Court/Industrial Tribunal/Authority has been filed shall be necessary.

REGISTRAR (FILING)

IN THE HIGH COURT OF DELHI, AT NEW DELHI

RKD/DHC/No. 188

Dated 14/03/2014

CIRCULAR

The matter regarding finalisation of the list of original documents which are to be removed and retained in respect of decided cases of the Original Side at the time of destruction of records is under active consideration of this Court. A tentative list of the original documents which are to be removed/retained for being returned to the parties/counsel is attached.

Members of the Bar through the Secretary of the Bar Association are invited to give their valuable suggestions for addition/deletion in the aforesaid tentative list of original documents within 15 days from the date of this Circular.

Sd/-
(V.K. Kochhar)
Registrar (Original)
for Registrar General

HIGH COURT OF DELHI: NEW DELHI

NOTIFICATION

No. 182/Rules/DHC Dated: 10.03.2014

In exercise of the powers conferred by Section 7 of the Delhi High Court Act, 1966 (Act 26 of 1966) read with Article 227 of the Constitution of India and all other powers enabling it in this behalf, the High Court of Delhi, with the prior approval of the Lt. Governor of the Government of National Capital Territory of Delhi, hereby makes the following amendments in the existing Part A of Chapter 8 of High Court Rules & Orders, Volume IV:-

AMENDMENTS

THE FOLLOWING SHALL BE INSERTED AS RULE 2A BETWEEN EXISTING RULES 2 AND 3 IN PART A OF CHAPTER 8 OF HIGH COURT RULES & ORDERS, VOLUME-IV:-

2A **Regarding service of summons in criminal cases**—(a) In addition to the other modes of service, as provided under the Code of Criminal Procedure, 1973, the summons to the accused and to the witnesses in non-cognizable cases may also be served through approved courier.

(b) In cognizable cases, summons to the witnesses may also be served by the police, through approved courier, in addition to other modes of services provided under the Code of Criminal Procedure, 1973.

(c) The rules governing the service of process through courier agencies, as approved by the High Court of Delhi, qua civil courts, shall also govern the service of process in the criminal cases also.

NOTE: THIS RULE SHALL COME INTO FORCE FROM THE DATE OF ITS PUBLICATION IN THE GAZETTE.

By order of the Court
Sd/-
(Sangita Dhingra Sehgal)
Registrar General

HIGH COURT OF DELHI: NEW DELHI

NOTIFICATION

No. 183/Rules/DHC Dated: 10.03.2014

In exercise of the powers conferred by Section 7 of the Delhi High Court Act, 1966 (Act 26 of 1966) read with Article 227 of the Constitution of India and all other powers enabling it in this behalf, the High Court of Delhi, with the prior approval of the Lt. Governor of the Government of National Capital Territory of Delhi, hereby inserts the following new Part D, after the existing Part C of Chapter 8 of the High Court Rules & Orders, Volume IV:-

Part D

FILLING UP OF FORMS OF PROCESS IN NON COGNIZABLE CASES

1. **Option of a party to fill up forms-** With their applications for the issue of process, parties may, if they so desire, file printed forms of the same duly filled up in accordance with the rules of the High Court regarding the issue of the process. The date of appearance and the date of the process will be left blank.

2. **Responsibility for accuracy of contents-** The parties or their pleaders shall sign the forms thus filled in the left bottom corner, and will be held responsible for the accuracy of the information entered in the forms.

3. **Legible handwriting-** The forms must be filled up in a bold, clear and easily legible handwriting.

4. **Dates to be filled in by office-** When orders for the issue of process are passed by the Court, the date fixed for appearance will be inserted in the form and process will be dated by an official of the Court before the processes are signed.

5. **Free supply of forms-** The necessary number of printed forms of process will be supplied to the parties or their pleaders, free of cost, on application to such official of the Court as the Presiding Judge shall direct.

NOTE: THESE AMENDMENTS SHALL COME INTO FORCE FROM THE DATE OF THEIR PUBLICATION IN THE GAZETTE.

By Order of the Court
Sd/-
(Sangita Dhingra Sehgal)
Registrar General

HIGH COURT OF DELHI: NEW DELHI

NOTIFICATION

No. 217/Rules/DHC Dated: 31.03.2014

In exercise of powers conferred under Article 235 of the Constitution of India, Section 47 of the Punjab Courts Act, 1918 and all other powers enabling it in this behalf, the High Court of Delhi hereby makes the following amendment in the "Delhi Higher Judicial Service (Leave) Rules, 2010", namely:-

1. **The words "Central Civil Services (Leave) Rules, 1972" occurring at the end of Serial No. 11 of Form 2, shall be substituted by the words "Delhi Higher Judicial Service (Leave) Rules, 2010".**

NOTE: THIS AMENDMENT SHALL COME INTO FORCE FROM THE DATE OF ITS PUBLICATION IN THE GAZETTE.

By order of the Court
Sd/-
(Sangita Dhingra Sehgal)
Registrar General

HIGH COURT OF DELHI: NEW DELHI

NOTIFICATION

No. 216/Rules/DHC Dated: 31.03.2014

In exercise of powers conferred under Article 235 of the Constitution of India, Section 47 of the Punjab Courts Act, 1918 and all other powers enabling it in this behalf, the High Court of Delhi hereby makes the following amendment in the "Delhi Judicial Service (Leave) Rules, 2011", namely:-

1. **The words "Central Civil Services (Leave) Rules, 1972" occurring at the end of Serial No. 11 of Form 2, shall be substituted by the words "Delhi Judicial Service (Leave) Rules, 2011".**

NOTE: THIS AMENDMENT SHALL COME INTO FORCE FROM THE DATE OF ITS PUBLICATION IN THE GAZETTE.

By order of the Court
Sd/-
(Sangita Dhingra Sehgal)
Registrar General

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independent contract. The bank is not to look to the terms of the underlying or the main contract entered into between the contractor and the beneficiary. The examination by the Court has to be from the point of view of the concerned bank furnishing bank guarantee and not independent to it. The only exceptions are the exceptions of fraud or whether the invocation of bank guarantee is in terms of the bank guarantee. The tests adopted by the Courts are: Is the fraud "egregious"? Is it an established fraud of the beneficiary known to the bank? Or whether independent of the bank, the aggrieved party sets up a case of special equity. A broad test would be that, would an aggrieved party find it difficult to realize or recover the amounts reflected in bank guarantee from the opposite party, if the aggrieved party were to ultimately succeed in the principal action. Held, in the present case, the case of petitioner does not come within the ambit of any exception—Petition dismissed.

— Sec. 34—Delay—Ld. Arbitrator dispatched signed copies of award through registered post to the General Manager, Head quarter and, Senior Divisional Commercial Manager of Railways on 4.11.2010. Copies received by GM and Head Quarter on 8.11.2010—Senior DCM denying having received copy on 8.11.2010. Held, once it is shown that document was sent properly addressing, prepaying and posting by registered post to addressee than the presumption provided U/s 27 of General Clauses Act read with Sec. 114 Illustration (f) of Indian Evidence Act gets triggered. A noting on the award reflected that it was received on 8.11.2010 in the office of Senior DCM—No cogent explanation why the copy received in the Office of GM & HQ not transmitted to Office of Sr. DCM. Held, from 8.11.2010 the petition was beyond period of 3 months and 30 days and the court has no power to

condone the delay where the initial filing is beyond the prescribed period U/s 34 (3) of the Act.

— Section 7, 16(2) and 37—Code of Civil Procedure, 1908—Order 1 Rule 10—Respondent No. 1 filed suit against petitioner and respondent no. 2 to 5 for recovery challenging action of petitioner in encashing a bank guarantee issued by respondent no.1 to petitioner in respect of certain purchase orders placed by petitioner on respondent no.1—Petitioner entered appearance in suit and raised a preliminary issue as to jurisdiction of Court to try suit in view of existence of arbitral clause/s in purchase orders—Respondent No. 1 sought to contend at that juncture that matter is not arbitrable inasmuch as it has raised issues of fraud against petitioner and respondents no.2 to 5—A joint application filed by parties for compromise whereunder parties agreed to refer controversy in suit to arbitration was allowed by Lok Adalat and respondent no.1 proceeded to file its claim before Sole Arbitration praying for substantially same relief as in suit, against petitioner and respondent no.2 to 5—Application of petitioner to delete respondent no.2 to 5 from array of parties in claim allowed by arbitrator—Order of arbitrator set aside by learned Additional District Judge in appeal of respondent no. 1—Order of learned Additional District Judge challenged before High Court—Plea taken, order of lok adalat cannot bind respondents no.2 to 5, given that they never appeared before Lok Adalat nor were they party to joint compromise application—Per contra plea taken, given that order of Lok Adalat referred all parties to arbitration, logical sequitur thereof is that respondents no.2 to 5 were also referred to arbitration—Held—Scope of a reference has to be decided on basis of terms of arbitration agreement—Respondents no.2 to

5 are not party to any agreement embodied in document with respondent no.1 agreeing to refer their disputes to arbitration—Nor is it case of respondent no.1 that there has been exchange of statements of claims and defence in which it had alleged existence of arbitration agreement and same has been accepted and not denied by respondent no.2 to 5 in their defence statement—It is also not case of respondent no.1 that any exchange of letters, telex, telegrams, or other means of telecommunication referred to provide a record of any arbitration agreement between parties—Respondents no.2 to 5 are not party to purchase orders—Respondent no.1 has not led any evidence or even pleadings to contend that respondents no.2 to 5 had consented before Lok Adalat that matter be referred to arbitration—Findings in impugned order that order of Lok Adalat is binding upon respondents no.2 to 5 is in excess of jurisdiction and patently illegal being contrary to records—Consequently, impugned order deserves to be and is accordingly set aside.

— National Agricultural Cooperative Marketing Federation of India Ltd. (NAFED) decree holder—Kripa Overseas—M/s. Rital Impex Ltd.—Collectively referred as judgments debtors—involved in arbitral proceedings—NAFED preferred petition under Section 9 of the Arbitration and Conciliation Act—Resulted in an order of injunction restraining the sale of several properties, including the property in question (A-13, Block B-1, Mohan Cooperative Industrial Estate, Mathura Road, New Delhi, 110044)—Subsequently, the three parties entered into a settlement dated 03.05.2007 Rs. 20 Cr. shall be paid within next 60 days upon raising loan by mortgaging the property in question - property in question was mortgaged with ICICI Bank against advance of Rs. 1.5 crores other properties subject

matter of attachment, in Section 9 proceedings, were released from the attachment order of the Court on 14.12.2007—The Order dated 14.12.2007, did not refer to the property in question; it described another property—Subsequently corrected and previous order modified through an order of 18.412.2007—Property in question was allowed to be sold by the owner/judgment debtor—Sale deed was executed by one of the judgment debtors in favour of the objector total consideration of Rs. 3.5 crores payment of Rs. 1.5 crores made to ICICI Bank to clear the mortgage and recover the title deeds remainder to the owner/judgment debtor arbitration proceedings between NAFED, and the two judgment debtors award dated 24.09.2009 was made in terms of the settlement dated 03.05.2007 modified by the subsequent order dated 04.04.2008 holding, inter alia, that NAFED is (sic) held entitled to the outstanding amount by sale of the properties, mentioned in the deed of settlement dated 3.5.2007, by public auction—NAFED instituted execution proceedings property in question was attached—NAFED instituted execution proceedings property in question was attached appellant, preferred objections contending that he had clear title to the property sold without any precondition learned Single Judge concluded—Court in its order dated 14.12.2007 did not permit an unconditional sale by the respondents/judgment debtors condition respondents shall deposit Rs. 18 crores by the sale of two properties including the one in question, within 75 days of the sale to satisfy a part of the petitioner/decree holders claim—To acquire a clear and unencumbered title to the property in question, the objector/applicant should have ensured that the said condition was complied with by the respondents/judgment debtors sale deed in question is clearly in contravention of the order dated 14.12.2007 and is subject to Section 52 of the Transfer of Property Act property in question was not released from the lot of properties under the

It is only after this specific request is made, that applicant could invoke benefit of sub-rule (3-A) (a) whereby "government servant referred to in Sub-rule (1) may make a request in writing to appointing authority to accept notice of voluntary retirement of less than three months giving reasons therefor"—So it is only upon application being made three months prior to intended date of retirement that request for lessening or waiving period of waiting for three months could be made—When request is made in this manner, Appointing Authority could exercise discretion, based upon exigencies of case, for relaxation of three months period under Rule 48-A (3-A) (b)—In present case, just exact opposite was done, i.e., application for voluntary retirement was made to be with immediate effect and three months, notice period was sought to be adjusted against pay for subsequent three months; respondent/applicant had misconstrued relevant Rule—Insofar as respondent/applicant had not made any request in writing three months earlier, and had instead notified government to accept his resignation with immediate effect from 31.08.2007, aforesaid provision for relaxation of three months period would not be available to him—In circumstances, government was well within its rights to accept resignation as was done in instant case.

CODE OF CIVIL PROCEDURE, 1908—Order 9 Rule 13—Appeal against dismissal of application u/o 9 r 13 for setting aside ex parte decree. Held—An ex parte decree can be set aside when a Defendant satisfies the Court that the summons had not been duly served or he was prevented by sufficient cause from appearing when the suit was called for hearing. Appellant had admitted the service of summons. Appellant was aware of the pendency for the suit and had sufficient time to appear and answer the claim of respondent no. 1. Only reason

given by Appellant for not appearing in Court is the alleged assurance given by Respondent no. 2 that the Appellant would be duly represented in the matter. This reason cannot constitute a sufficient cause for non-appearance of Appellant. Appellant has been willfully negligent, recourse to Or. 9 R. 13 not available. Appeal Dismissed.

— Order VII Rule 11—'Associateship' agreement dated 02.12.2011—STC and Millennium import of continuous cast copper rods—Millennium importing such rods from two Synergic companies (Synergic, Singapore and Synergic, Malaysia)—Letter of Credit (LC) opened by STC through Allahabad Bank payable to the two Synergic companies through foreign bank plaintiffs, Millennium and STC contended before the learned Single Judge that the two Synergic companies had defrauded STC documents concerning shipment of the products were false and fabricated learned Single Judge rejected plaint on two grounds first, LC constitutes an independent transaction, obligations are not contingent on the intricacies of the underlying contract rather, on the presentation of the necessary documents to the bank in question second limited exception in interfering with LC is that of fraud played upon by the seller on the purchaser and the paying bank was has notice of such fraud—Comprised solely of allegations of fraud learned single judge rejected the suit under Order VII Rule 11 CPC—Hence this appeal. Held: Payment under LC injuncted first, there is a possibility of irretrievable damage second, were there is fraud in the underlying transaction which is brought to the notice of the bank contract of the bank guarantee or the LC is independent of the main contract between the seller and the buyer irrevocable bank guarantee or LC the buyer cannot obtain

injunction against the banker on the ground that there was a breach of the contract by the seller—Documents constitute complying presentation of LC is solely that of the issuing bank (Allahabad Bank) bank does so determine, the non-acceptance by the buyer (STC/Millennium) is not determinative issuing bank accepted the documents considerable lapse of time, informed the foreign bank about the discrepancy which could not be done in view of Article 16 UCP notice to be given no later than the close of the fifth banking day fraud exception to honouring an LC foreign bank must have notice or knowledge of such fraud before making payment evidence must be clear both as to the fact of fraud and as to the bank's knowledge plaint in this case disclosed sufficient pleadings as to the alleged fraud played upon STC/Millennium by the two Synergic companies only reference to the foreign bank's knowledge of such fraud plaint refers casually and vaguely, without referring to any details, to the question of notice of fraud on the foreign bank, which forms a crucial part of the cause of action absence of any particulars pleaded, or any evidence to support, the claim that the foreign bank colluded with the Synergic companies, or even had notice of such fraud, the claim as disclosed in the plaint is bound to fail, as the cause of action pleaded does not entitle STC to the remedy it prays for.

State Trading Corporation of India Ltd. v. *Millennium Wires (P) Ltd. & Ors.*..... *1045*

— Section 151, Order VII Rule 14 (3) and Order VIII Rule 1A(3)—Applications filed by petitioner for placing documents on record and for leading secondary evidence qua photocopies of documents so filed dismissed by Trial Court—Order challenged before High Court—Plea taken, Trial Court has failed to exercise jurisdiction vested in it by not granting leave to file documents—Petitioner was always diligent in

prosecuting case and in any event, respondent would not be prejudicially affected if documents were placed on record—Documents were necessary for effective adjudication of dispute before Trial Court and hence they ought to be allowed to be exhibited—Held—Appropriate time for filing a document in support of a defendant's defence is when written statement is filed—A document that is not produced along with written statement or entered in list filed with written statement ought not to be received in evidence without leave of Court—Injunction of law under Order VIII Rule 1A(1) is not one to be lightly ignored, a fortiori and especially in matters such as present case, where excessive delay of over 11 years, has been caused by defendant in eventually approaching Court under said provision—For exercise of discretion by Court under Order VIII Rule 1A(3) of Code in Favour of a defendant, defendant would have to satisfy Court to qualifying criteria (i) that documents were earlier not within knowledge of party; or (ii) that documents could not be produced despite exercise of diligence on part of defendant —Petitioner has failed to provide sufficient and cogent reasons for allowing documents to be filed—It is not case of petitioner that documents were not within his power nor has petitioner made out any case of exercise of diligence, despite which documents could not be filed—To the contrary, impugned order observes lack of diligence on part of petitioner, as documents had not been filed for a period of eleven years from date of filing of written statement and not even adverted to in evidence filed later—Only explanation proffered by petitioner is inadvertence which cannot be regarded as a ground for exercise of discretion under Order VIII Rule 1A(3)—Impugned order does not suffer from material irregularity warranting interference of this Court in its revisionary jurisdiction.

Shri Ramesh Kumar & Anr. v. *Sangeeta Khanna*.... *1106*

— O. VII Rule 11(a), (b) & (c). Held, while deciding an application U/O.7 R. 11 CPC, Court is not required to take into consideration the defence set up by the defendant in his written statement—The question whether plaint discloses any cause of action, is to be decided from the averments of plaint itself. Strength and weakness of the case of plaintiff cannot be weighed for deciding such application. Assertions in the plaint must be assumed to be correct and Court cannot take into consideration whether the plaintiff may ultimately succeed or not.

Sureshta Malhotra v. *Urmila Rani Chadha & Ors.* *1151*

— O.VII Rule 11(a), (b) & (c). Held, While deciding an application U/o.7 R. 11 CPC, Court is not required to take into consideration the defence set up by the defendant in his written statement. The question whether plaint discloses any cause of action, is to be decided from the averments of plaint itself. Strength and weakness of the case of plaintiff cannot be weighed for deciding such application. Assertions in the plaint must be assumed to be correct and Court cannot take into consideration whether the plaintiff may ultimately succeed or not.

Abhishek Vohra v. *Sureshta Malhotra & Ors.* *1159*

— Order 1 R. 10—Plaintiff filed a suit for specific performance to enforce an agreement to sell entered into with the defendant—Defendant informing that the suit property was sold before filing of the suit to proposed defendant—Application U/o. 1 R.10 CPC filed by the plaintiff to impaled buyer as proposed defendant. Held, since property was sold prior to filing of the suit the doctrine of the Lis - pendent would not be applicable.

— Also held, that the claim of proposed defendant that Section 19(b) of Specific Relief Act would be applicable is a question of trial as it's a question of evidence whether proposed defendant had knowledge of the previous agreement or not and also whether he purchased the property benefice or mollified. The proposed defendant who is a subsequent purchaser and who is not claiming adverse title to the seller, therefore, is a necessary party irrespective or the fact whether he purchased the property with or without notice of the prior agreement, as he would be affected by the final outcome of the case between plaintiff and defendant.

Dharampal Satyapal Ltd. v. *Sanmati Trading and Investment Ltd. and Ors.* *1204*

COMPANIES ACT, 1956—Appeal U/s 10 F of the impugning order of CLB dismissing application for rectification of register of members—Petition filed after 16 years from when the name of appellant was omitted from the register.

— Held even assuming that the Limitation Act 1963 does not apply to proceedings before the CLB and that Sub—section 4 of Section 111 does not provide for any period of limitation, the delay was not enough and appellant was guilty of latches.

— Also held the appellant for 15—16 years accepted the settlement and acted upon it and also his other family members acted upon the settlement. In several judgments, it has been held by the Supreme Court that a family settlement is given effect to by the courts on the broad and general principle that it brings about peace and harmony in the and family and puts an end to existing or future disputes regarding property amongst the family members.

Dinesh Sud v. *Stitchwell Qualitex Pvt. Ltd. & Ors.* *831*

CONSTITUTION OF INDIA, 1950—Article 14—Respondent employees has filed writ petition and had sought entitlement to pension as was available to other employees of Visa Bharati University who had completed ten years of continuous service—Learned Single Judge quashed notification of respondent University that had stopped pension by its order to AERC staff of University—Impugned order challenged before Division Bench in appeal—Plea taken, Allahabad High Court had dismissed a claim for a similar relief which was sought against Allahabad University by members of AERC attached to that University—Held—Learned Single Judge distinguished facts of cited was with present case and found that ruling to be inapplicable to present case—Language employed in Memorandum of Understanding is clear as daylight and requires no interpretation with respect to its intent and import—Objective was clearly that employees of AERC attached to respondent University should be merged with and treated at par with other employees of said University and all benefits would be available to these newly merged employees entering into a larger pool of employees as it were—A perusal of language used in MOU would clearly set out intent of Union of India to first merge and integrate employees of AERC and put them at par with those of University—Having done so on its own, appellants would be estopped from subsequently disowning them or denying them pensionary benefits that were otherwise guaranteed under MOU—Although said employees were not party to MOU, benefits having been granted to them w.e.f. 1995 cannot be unilaterally withdrawn from or denied to them thirteen years later in 2008—Responsibility towards post retirement benefits with respect to employees of AERC was settled between Government and respondent University by transferring same to latter on assurance that former would give grants-in-aid and adequate annual budgetary allocation to meet responsibility and relevant contingencies—Employees

were never consulted for a part of shift in such responsibility—They were content in fact that their terms of employment had not been altered to their detriment and had indeed been improved—This cannot be altered unilaterally now, to their detriment—Withdrawing benefits as per impugned order would be to leave them in lurch and to virtually disown them by subterfuge—This act would be unfair and impermissible and would warrant to be quashed.

Union of India & Ors. v. *Radharanjan Pattanaik & Ors.* *818*

— Petitioners preferred writ petitions aggrieved by non-payment of Bhutan Compensatory Allowance (BCA)—It was alleged by them, they were compensated under DANTAK in Bhutan but were not paid as per rules and regulations—As per respondent, petitioners did not fulfill eligibility criteria for posting to BCA, thus, not entitled to BCA—Petitioners received without any objection payment of Dearness Allowance and House Rent Allowance during alleged periods .

— Held:- Petitioners not entitled to BCA as neither posted to 504 SS & TC under BCA criteria nor physically served in the area where BCA was applicable for their entire posting—Moreover, no complaint or representation was made by them promptly and they also received amounts of Dearness Allowance and House Rent Allowance.

Harish Chander v. *Union of India and Ors.* *845*

— Article 14, 19 (1) (g) and 21—Navy Act, 1957—Regulation 159, 161, 163, 169—petitioner by way of writ petition challenged order dated 01/11/1990 in terms of Regulation 156 of Act convening court martial of petition on 27 charges—He also challenged order dated 15/03/1991 of Court Martial finding him guilty of commission of 8 charges and order of

sentence awarding him sentence of 24 months RI, dismissal from service and fine of Rs. 1,000/- or 6 months imprisonment in default of payment of fine—Petitioner further challenged order dated 27/08/1991 passed by Chief of Naval for maintaining conviction of petitioner on all charges except on Charge 20 and reducing sentence of imprisonment to period already undergone by him—Also, order dated 08/12/2010 and 23/12/2010 passed by Armed Forces Tribunal was challenged by petitioner whereby findings of guilty of Court Martial on all charges other than charge no. 7 was set aside—According to petitioner, he had illustrious, unblemished career of over 20 years of service with Indian Navy and was committed soldier till he was wrongly implicated in the case—It was urged on behalf of petitioner that court martial was convened without application of mind on the material placed before Convening Authority as documents were so voluminous which could not have been considered on the same day by Authority to pass order to convene court martial.

— Held: Convening Authority is required to satisfy himself not only that charges are properly framed but also that evidence if uncontradicted or unexplained would probably suffice to ensure conviction should have sufficient time to scrutinize requisite records before taking a decision.

Avtar Singh v. *Union of India and Ors.* *850*

— Article 14, 19 (1) (g) and 21—Navy Act, 1957—Regulation 159, 161, 163, 169—Petitioner urged summary of evidence along with charge sheet placed before Convening Authority did not contain iota of evidence on charge no. 7 for which petitioner was found guilty by Armed Forces Tribunal. Held:-Convening Authority is required to satisfy himself not only that the charges are properly framed but also that the evidence if uncontradicted or unexplained would probably suffice to

ensure a ' conviction'.

Avtar Singh v. *Union of India and Ors.* *850*

— Article 226, General Conditions of the CCS (Leave Rules), Rule 7 of Chapter 2, 25: Petitioner has filed writ aggrieved by order rejecting Petitioner's candidature for appointment as SI in the Limited Departmental Competitive Examination (LDCE) and older. Further aggrieved by order whereby sanctioned casual leave was cancelled and the period was regularized as earned leave. Petitioner applied for 10 days of casual leave in April, 2010 and was supposed to report back on 15.04.2010—Ongoing Kumbh Mela caused disruption in transport—Causing Petitioner to report back to work one day late. The said explanation was acception as bonafide. Respondents passed an order on 03.05.2010 converting the Petitioner's casual leave to half pay leave without salary and allowances, and that the same would be treated as a break in service rendering the Petitioner ineligible for the LDCE. Held: Respondents failed to communicate order dated 03.05.2010—Burden of disclosing the same lay on the respondents—In the present case by adjusting the absence of the petitioner against leave admissible, respondents have treated the petitioner's leave as bonafide—No order has been passed treating the period as a break in service, thus the same cannot be so treated—Further, scheme of the examination does not stipulate 4 continuous years of service preceding the LDCE—Order converting petitioner's casual leave to earned leave is quashed and the said period shall be treated as casual leave—Respondents directed to consider petitioner's candidature for appointment as Sub-Inspector—Petitioner entitled to notional seniority, but not backwages or arrears in salary.

Dhiraj Bhatt v. *Union of India and Ors.* *921*

— Article 227—Indian Evidence Act, 1872—Section 63—Code

of Civil Procedure, 1908—Section 151, Order VII Rule 14 (3) and Order VIII Rule 1A(3)—Applications filed by petitioner for placing documents on record and for leading secondary evidence qua photocopies of documents so filed dismissed by Trial Court—Order challenged before High Court—Plea taken, Trial Court has failed to exercise jurisdiction vested in it by not granting leave to file documents—Petitioner was always diligent in prosecuting case and in any event, respondent would not be prejudicially affected if documents were placed on record—Documents were necessary for effective adjudication of dispute before Trial Court and hence they ought to be allowed to be exhibited—Held—Appropriate time for filing a document in support of a defendant's defence is when written statement is filed—A document that is not produced along with written statement or entered in list filed with written statement ought not to be received in evidence without leave of Court—Injunction of law under Order VIII Rule 1A(1) is not one to be lightly ignored, a fortiori and especially in matters such as present case, where excessive delay of over 11 years, has been caused by defendant in eventually approaching Court under said provision—For exercise of discretion by Court under Order VIII Rule 1A(3) of Code in Favour of a defendant, defendant would have to satisfy Court to qualifying criteria (i) that documents were earlier not within knowledge of party; or (ii) that documents could not be produced despite exercise of diligence on part of defendant —Petitioner has failed to provide sufficient and cogent reasons for allowing documents to be filed—It is not case of petitioner that documents were not within his power nor has petitioner made out any case of exercise of diligence, despite which documents could not be filed—To the contrary, impugned order observes lack of diligence on part of petitioner, as documents had not been filed for a period of eleven years from date of filing of written statement and not even adverted to in evidence filed later—Only explanation proffered by petitioner is inadvertence which

cannot be regarded as a ground for exercise of discretion under Order VIII Rule 1A(3)—Impugned order does not suffer from material irregularity warranting interference of this Court in its revisionary jurisdiction.

Shri Ramesh Kumar & Anr. v. *Sangeeta Khanna.... 1106*

— Article 226— Writ Petition—Delhi Kerosene Oil (Export & Price) Order, 1962—Clause 6—Cancellation of licence—Conviction-transfer of licence in the name of petitioner upon the death of father—Petitioner firm was issued a licence for distribution of kerosene oil in the year 1977-on 28.04.1995 inspection staff of respondent found shortage of 1233 litres for the period from 01.04.1995 to 28.04.1995 an FIR registered deceased father of the petitioner proprietor of the firm at that time on 07.06.1995 an Assistant Commissioner (East) suspended the licence on the basis of report on 16.08.1995 Assistant Commissioner (Judicial) after considering the facts and circumstances-material placed on record revoked the order of suspension imposed the penalty of forfeiture of security amount-ground-actual shortage 68 litres within permissible limit not on higher side—Meanwhile proceedings initiated upon filing of FIR—Additional Sessions Judge vide judgment dated 03.04.2001 convicted the father of the present proprietor and sentenced him to undergo imprisonment till rising of the Court and imposed fine of Rs. 2000/- after conviction the father continue to run the kerosene depot till his death on 24.02.2006-in June, 2006 present proprietor applied for change of the name of the proprietor in the licence due to death of his father—Assistant Commissioner vide order dated 13.06.2006 allowed the change of the name—directed to deposit security amount on 17.08.2007 show cause notice issued as to why authorization may not be cancelled under Clause 6 (3) of Delhi Kerosene Oil (Export & Price) Control Order, 1962—Reply filed—Respondent dissatisfied with reply

cancelled the licence vide order dated 01.09.2007—Appeal preferred—dismissed preferred writ petition—Contended act of respondent cancelling the licence after long period-unjustified—Respondent allowed change of proprietor name in 2006—No action survives against present petitioner same stale act of previous proprietor condoned—Show cause notice issued after gap of 6 years licence renewed from time to time—Penalty of forfeiture of security amount already imposed—Punishment of the same offence cannot be imposed again on the present proprietor-per contra- the respondent well within their right to take action in terms of Control Order—Delay procedural due to transfer of Assistant Commissioner—Held—Statutory authority required to act reasonable, fairly and expeditiously no reasonable or plausible explanation for gross delay—Respondent waived their right to take action—Respondent agreed to transfer the licence in the name of present proprietor condoned the act of previous licencee—Licence of present proprietor cannot be canceled for the act of previous proprietor—Cancellation quashed—Writ petition allowed.

Madan Lal Pawan Kumar v. *Govt. of NCT of Delhi & Ors.* *1106*

— Article 227—Arbitration and Conciliation Act, 1996—Section 7, 16(2) and 37—Code of Civil Procedure, 1908—Order 1 Rule 10—Respondent No. 1 filed suit against petitioner and respondent no. 2 to 5 for recovery challenging action of petitioner in encashing a bank guarantee issued by respondent no.1 to petitioner in respect of certain purchase orders placed by petitioner on respondent no.1—Petitioner entered appearance in suit and raised a preliminary issue as to jurisdiction of Court to try suit in view of existence of arbitral clause/s in purchase orders—Respondent No. 1 sought to contend at that juncture that matter is not arbitrable inasmuch

as it has raised issues of fraud against petitioner and respondents no.2 to 5—A joint application filed by parties for compromise whereunder parties agreed to refer controversy in suit to arbitration was allowed by Lok Adalat and respondent no.1 proceeded to file its claim before Sole Arbitration praying for substantially same relief as in suit, against petitioner and respondent no.2 to 5—Application of petitioner to delete respondent no.2 to 5 from array of parties in claim allowed by arbitrator—Order of arbitrator set aside by learned Additional District Judge in appeal of respondent no. 1—Order of learned Additional District Judge challenged before High Court—Plea taken, order of lok adalat cannot bind respondents no.2 to 5, given that they never appeared before Lok Adalat nor were they party to joint compromise application—Per contra plea taken, given that order of Lok Adalat referred all parties to arbitration, logical sequitur thereof is that respondents no.2 to 5 were also referred to arbitration—Held—Scope of a reference has to be decided on basis of terms of arbitration agreement—Respondents no.2 to 5 are not party to any agreement embodied in document with respondent no.1 agreeing to refer their disputes to arbitration—Nor is it case of respondent no.1 that there has been exchange of statements of claims and defence in which it had alleged existence of arbitration agreement and same has been accepted and not denied by respondent no.2 to 5 in their defence statement—It is also not case of respondent no.1 that any exchange of letters, telex, telegrams, or other means of telecommunication referred to provide a record of any arbitration agreement between parties—Respondents no.2 to 5 are not party to purchase orders—Respondent no.1 has not led any evidence or even pleadings to contend that respondents no.2 to 5 had consented before Lok Adalat that matter be referred to arbitration—Findings in impugned order that order of Lok Adalat is binding upon respondents no.2 to 5 is in

excess of jurisdiction and patently illegal being contrary to records—Consequently, impugned order deserves to be and is accordingly set aside.

Bharat Heavy Electrical Ltd. v. *Ashutosh Engineering Industries & Ors.* *1128*

CUSTOMS ACT, 1962—Section 18, 25, 27—Present writ petition filed impugning Custom Circular and Notification and seeking quashing of orders passed by Commissioner of Customs and refund of provisional duty paid-Central issue arising in the petition is whether the Central Government while imposing conditions for grant of exemption u/s 25(1) of the Act can lay down conditions in derogation to the specific statutory provisions and stipulations in section 27.

— Impugned Circular No. 23/2010—Customs dated 29th July, 2010 and Circular No. 93/2008 dated 1st August, 2008 sought to prescribe a time limit whereby an importer was entitled to a refund only if claim was made with one year of payment of actual duty—Whether paid on provisional or final assessment thereby rendering date of finalization of assessment inconsequential.

— Petitioner imported electric goods-present transaction contained three sets of bill of exchanges—Petitioner's three separate claims for refund were rejected on the ground that they were filed beyond the stipulated period of one year—Therefore, the present petition wherein the Petitioner claims that u/s 27 limitation period is prescribed from the period of final assessment, and the impugned notification seeks to change the period prescribed under the statute.

— Respondent contends that section 27 had no application in the present case, and that u/s 25 the Government had the power

to grant exemption, subject to certain conditions—Further application for refund had to be made within time period stipulated in the notification.

— Held:

— (i) Section 25 empowers the Central Government to issue a notification in the Gazette and exempt generally either absolutely or subject to such conditions which may have to be fulfilled, from the whole or any part of the customs duty leviable thereupon. A notification u/s 25 has to be liberal-only exemption can be granted under such section, higher duty or harsher terms than those mentioned in the Act cannot be imposed.

— (ii) The word exemption as used in s. 25(1) can include extension or increase in time, but cannot include power of the Government to, vide a circular, reduce statutory time stipulated for claim of refund.

— (iii)Circulars can supplant but not supplement the law-Circulars might mitigate rigours of law by granting administrative relief beyond relevant provisions of the statute—However, Central Government is not empowered to withdraw benefits or impose stricter conditions than postulated by the law.

— Held: Circular stipulates that the date of payment of provisional duty and not the date of final adjudication is determinative for computing the limitation period of refund under notification. It can be faulted for many reasons. These are as under:

— i. As per Section 25(1), Central Government is empowered to issue a notification granting exemption i.e. grant exemption

generally or absolutely or subject to conditions from whole or any part of custom duty leviable on goods. A notification cannot restrict the benefit or impose more rigorous or severe terms than the one prescribed under the Act. Notification canliberalise and grant exemption. Indulgence and benevolence can be an objective of a notification and restricted or shorter period of refund is not postulated. Notification cannot impose more deleterious terms and reduce the period of limitation for refund of claim. (Sub-Section 2A to Section 25 is not applicable)

— ii. Section 27 of the Act prescribes period of limitation. The period of limitation under the said Section cannot be curtailed by way of a notification but a notification can extend and increase the period of limitation. Similarly, a circular cannot reduce the period of limitation for seeking refund stipulated in Section 27 of the Act.

— iii. Section 27 applies to all refunds whether due and payable pursuant to appellate orders or Court orders or otherwise in terms of exemption notification under Section 25(1) or special orders under Section 25(2) of the Act.

— iv. The expression 'date of payment' used in notification can mean the date of final assessment. The said interpretation would be in accordance and as per explanation II to Section 27. Similar expression has been used in Section 27 (1). Circular accepts that in some cases refunds under the notification had been issued on a claim being made within one year from date of final assessment and beyond one year from the date of provisional assessment. The circular however, stipulates that the claim for refund would be entertained under the notification, if it is made within one year from payment of duty and not final assessment. This, may result in reducing

the period . Assuming that the issue of date of payment was debatable, the Board did not deem it appropriate to fix a period or time limit during which claims of refund should be entertained in cases where the Assessee bonafidely believed and were acting on the presumption that period of one year was to be computed from the date of final assessment. The said belief was not ill founded but based on sound logic and reasoning. The Board while issuing the circular would have been fair and just and fixed a time limit during which past claim of refund could be entertained with a reference to the date of final assessment.

— Held: To sum up:

— a. where the imported goods are released on payment of CVD on regular assessment, the application seeking refund can be made within one year of the payment of the CVD in terms of the notification read with Circular.

— b. where the goods are released on provisional assessment followed by the final assessment, the application seeking refund can be made within the period of one year or six months, as the case may be, of the final assessment as stipulated by Explanation II to section 27 of the Act or within the enlarged period of one year from the date of provisional release as stipulated by the notification read with Circular.

— Impugned circular in so far as it holds that S. 27 has no application is held ultra vires the statute and quashed. Impugned orders set aside. Petition disposed off.

DELHI KEROSENE OIL (EXPORT & PRICE) ORDER, 1962—Clause 6—Cancellation of licence—Conviction-transfer of licence in the name of petitioner upon the death of father—Petitioner firm was issued a licence for distribution of kerosene oil in the year 1977-on 28.04.1995 inspection staff of respondent found shortage of 1233 litres for the period from 01.04.1995 to 28.04.1995 an FIR registered deceased father of the petitioner proprietor of the firm at that time on 07.06.1995 an Assistant Commissioner (East) suspended the licence on the basis of report on 16.08.1995 Assistant Commissioner (Judicial) after considering the facts and circumstances-material placed on record revoked the order of suspension imposed the penalty of forfeiture of security amount-ground-actual shortage 68 litres within permissible limit not on higher side—Meanwhile proceedings initiated upon filing of FIR—Additional Sessions Judge vide judgment dated 03.04.2001 convicted the father of the present proprietor and sentenced him to undergo imprisonment till rising of the Court and imposed fine of Rs. 2000/- after conviction the father continue to run the kerosene depot till his death on 24.02.2006-in June, 2006 present proprietor applied for change of the name of the proprietor in the licence due to death of his father—Assistant Commissioner vide order dated 13.06.2006 allowed the change of the name—directed to deposit security amount on 17.08.2007 show cause notice issued as to why authorization may not be cancelled under Clause 6 (3) of Delhi Kerosene Oil (Export & Price) Control Order, 1962—Reply filed—Respondent dissatisfied with reply cancelled the licence vide order dated 01.09.2007—Appeal preferred—dismissed preferred writ petition—Contended act of respondent cancelling the licence after long period-unjustified—Respondent allowed change of proprietor name in 2006—No action survives against present petitioner same stale act of previous proprietor condoned—Show cause notice issued after gap of 6 years licence renewed from time to time—Penalty of

forfeiture of security amount already imposed—Punishment of the same offence cannot be imposed again on the present proprietor-per contra- the respondent well within their right to take action in terms of Control Order—Delay procedural due to transfer of Assistant Commissioner—Held—Statutory authority required to act reasonable, fairly and expeditiously no reasonable or plausible explanation for gross delay—Respondent waived their right to take action—Respondent agreed to transfer the licence in the name of present proprietor condoned the act of previous licencee—Licence of present proprietor cannot be canceled for the act of previous proprietor—Cancellation quashed—Writ petition allowed.

DELHI RENT CONTROL ACT, 1958—Section 25B—Petitioner filed revision petition challenging order of learned ACJ-cum-CCJ-cum-ARC (E) dismissing application of petitioner-tenant seeking leave to defend and passing order of eviction against tenant in Eviction Petition—Plea taken, landlord already possesses a chamber, which has been allotted to him in Rohini District Courts and this fact has been suppressed from learned ARC and by stating that he is not in possession of any chamber—Shop adjoining suit property would be more suitable for running a lawyer's chamber out of, in view of its on looking a wider road than suit property and hence requirement of landlord is not bona fide—Per contra plea taken, document now sought to be relied upon by tenant list issued by Rohini Courts Bar Association was not before learned ARC and hence cannot be considered—In any case, list does not indicate that landlord is in possession of any chamber—Held—This Court, in exercise of its power under proviso to Section 25-B of Act acts only as a Court of revision, and not of appellate Court—Not being appellate Court, this Court cannot, at this stage, consider fresh evidence that was not before

learned ARC—It would not be a proper exercise of power under Section 25-B of Act if Court were to now decide this petition on basis of said document—Learned ARC has, in fact, given a reasoned order in this regard and held that it is a bona fide request of landlord, which is reasonable and well within his prerogative—Issue of whether another property in possession of landlord is more suitable than suit property and whether requirement of landlord is bona fide are issues of fact that this Court would abstain from getting into—All that this Court is mandated to do is to satisfy itself as to whether impugned order is in accordance with law i.e., whether finding that requirement of landlord is bona fide is a finding in accordance with law—This Court finds no merit in petition requiring exercise of its jurisdiction under Section 25-B of Act.

Narender Kumar Jain v. *R.S. Sewak* *1090*

— Section 25B—Revision petition filed challenging order of learned SCJ-cum-RC dismissing application of petitioner-tenant seeking leave to defend and passing order of eviction against tenant in eviction petition—Plea taken, site plan of ground floor clearly shows four shops and landlord would have demolished one wall between two shops to make it seem like one shop—Held—Jurisdiction of this Court in exercise of its powers under Section 25B has to be to a limited extent and only to ensure that findings of fact are in accordance with law—Tenant, by this petition, is praying that Court upset reasoned findings of learned ARC in impugned order—Findings of learned ARC on basis of documents on record is a possible interpretation and is reasonable, based on documents on record—Given same, this Court does not find it appropriate to substitute reasoned findings of learned ARC with any other possible opinion.

Pawan Pathak v. *Chhajju Ram* *1099*

EVIDENCE ACT, 1872—Appreciation of Evidence—Early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding truth of the version.

— Evidence Act—Appreciation of Evidence—The testimony of the injured witness is accorded a special status in law.

— Evidence Act—TIP Adverse inference is to be drawn against the appellants for declining to participate in the Test Indentification Proceedings. It is settled legal preposition that Identification Parade is a tool of investigation and is used primarily to strengthen the case of the prosecution on the one hand and to make doubly sure that accused in the case are actual culprits. It is trite to say that substantive evidence is the evidence of identification in Court.

Amar Kumar Gupta v. *State of Delhi* *1007*

— Section 63—Code of Civil Procedure, 1908—Section 151, Order VII Rule 14 (3) and Order VIII Rule 1A(3)—Applications filed by petitioner for placing documents on record and for leading secondary evidence qua photocopies of documents so filed dismissed by Trial Court—Order challenged before High Court—Plea taken, Trial Court has failed to exercise jurisdiction vested in it by not granting leave to file documents—Petitioner was always diligent in prosecuting case and in any event, respondent would not be prejudicially affected if documents were placed on record—Documents were necessary for effective adjudication of dispute before Trial Court and hence they ought to be allowed to be exhibited—Held—Appropriate time for filing a document in support of a defendant's defence is when written statement is filed—A document that is not produced along with written statement or entered in list filed with written statement ought not to be received in evidence without leave of Court—

Injunction of law under Order VIII Rule 1A(1) is not one to be lightly ignored, a fortiori and especially in matters such as present case, where excessive delay of over 11 years, has been caused by defendant in eventually approaching Court under said provision—For exercise of discretion by Court under Order VIII Rule 1A(3) of Code in Favour of a defendant, defendant would have to satisfy Court to qualifying criteria (i) that documents were earlier not within knowledge of party; or (ii) that documents could not be produced despite exercise of diligence on part of defendant —Petitioner has failed to provide sufficient and cogent reasons for allowing documents to be filed—It is not case of petitioner that documents were not within his power nor has petitioner made out any case of exercise of diligence, despite which documents could not be filed—To the contrary, impugned order observes lack of diligence on part of petitioner, as documents had not been filed for a period of eleven years from date of filing of written statement and not even adverted to in evidence filed later—Only explanation proffered by petitioner is inadvertence which cannot be regarded as a ground for exercise of discretion under Order VIII Rule 1A(3)—Impugned order does not suffer from material irregularity warranting interference of this Court in its revisionary jurisdiction.

Shri Ramesh Kumar & Anr. v. *Sangeeta Khanna 1106*

INDIAN PENAL CODE, 1860—Section 394/396/307/120B/34—Section 25-27—Arms Act, 1959—A1 and A2 convicted for offence u/S 392/34 IPC—In addition A1 convicted u/S 397 IPC.

— Held, It is well settled that substantive evidence of the witness is his evidence identification in the court—Complainant who had direct confrontation with the assailants for sufficient duration had ample opportunity to observe and grasp the broad

features of the culprits—No ulterior motive assigned to the complainant for falsely identifying the accused—No conflict between ocular and medical evidence—recovery of robbed articles from the possession of assailants is a vital incriminating circumstance to connect them with the crime—Police will plant substantial amount of Rs. 12,000/- to implicate falsely is unbelievable—Minor contradiction and discrepancies not material when presence of complainant at the spot was natural and probable and he was also injured.

Zarar Khan @ Mulla v. *State (Govt. of NCT of Delhi) 960*

— Sec. 302, 304(II)—FIR is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at trial. The object to insist prompt lodging of FIR is to obtain the earliest information regarding the circumstances in which the crime committed.

— There is no such universal rule as warrant rejection of the evidence of a witness merely because he/she was related to or interested in the parties to either side. If the presence of such a witness at the time of occurrence is proved or considered to be natural and the evidence tendered by such witness is found in the light of surrounding circumstance and probabilities of the case to be true, it can provide a good and sound basis for conviction.

— Prior to the occurrence, there was no animosity of these with the appellant to falsely implicate him in the incident.

Ram Parshad v. *The State (Govt. of NCT of Delhi) 981*

— Section 301-embodies doctrine of transfer of malice and is attracted when accused causes death of a person whose death he neither intends nor knows will be the result of his act.

— Evidence Act—There is no legal hurdle in convicting a person on the sole testimony of a single evidence if his version is clear and reliable, for the principle that the evidence has to be weighed and not counted.

Anil Taneja & Anr. v. *State of Delhi* *1000*

— Section 308—Attempt to commit culpable homicide—Section 34—Common intention—Appellant and one Harish inflicted injuries to the victim fled the spot after causing injuries—Injured removed to hospital by brother—Information given to the police station DD No. 63B recorded at PS Najafgarh police reached hospital FIR No. 189/1998 u/s. 308/34 IPC lodged making endorsement DD No. 63B—Statement of injured recorded injuries opined to be grievous accused persons arrested charge sheet filed accused persons charged prosecution examined eight witnesses statement of accused persons recorded denied involvement and pleaded false implication examined one witness in defence appellant convicted for offence u/s. 308 IPC accused Harish convicted for offence u/s. 323 IPC and released on probation appellant sentenced to substantive sentence aggrieved appellant preferred appeal contended injured in the habit of teasing the women folk and was beaten report not lodged immediately soon after the incident unexplained delay of three days crime weapon not recovered blood stained clothes of the injured not seized no independent public witness associated name of the assailant not disclosed to the doctor—Doctor who declared injured unfit for statement not examined APP contended no strong reasons to discard the testimony of injured grievous injuries inflicted on vital organs testimony corroborated by medical evidence Held:- No challenge to the injuries sustained by victim testimony of PW2 remained unchallenged injuries opined to be grievous causes by blunt object testimony of doctors remained unchallenged presence at the crime scene at the time

of incident not denied by the appellant not disclosed whom the victim used to tease no complaint lodged against the victim for teasing no reason for victim falsely implicate the accused persons material facts deposed by injured remained unchallenged cogent and reliable testimony of victim cannot be brushed aside on account of delay in recording his statement non examination of independent public witness of no consequence non recovery of weapon of offence not fatal discrepancies/omissions in injured's statement do not affect the prosecution case testimony of victim in consonance with medical evidence no vital discrepancy in cross examination to doubt his version specific motive attributed to the appellant all relevant contentions taken into consideration judgment warrants no interference substantive sentence modified compensation awarded appeal disposed of.

Deep Chand v. *State & Anr.* *1038*

— Section 394 voluntarily causing hurt in robbery—Section 397 robbery with attempt to cause death or grievous hurt—Section 120B criminal conspiracy—Section 302 murder—Section 34 common intention complainant informed police about looting in his house DD No. 51B recorded police reached the spot wife and servant of the complainant found in injured condition household articles scattered in the house injured sent to hospital complainant declared fir for statement on statement of complainant FIR no. 539/2003 PS New Friends Colony under sections 395/396/397/120B/412/307/34 IPC and 27 Arms Act recorded complainant wife caught by two boys hands of the servant tied and made to lie down hands of the another person (PW-15) also tied up behind his back one of the boys hit the complainant-complainant started raising hue and cry one of the witnesses caused injuries to the complainant, his wife and servant two boys threatened other two ransacked and looted the house disconnected telephone lines complainant gave description of the boys wife of the complainant declared

brought dead cause of death asphyxia as a result of smothering list of missing/stolen articles prepared blood stained rope, blood stained pillow, blood stained guaze, blood stained muffler blood stained cushion cover seized appellants Pradeep and Mohd. Shamim arrested jewellery articles, watch and mobile phone recovered at their instance one desi katta also recovered made disclosure statement led to recovery of stolen property appellant Kanhaiya Lal arrested on the pointing out of appellant Shamim made disclosure produced a pulanda containing jewellery articles a knife also produced appellant Sonu arrested at the pointing our of appellants made disclosure produced a bag containing ornaments knife also recovered from the bag accused Kanhaiya Lal s/o. Shri Laxmi Narain arrested at the pointing of appellants made disclosure statement ornaments recovered from his house appellants refused to join TIP jewellers to whom jewellery articles sold arrested the person who sold country made pistol also surrendered TIP of recovered articles conducted charge sheet filed charges for offence u/s. 120B/302/394/395/396 IPC framed against all the appellants and for offence u/s. 390 IPC against appellant Mohd. Shamim for offence u/s. 412 IPC against jewellers u/s. 27 Arms Act against appellant Kanhaiya Lal framed prosecution examined 23 witnesses statement of appellants recorded u/s. 313 Cr. P.C. appellants examined witnesses in their defense appellants convicted of offences under section 120B, 394 r/w.397 and u/s. 302/34 IPC aggrieved appellants preferred appeals contended secret information, disclosure statements, arrests and recoveries implausible and not believable identification of appellants improper no injuries on the body of the deceased no eye-witnesses to strangulation by any of the appellants doctor who conducted post mortem nor examined gagging of mouth was done only to silence her no intention to cause such injury as may cause death. Held: Witnesses identified appellants as intruders having weapon during examination challenge to disclosure statements and

recoveries misconceived jewellery items recovered at the instance of and from the appellants identified as stolen articles appellants armed with pistol, dagger barged into the house in pursuance of criminal conspiracy of committing robbery disconnected telephone lines immobilised the occupants mouth of the PW 15 and others gagged not allowing them to raise alarm rooms ransacked and jewellery stolen mouth of the wife of the complainant gagged—She was unable to breath and suffered asphyxia appellants deemed to have knowledge that injuries are such as would cause her death done in pursuance of conspiracy all appellants liable no evidence of intention of appellants to cause her death-death of the lady cannot be murder act do.

Mohd. Shamim & Ors. v. *The State Through Govt. of NCT of Delhi* *1071*

— Section 392/397—Conviction—Appeal against. Held, no ulterior motive assigned to the witnesses, who had no prior acquaintance with appellant, to falsely implicate him. Non-examination of the person who was instrumental in apprehending the appellant is of no consequence as the appellant identified without hesitation by material witnesses who had direct confrontation with the appellant in the bus. Acquittal of co-accused due to lack of evidence and lapses on the part of investigation is inconsequential to give benefit to appellant. Appellant did not give any plausible explanation qua incriminating circumstances against him. Appellant did not give any reasonable explanation about this presence with a knife inside the bus at the relevant time. He was arrested soon after the incident, therefore, TIP was not necessary.

Shyambir v. *State Govt. of NCT of Delhi* *1218*

LAND ACQUISITION ACT, 1894—Section 4, 5A, 6, 9, 10, 17 (1) and (4)—Petition filed challenging Notification issued by

respondent under Section 4 and 17 (1) and (4) of L.A. Act dispensing with hearing under Section 5A of Act as well as Notification under Section 6 of Act, declaring that land was required for 'public purpose'—Plea taken, notification under Section 6 was issued merely four days before expiry of one year statutory period for Section 6 declaration—Lackadaisical approach of Government shows that there was no real urgency for acquisition of property and it was only for denying a fair hearing under Section 5A that notification under Section 17 (4) was issued—Per contra plea taken, there was actually no delay in matter and that time taken in processing of file was on account of official movement of same and issuance of notifications was in ordinary course—Held—Power under Section 17(4) to dispense with hearing under Section 5-A must not only be exercised sparingly and only in cases where public purpose for which acquisition is sought brooks no delay, but Government ought to exhibit such urgency in its actions as well—During process of acquisition—Both pre and pose notification—While it cannot be held that delays by Government, whether by pre or post notification would, by itself be good ground for courts to interfere with State's invocation of power under Section 17(4), Court would rightly exercise its power of judicial review and restore to land owner his/her right to be heard under Section 5A where delay is of such a nature as to negate very urgency claimed for invoking Section 17(4)—Perusal of file pertaining to property shows that subsequent to issuance of a letter to LAC on 13th May, 2009, there is a perplexing silence of inactivity till 20th April, 2010—This stares in face of aforesaid urgency which was otherwise vigorously emphasized by respondent for sake of invocation of Section 17(4)—It is evident that although acquisition was requisitioned in February, 2009 to remove paraneal traffic bottleneck coupled with sense of urgent for a smooth of traffic especially in view of then ensuing CWG in October, 2010 yet respondent itself took about 19 months to

issue Section 4 notification—This , by no stretch of imagination, can be said to demonstrate any urgency—There was clearly no justification for invocation of urgency provision of Section 17 (4) and consequent denial to petition of valuable right of hearing under Section 5 A—Consequently notification under Section 17 (40 as well as under Section 6 along with notice issues under Sections 9 & 10 of Act quashed.

Bhola Ram v. *GNCTD* *909*

LIMITATION ACT, 1963—Sec. 5—Arbitration and Conciliation Act, 1996—Sec. 34—Condonation of delay in re-filing the petition U/s 34 of Arbitration & Conciliation Act, 1996—After deducting 30 days which is maximum cumulative period permissible for removing the objections, under Delhi High Court Rules., the net delay in re-filing of 138 days. Held the Court is empowered to condone the delay in re-filing, provided there is no neglect and sufficient causes shown to explain the delay. The sufficiency of cause would depend facts & circumstances of the case. Held further that the span of delay as well as bonafides/quality of the explanation tendered seeking condonation are both relevant factors, especially in the context of the Arbitration Act, 1996, where as per Sec. 34 (3) of the Act Sec. 5 of the Limitation Act 1963 would have no applicability. Held a large number of time spent in refiling would itself tend to demonstrate negligence, unless a credible explanation is set forth. The reason put forth in this case was that paper book was inadvertently placed in a file by the clerk of the counsel and was not traceable. The negligence and callousness on the part of FCI in prosecuting the matter is clear from the fact that FCI did not seek to know from its counsel about status of its petition—Petition for condonation of delay in re-filing dismissed.

Food Corporation of India v. *Pratap Rice & General Mills* *1064*

NARCOTICS DRUGS AND PSYCHOTROPIC SUBSTANCES ACT—Section 21 (c) of Appellant convicted—Conviction primarily based no statement of complainant PW1 and confessional statement u/S 67 of the Act—Held, the panchnama merely reflects name of the two public witnesses without further details about their addresses and parentage—No sincere attempts made to serve summons upon them at specific addresses and prosecution dropped them without valid reasons.—Complainant version remained uncorroborated from independent sources. Joining of independent public witnesses is not a mere formality and sincere attempts were required to be made before apprehension of accused.—Complainant was evasive as to who were other members in the raiding team.—Other members of raiding team not examined.—Secret informer was not a member in the raiding team.—The driver of vehicle in which the raiding team went to New Delhi Railway Station not joined.—Steps of log book of vehicle not filed.—No information given to security guards/RPF personnel present at the station and no railway official/vendors/stall owners joined in the proceedings.—No proceeding conducted at the spot and no material came out on record to infer that the place of apprehension was not conducive to conduct the proceedings.

— Also held, that the contents of disclosure statement of accused was found incorrect during investigation and remained unproved—It is now well Settled that the court must seek corroboration of the purported confession from independent sources—Accused acquitted.

Mohd. Irfan v. *Directorate of Revenue Intelligence*..... *953*

NAVY ACT, 1957—Regulation 159, 161, 163, 169—petitioner by way of writ petition challenged order dated 01/11/1990 in terms of Regulation 156 of Act convening court martial of petition on 27 charges—He also challenged order dated 15/03/1991 of Court Martial finding him guilty of commission of 8 charges and order of sentence awarding him sentence of 24 months RI, dismissal from service and fine of Rs. 1,000/- or 6 months imprisonment in default of payment of fine—Petitioner further challenged order dated 27/08/1991 passed by Chief of Naval for maintaining conviction of petitioner on all charges except on Charge 20 and reducing sentence of imprisonment to period already undergone by him—Also, order dated 08/12/2010 and 23/12/2010 passed by Armed Forces Tribunal was challenged by petitioner whereby findings of guilty of Court Martial on all charges other than charge no. 7 was set aside—According to petitioner, he had illustrious, unblemished career of over 20 years of service with Indian Navy and was committed soldier till he was wrongly implicated in the case—It was urged on behalf of petitioner that court martial was convened without application of mind on the material placed before Convening Authority as documents were so voluminous which could not have been considered on the same day by Authority to pass order to convene court martial.

— Held: Convening Authority is required to satisfy himself not only that charges are properly framed but also that evidence if uncontradicted or unexplained would probably suffice to ensure conviction should have sufficient time to scrutinize requisite records before taking a decision.

Avtar Singh v. *Union of India and Ors.* *850*

— Regulation 159, 161, 163, 169—Petitioner urged summary of evidence along with charge sheet placed before Convening

Authority did not contain iota of evidence on charge no. 7 for which petitioner was found guilty by Armed Forces Tribunal. Held:- Convening Authority is required to satisfy himself not only that the charges are properly framed but also that the evidence if uncontradicted or unexplained would probably suffice to ensure a ' conviction'.

Avtar Singh v. *Union of India and Ors.* *850*

TRANSFER OF PROPERTY ACT, 1882—Sections 52 and 53 of Legality of attachment of Property—Section 9—Arbitration and Conciliation Act, 1996—National Agricultural Cooperative Marketing Federation of India Ltd. (NAFED) decree holder—Kripa Overseas—M/s. Rital Impex Ltd.—Collectively referred as judgments debtors—involved in arbitral proceedings—NAFED preferred petition under Section 9 of the Arbitration and Conciliation Act—Resulted in an order of injunction restraining the sale of several properties, including the property in question (A-13, Block B-1, Mohan Cooperative Industrial Estate, Mathura Road, New Delhi, 110044)—Subsequently, the three parties entered into a settlement dated 03.05.2007 Rs. 20 Cr. shall be paid within next 60 days upon raising loan by mortgaging the property in question - property in question was mortgaged with ICICI Bank against advance of Rs. 1.5 crores other properties subject matter of attachment, in Section 9 proceedings, were released from the attachment order of the Court on 14.12.2007—The Order dated 14.12.2007, did not refer to the property in question; it described another property—Subsequently corrected and previous order modified through an order of 18.412.2007—Property in question was allowed to be sold by the owner/judgment debtor—Sale deed was executed by one of the judgment debtors in favour of the objector total consideration of Rs. 3.5 crores payment of Rs. 1.5 crores made to ICICI Bank to clear the mortgage and recover the title deeds remainder to the owner/judgment debtor

arbitration proceedings between NAFED, and the two judgment debtors award dated 24.09.2009 was made in terms of the settlement dated 03.05.2007 modified by the subsequent order dated 04.04.2008 holding, inter alia, that NAFED is (sic) held entitled to the outstanding amount by sale of the properties, mentioned in the deed of settlement dated 3.5.2007, by public auction—NAFED instituted execution proceedings property in question was attached—NAFED instituted execution proceedings property in question was attached appellant, preferred objections contending that he had clear title to the property sold without any precondition learned Single Judge concluded—Court in its order dated 14.12.2007 did not permit an unconditional sale by the respondents/judgment debtors condition respondents shall deposit Rs. 18 crores by the sale of two properties including the one in question, within 75 days of the sale to satisfy a part of the petitioner/decree holders claim—To acquire a clear and unencumbered title to the property in question, the objector/applicant should have ensured that the said condition was complied with by the respondents/judgment debtors sale deed in question is clearly in contravention of the order dated 14.12.2007 and is subject to Section 52 of the Transfer of Property Act property in question was not released from the lot of properties under the cover of attachment sale consideration of Rs. 3.5 crores to the objector for the property gross undervaluation judicial notice of this fact in holding that such a transfer would also violate Section 53 of the Transfer of Property Act—Hence the present appeal. Held: Conjoint reading of the two orders 16.05.2007 and 18.12.2007 clarify that whereas the first order lifted or vacated the attachment made earlier in respect of two properties did not include the property in question the second order specifically vacated the attachment in respect of the property in question—NAFED never chose to apply for its modification or recall—No conditions or restrictions of the

kind—Applicable to the sale of the title documents in respect of the property in question.

— Applicability of Section 52—A transferee from a judgment debtor is presumed to be aware of the proceedings before a Court of law recognizes the doctrine of lis pendens—Rule 102 of Order XXI of the Code take into account the ground reality and refuses to extend helping hand to purchasers of property in respect of which litigation is pending unfair, inequitable or undeserved protection is afforded to a transferee pendente lite, a decree holder will never be able to realize the fruits of his decree—In the present case, NAFES'S claim was one for money in arbitral proceedings—Pending adjudication it sought for attachment of the judgment debtor's properties—But in no manner enlarge the scope of its claim into one encompassing any right to immovable property "directly" or "specifically—Absence of any restriction as to the marketability of the title, or direction by the Court, amounting to an encumbrance or charge order of 18.12.2007 operated to lift the attachment—This was done to facilitate sale direction in the previous order of 14.12.2007 that NAFED could retain the title deeds till it was paid Rs. 18 crores was meaningless and inapplicable because the title deeds were with ICICI Bank, which were later redeemed by the purchaser objector who was made aware of the mortgage in favour of that bank.

— Applicability of Section 53—In the present case, far from discharging the onus of proving want of good faith—NAFED merely relied on a textual interpretation of the orders dated 14.12.2007 and 18.12.2008 argued that the property was sold for inadequate consideration impugned order is based on "judicial notice" having been taken about the prices of land law casts a burden on the decree holder (NAFED), who has gotten its rights crystallized subsequently in the award—Till

then, it had no claim in respect of the suit property faced attachment for a brief period attachment was lifted, to enable its sale, in order to satisfy NAFED's claims sale ought to have proceeded in a particular manner, nothing prevented it from insisting upon imposition of conditions—Having failed to do so, its mere allegation of undervaluation of the property could not have resulted in the impugned finding.

ILR (2014) II DELHI 791
W.P. (C)

PIONEER INDIA ELECTRONICS (P) LTD. ....PETITIONER

VERSUS

UNION OF INDIA & ANR. ....RESPONDENTS

(SANJIV KHANNA & SANJEEV SACHDEVA, JJ.)

W.P. NO. : 5120/2011 DATE OF DECISION: 13.09.2013

The Customs Act, 1962—Section 18, 25, 27—Present writ petition filed impugning Custom Circular and Notification and seeking quashing of orders passed by Commissioner of Customs and refund of provisional duty paid-Central issue arising in the petition is whether the Central Government while imposing conditions for grant of exemption u/s 25(1) of the Act can lay down conditions in derogation to the specific statutory provisions and stipulations in section 27.

Impugned Circular No. 23/2010—Customs dated 29th July, 2010 and Circular No. 93/2008 dated 1st August, 2008 sought to prescribe a time limit whereby an importer was entitled to a refund only if claim was made with one year of payment of actual duty—Whether paid on provisional or final assessment thereby rendering date of finalization of assessment inconsequential.

Petitioner imported electric goods-present transaction contained three sets of bill of exchanges—Petitioner's three separate claims for refund were rejected on the ground that they were filed beyond the stipulated period of one year—Therefore, the present petition wherein the Petitioner claims that u/s 27 limitation

period is prescribed from the period of final assessment, and the impugned notification seeks to change the period prescribed under the statute.

Respondent contends that section 27 had no application in the present case, and that u/s 25 the Government had the power to grant exemption, subject to certain conditions—Further application for refund had to be made within time period stipulated in the notification.

Held:

(i) Section 25 empowers the Central Government to issue a notification in the Gazette and exempt generally either absolutely or subject to such conditions which may have to be fulfilled, from the whole or any part of the customs duty leviable thereupon. A notification u/s 25 has to be liberal-only exemption can be granted under such section, higher duty or harsher terms than those mentioned in the Act cannot be imposed.

(ii) The word exemption as used in s. 25(1) can include extension or increase in time, but cannot include power of the Government to, vide a circular, reduce statutory time stipulated for claim of refund.

(iii) Circulars can supplant but not supplement the law-Circulars might mitigate rigours of law by granting administrative relief beyond relevant provisions of the statute—However, Central Government is not empowered to withdraw benefits or impose stricter conditions than postulated by the law.

Held: Circular stipulates that the date of payment of provisional duty and not the date of final adjudication is determinative for computing the limitation period of

refund under notification. It can be faulted for many reasons. These are as under:

i. As per Section 25(1), Central Government is empowered to issue a notification granting exemption i.e. grant exemption generally or absolutely or subject to conditions from whole or any part of custom duty leviable on goods. A notification cannot restrict the benefit or impose more rigorous or severe terms than the one prescribed under the Act. Notification canliberalise and grant exemption. Indulgence and benevolence can be an objective of a notification and restricted or shorter period of refund is not postulated. Notification cannot impose more deleterious terms and reduce the period of limitation for refund of claim. (Sub-Section 2A to Section 25 is not applicable)

ii. Section 27 of the Act prescribes period of limitation. The period of limitation under the said Section cannot be curtailed by way of a notification but a notification can extend and increase the period of limitation. Similarly, a circular cannot reduce the period of limitation for seeking refund stipulated in Section 27 of the Act.

iii. Section 27 applies to all refunds whether due and payable pursuant to appellate orders or Court orders or otherwise in terms of exemption notification under Section 25(1) or special orders under Section 25(2) of the Act.

iv. The expression 'date of payment' used in notification can mean the date of final assessment. The said interpretation would be in accordance and as per explanation II to Section 27. Similar expression has been used in Section 27 (1). Circular accepts that in some cases refunds under the notification had been issued on a claim being made within one year from

date of final assessment and beyond one year from the date of provisional assessment. The circular however, stipulates that the claim for refund would be entertained under the notification, if it is made within one year from payment of duty and not final assessment. This, may result in reducing the period . Assuming that the issue of date of payment was debatable, the Board did not deem it appropriate to fix a period or time limit during which claims of refund should be entertained in cases where the Assessee bonafidely believed and were acting on the presumption that period of one year was to be computed from the date of final assessment. The said belief was not ill founded but based on sound logic and reasoning. The Board while issuing the circular would have been fair and just and fixed a time limit during which past claim of refund could be entertained with a reference to the date of final assessment.

Held: To sum up:

a. where the imported goods are released on payment of CVD on regular assessment, the application seeking refund can be made within one year of the payment of the CVD in terms of the notification read with Circular.

b. where the goods are released on provisional assessment followed by the final assessment, the application seeking refund can be made within the period of one year or six months, as the case may be, of the final assessment as stipulated by Explanation II to section 27 of the Act or within the enlarged period of one year from the date of provisional release as stipulated by the notification read with Circular.

Impugned circular in so far as it holds that S. 27 has no application is held ultra vires the statute and quashed. Impugned orders set aside. Petition disposed

off.

The main issue which arises for consideration in the present petition is whether the Central Government while imposing conditions for grant of exemption under Section 25(1) of the Act could lay down conditions in derogation to the specific statutory provisions and stipulations contained in Section 27 of the Act. **(Para 21)**

Before we elucidate upon Section 18, we would like to examine the provisions of Section 25 of the Act. The said Section empowers the Central Government to issue a notification in the Gazette and exempt generally either absolutely or subject to such conditions, which may have to be fulfilled before or after clearance of the goods, from the customs from whole or any part of customs duty leviable thereon. It is important to note that the notification can only grant exemption absolutely or subject to certain conditions. Thus, notification under Section 25(1) has to be liberal, indulgent or benevolent and reduce/delimit the rigours of the statute. Imposition of increased or higher tax by a notification under Section 25 is impermissible and prohibited. Only exemption can be granted but harsher or higher duty or more rigorous or harsher terms than those mentioned and stipulated under the Act cannot be imposed and stipulated. **(Para 25)**

The word .exemption, as used in sub-section (1) to Section 25 can and should include extension or increase in time but cannot be stretched and expounded to include power of the Government to, by a circular, reduce the statutory time for a claim of refund stipulated under the principal enactment, i.e., the Customs Act, 1962. That would make the circular ultra vires the statute and beyond the scope of the Act, Rules etc. Circulars might depart from the strict tenure of the statutory provision and might mitigate rigours of law thereby granting administrative relief beyond terms of the relevant provisions of the statute, but the Central Government is not empowered to withdraw benefits or impose harsher or

stricter conditions than those postulated by the statute. In later cases, circulars can supplant the law but not supplement the law. **(Para 27)**

Section 18 of the Act, postulates payment of duty which is ad-hoc or interim duty which is paid but subject to final assessment. Ultimately, the duty payable is determined and decided by final assessment and the said determination is mandatory, when provisional assessment is made. Difference between the final duty payable and provisional duty paid will either result in a demand or a refund. Until final assessment is done, the duty paid is merely provisional and not fully ascertained or quantified. It can fluctuate. **(Para 31)**

Circular No. 23 of 2010/custom issued on 7th September, 2010 stipulates that the date of payment of provisional duty and not the date of final adjudication is determinative for computing the limitation period of refund under notification No. 93 of 2008 issued on 1st August, 2008, can be faulted for many reasons. These are as under:

i. As per Section 25(1), Central Government is empowered to issue a notification granting exemption i.e. grant exemption generally or absolutely or subject to conditions from whole or any part of custom duty leviable on goods. A notification cannot restrict the benefit or impose more rigorous or severe terms than the one prescribed under the Act. Notification can liberalise and grant exemption. Indulgence and benevolence can be an objective of a notification and restricted or shorter period of refund is not postulated. Notification cannot impose more deleterious terms and reduce the period of limitation for refund of claim. (Sub – section 2A to Section 25 is not applicable)

ii. Section 27 of the Act prescribes period of limitation. The period of limitation under the said Section cannot be curtailed by way of a notification but a notification can extend and increase the period of limitation. Similarly, a circular cannot reduce the period of

limitation for seeking refund stipulated in Section 27 of the Act.

iii. Section 27 applies to all refunds whether due and payable pursuant to appellate orders or court orders or otherwise in terms of exemption notification under Section 25(1) or special orders under Section 25(2) of the Act.

iv. The expression 'date of payment' used in notification No. 93 of 2008 dated 1st August, 2008 can mean the date of final assessment. The said interpretation would be in accordance and as per explanation II to Section 27. Similar expression has been used in Section 27(1). Circular issued on 29th July, 2010 accepts that in some cases refunds under the notification dated 1st August, 2008 had been issued on a claim being made within one year from date of final assessment and beyond one year from the date of provisional assessment. The circular however, stipulates that the claim for refund would be entertained under the notification dated 1st August, 2008, if it is made within one year from payment of duty and not final assessment. This, may result in reducing the period. Assuming that the issue of date of payment was debatable, the Board did not deem it appropriate to fix a period or time limit during which claims of refund should be entertained in cases where the Assessee bonafidely believed and were acting on the presumption that period of one year was to be computed from the date of final assessment. The said belief was not ill founded but based on sound logic and reasoning. The Board while issuing the circular would have been fair and just and fixed a time limit during which past claim of refund could be entertained with a reference to the date of final assessment.

(Para 37)

To sum up:

a. where the imported goods are released on payment of CVD on regular assessment, the application seeking refund can be made within one year of the payment of the CVD in terms of the notification dated 1st August, 2008 read with Circular No. 23/2010–Custom dated 29th July, 2010.

b. where the goods are released on provisional assessment followed by the final assessment, the application seeking refund can be made within the period of one year or six months, as the case may be, of the final assessment as stipulated by Explanation II to section 27 of the Act or within the enlarged period of one year from the date of provisional release as stipulated by the notification dated 1st August, 2008 read with Circular No. 23/2010–Custom dated 29th July, 2010. **(Para 39)**

In view of the above, the impugned Circular No. 23/2010-Custom to the extent it holds that section 27 of the Act has no application is held ultra-vires the statute and quashed. The impugned orders dated 21.3.2011 and 27.4.2011 passed by respondent No.2 relying on Circular No. 23/2010-Custom dated 29.07.2010 are hereby set aside and the matter is remanded to respondent No.2 to assess the claim of the petitioner for refund on imports and to process the same in accordance with the provisions of Section 27 of the Act. **(Para 43)**

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Sukumar Pattjoshi, Senior Advocates with Mr. S.K. Dubey, Mr. Zeeshan Khan and Ms. Anuradha Salhotra, Advocates.

FOR THE RESPONDENTS : Ms. Sonia, Sharma, Advocate for Union of India, Mr. Anshuman Chowdhury Advocate for R-2.

CASE REFERRED TO:

1. *KSJ Metal Impex Private* vs. *Under Secretary, Customs and Others* in Writ Petition No. 959/2013 decided on 21.01.2013.

RESULT: Writ petition allowed.

SANJEEV SACHDEVA, J.

1. The petitioner has filed the present petition impugning the Circular No.23/2010-Customs dated 29.7.2010 and the notification No. 93/2008-Customs dated 1.8.2008. The petitioner further prays for setting aside of the orders dated 21.3.2011 and 27.4.2011 passed by the Commissioner of Customs (Appeals) relying on the impugned Circular No. 23/2010-Customs dated 29.7.2010 and further sought a writ of mandamus seeking refund of the provisional duty paid amounting to Rs. 94,43,216/-.

2. The petitioner M/s Pioneer India Electronics Private Limited was incorporated in the year 2008 and is subsidiary of Pioneer Corporation, Japan. The petitioner is engaged in the import and marketing of Pioneer branded products in India.

3. The petitioner imported several electrical goods falling under the first schedule of the Customs Tariff Act, 1975 (hereinafter referred to as, the Act). The goods were cleared after payment of provisional duty.

4. As it was a case of a related party transaction, Customs Authorities referred the case to the Special Valuation Branch of the Customs for the purposes of valuation and clearance. Pending valuation by the Special Valuation Branch, all bills of Entry were cleared by the Customs Authorities provisionally under Section 18 of the Act. After valuation by the Special Valuation Branch of the Customs, the liability was determined and the importer i.e. the petitioner then applied for finalisation of the Bill of Entry. On the finalisation of the Bill of Entry, the final duty was assessed and the provisional duty paid was adjusted towards the final assessment. The said procedure is followed in related party transactions. In case, any additional duty is payable on final adjudication, the importer is liable to pay the same and where the provisional duty is more than the final duty assessed the importer is entitled to the refund of the same.

5. On 14.09.2007 notification No. 102/2007-Customs was issued

by the Ministry of Finance, Government of India in exercise of powers conferred by Sub-section 1 of Section 25 of the Act. Vide the said notification, the Central Government exempted the goods falling within the first schedule to the Customs Tariff Act, 1975 when imported into India for subsequent sale from the whole of the additional duty of Customs leviable thereon under Sub-section 5 of Section 3 of the said Customs Tariff Act. The exemption contained in the notification was subject to the fulfilment of the following conditions:

> "(a) the importer of the said goods shall pay all duties, including the said additional duty of customs leviable thereon, as applicable, at the time of importation of the goods;
>
> (b) the importer, while issuing the invoice for sale of the said goods, shall specifically indicate in the invoice that in respect of the goods covered therein, no credit of the additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 shall be admissible;
>
> (c) the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs officer;
>
> (d) the importer shall pay on sale of the said pay on sale of the said goods, appropriate sales tax or value added tax, as the case may be;
>
> (e) the importer shall, inter alia, provide copies of the following documents alongwith the refund claim:
>
> I. Document evidencing payment of the said additional duty;
>
> II. Invoices of sale of the imported goods in respect of which refund of the said additional duty is claimed;
>
> III. documents evidencing payment of appropriate sales tax or value added tax, as the case may be, by the importer, on sale of such imported goods."

6. In this notification dated 14th September, 2007, no period of limitation was prescribed for making an application for refund of CVD. The notification postulated furnishing of documents evidencing payment of additional duty, invoices of sale of imported goods for which refund of additional duty was claimed and evidence of payment of appropriate

sales tax or value added tax. The absence of stipulation of any period of limitation leads to the clear implication that the refund would be processed under Section 27 of the Act. This aspect has been addressed below.

7. On 28.04.2008 the Central Board of Excise and Customs issued Circular No. 6 of 2008-Customs, on account of various representations being made by the importers, exporters, Trade and Industry Association and had reference from some of the Customs Fields Formations. One of the issues dealt with by the said circular related to the fixation of time limit for filing an application for refund. In respect of the same, the circular provided as under:

> **4. Time – Limit:**
>
> 4.1 In the Notification No.102/2007- Customs dated 14.9.2007, no specific time limit has been prescribed for filing a refund application. Under the circumstances, a doubt has been expressed that whether the normal time-limit of six months prescribed in section 27 of the Customs Act, would apply. In the absence of specific provision of section 27 being made applicable in the said notification, the time limit prescribed in this section would not be automatically applicable to refunds under the notification. Further, it was also represented that the goods imported may have to be despatched for sale to different parts of the country and that the importer may find it difficult to dispose of the imported goods and complete the requisite documentation within the normal period of six months. Taking into account various factors, it has been decided to permit importers to file claims under the above exemption upto a period of one year from the date of payment of duty. Necessary change in the notification is being made so as to incorporate a specific provision prescribing maximum time limit of one year from the date of payment of duty, within which the refund could be filed by any person. It is also clarified that the importers would be entitled to refund of duties only in respect of quantities for which the prescribed documents are made available and the claims submitted within the maximum prescribed time of one year. Unsold stocks would not be eligible for refunds.
>
> 4.2 It is also clarified that only a single claim against a particular Bill of Entry should be permitted to be filed within the maximum time period of one year. Filing of refund claim for a part quantity in a bill of entry shall not be allowed except when this is necessary at the end of the one year period. Further, since the Sales Tax (ST)/Value Added Tax (VAT) is being paid on periodical or monthly basis, even in case of bills of entry where the entire quantity of goods are sold within a month, all such cases shall be consolidated in a single refund claim and filed with the Customs authorities on a monthly basis. In other words, there would be a single refund claim in respect of one importer in a month irrespective of the number of Bills of Entry (B/Es) processed by the respective Commissionerate.
>
> 4.3 With the extension of time limit and the requirement to file claims on a monthly basis, Board feels that the number of refund claims should be manageable for disposal within the normal period of three months. Further, in the absence of specific provision for payment of interest being made applicable under the said notification, the payment of interest does not arise for these claims However, Board directs that the field formations shall ensure disposal of all such refund claims under the said notification within the normal period not exceeding three months from the date of receipt."
>
> (underlining supplied)

8. Circular No. 6/2008 dated 16th April, 2008 noticed that no specific time limit was fixed in notification dated 14th September, 2007. Doubts had been expressed as to whether Section 27 of the Act would apply. The circular purports to clarify that in the absence of specific stipulation in the notification, which made Section 27 of the Act applicable, the time limit prescribed in Section 27 of the Act would not be applicable automatically. This statement in the circular according to us is incorrect. Section 27 of the Act applies because of the statute i.e. the Act and does not require clutches of a notification for application. The aforesaid clarification in form of a circular can be also challenged and questioned to the extent that it withdraws or curtails beneficial provisions of Section 27 of the Act. The circular records that representations had been received from the importers, who had found it difficult to dispose of the exported goods and complete the requisite documentation within the normal period of six months. This period of six months is specified in Section 27 of

the Act. The Board keeping in view the aforesaid factors had decided to permit importers to file claims for exemption upto a period of one year, i.e., the time limit specified in Section 27 of six months, was extended to one year, but with certain stipulations, namely;

(i) Unsold stock would not be eligible for refund;

(ii) For one bill of exchange a single applicable would be maintainable;

(iii) The claim would be entertained on monthly basis, i.e., single refund claim irrespective of number of bills of entry processed in that month by the respective Commissionerate;

(iv) The refund claims would be normally disposed of within three months;

9. Subsequent to the issuance of circular No. 6 of 2008 the Central Government issued a notification No. 93/2008 on 1.8.2008. The notification No. 93/2008 amended paragraph 2(c) is as under:

"Paragraph 2(c) prior to the amendment read as:

"the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional custom officer."

Paragraph 2(c) after the amendment read as:

"the importer shall file a claim for refund of the said additional duty of customs paid on the imported goods with the jurisdictional customs officer before the expiry of one year from the date of payment of the said additional duty of customs."

(Underlining supplied)

10. This is the new notification issued by the Central Government on 1st August, 2008, which made amendment to paragraph 2 (c) of the earlier notification dated 14th September, 2007. Instead of time limit being fixed by the circular, the time limit for making claim for refund of additional duty was specified in the notification itself. The time limit as prescribed for making the said claim was one year from the date of payment of the additional duty on customs.

11. Observing that divergent practices were being followed as regard sanction of the refund claims in cases where the assessments were provisional, the Central Government issued circular No.23 of 2010-Customs on 29.7.2010. The Circular inter alia provided as under:

"3. The matter has been examined in the Board. As per the Board Circular No.6/2008-Customs dated 28.4.2008, the limitation of time under Section 27 of the Customs Act, 1962 is not applicable in cases relating to refund claims of 4% CVD. The refund of 4% CVD is admissible in terms of Notification No.102/2007-Customs dated 14.9.2007 read with Notification No.93/2008-Customs dated 1.8.2008 issued under Section 25(1) of the Customs Act, 1962 subject to fulfilment of certain conditions as envisaged in the said notifications. The time limit prescribed for the purpose of 4% CVD refund claim is one year from the date of payment of duty as per the said Notifications. Hence, in cases where the assessment is provisional, for the purpose of sanction of refund of 4% CVD, the date of payment of duty would be, the date of payment of CVD at the time of import of goods and not the date of finalization of provisional assessment. The Importer, therefore, would be eligible to get the refund, if the claims is filed within one year of the date of actual payment of 4% CVD i.e. the date of payment of duty at the time of clearance of imported goods."

(Underlining supplied)

12. Circular dated 29th July, 2010 seeks to explain notification No. 93 of 2008 dated 1st August, 2008 and states as under:

(i) Limitation of time specified for refunds under Section 27 of the Act is not applicable.

(ii) Claims of refunds of 4% CVD under Circular dated 28th April, 2008 should be filed within one year of payment of duty, whether the assessment was provisional or final was immaterial.

The reason given is that the notification has been issued under Section 25(1) of the Act and is subject to fulfilment of certain conditions; one of them being that the claim for refund should be made within one year from the date of payment of duty. Thus, in cases where assessment was provisional, date of payment

of duty for CVD would be the actual date of payment and not the date of finalization of provisional assessment. In other words, the order finalizing the assessment will not determine the limitation of one year for refund of duty. The date of finalization of assessment is, therefore, rendered inconsequential. The importer is entitled to refund only if the claim is made within one year from the date of payment of actual duty, whether it was paid as provisional assessment or on the basis of final assessment.

13. This notification No. 93 of 2008 and the Circular No. 23/2010–Custom have been impugned in the present petition.

14. In the present case the petitioner imported various goods from its related party, i.e., M/s Pioneer Corporation, Japan. In the present case three claims of the petitioner are in issue. The first claim pertains to an import vide seven bills of exchanges ranging between 22.12.2008 to 06.03.2009. In respect of imports made vide these bills of exchanges, the petitioner provisionally assessed the duty and paid the same between 31.12.2008 to 13.03.2009. The assessment of duty, i.e., finalisation of the bill of exchange was done by the customs authorities on 09.07.2010. The claim with respect to the first set of bill of exchange was lodged on 30.07.2010.

15. The second set of bill of exchanges range between 27.03.2009 to 12.08.2009 and the provisional duty was paid between 04.04.2009 to 12.08.2009. These set of bills of exchange were finalised on 09.07.2010 and the claim for the second set of bill of exchange was lodged on 22.12.2010.

16. The third set of bill of exchange range between 08.09.2009 to 09.10.2009 and provisional duty was paid between 15.09.2009 to 14.10.2009. The third set of bill of exchange was finalized on 09.07.2010 and the claim with respect to the same was lodged on 27.10.2010.

17. The first claim pertaining to the first set of bill of exchange was rejected by the Assistant Commissioner (Refund) vide order dated 31.10.2010 on the ground that the refund claim had been filed beyond the stipulated period of one year of the date of the payments of the duty at the time of clearance of the imported goods. The petitioner filed an appeal before the Commissioner of Customs (Appeals) against the order dated 30.10.2010 which appeal was further rejected by the Commissioner

of Customs (Appeals) vide its order dated 21.3.2011 and the said order is impugned in the present petition also. Similarly, the second claim of the petitioner for the second set of bill of exchanges was also rejected by the Assistant Commissioner (Refund) vide order dated 23.12.2010. The petitioner filed an appeal against the order dated 23.12.2010 before the Commissioner of Customs(Appeal) which appeal has also been dismissed vide order dated 27.4.2011 and the said order dated 27.4.2011 is also impugned in the present petition. The third claim filed by the petitioner with respect to the third set of bill of exchange was also rejected on the same ground by the Assistant Commissioner (Refund) vide order dated 28.2.2011 and the petitioner has filed an appeal on 11.4.2011 against the said order before the Commissioner of Customs (Appeals).

18. The case of the petitioner is that by the impugned notification and circular, the Central Government has created a situation whereby a person would need to file an application for refund even before the assessment is finalized as the time limit for making an application has been prescribed to commence from the date of payment of the provisional duty for release of the goods and not the final assessment of duty.

19. Learned counsel for the petitioner further contended that Section 27 which relates to claim for refund of duty, period for limitation prescribed is one year or six months as the case may be from the final assessment of duty and the impugned notification seeks to change the period prescribed under the Statute which was impermissible and contrary to law.

20. In contra learned counsel for the respondent submitted that the circular and notification had been issued in exercise of the powers conferred under Section 25 of the Act and under Section 25 the Government had the power to grant exemption subject to the certain conditions and the conditions so prescribed also stipulated a time limit for seeking refund and as such the application for refund had to be made within the time limit prescribed by notification and circular issued under Section 25 and that Section 27 had no application to the claim of refund under the circular issued under Section 25.

21. The main issue which arises for consideration in the present petition is whether the Central Government while imposing conditions for grant of exemption under Section 25(1) of the Act could lay down

conditions in derogation to the specific statutory provisions and stipulations contained in Section 27 of the Act.

22. Section 18 provides for provisional assessment of duty and lays down as under:

> "18. Provisional assessment of duty.– (1) Notwithstanding anything contained in this Act but without prejudice to the provisions contained in section 4–
>
> (a) where the proper officer is satisfied that an importer or exporter is unable to produce any document or furnish any information necessary for the assessment of duty on the imported goods or the export goods, as the case may be; or
>
> (b) where the proper officer deems it necessary to subject any imported goods or export goods to any chemical or other test for the purpose of assessment of duty thereon; or
>
> (c) where the importer or the exporter has produced all the necessary documents and furnished full information for the assessment of duty but the proper officer deems it necessary to make further enquiry for assessing the duty,
>
> the proper officer may direct that the duty leviable on such goods may, pending the production of such documents or furnishing of such information or completion of such test or enquiry, be assessed provisionally if the importer or the exporter, as the case may be, furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty finally assessed and the duty provisionally assessed.
>
> (2) When the duty leviable on such goods is assessed finally in accordance with the provisions of this Act, then–
>
> (a) in the case of goods cleared for home consumption or exportation, the amount paid shall be adjusted against the duty finally assessed and if the amount so paid falls short of, or is in excess of, [the duty finally assessed], the importer or the exporter of the goods shall pay the deficiency or be entitled to a refund, as the case may be;
>
> (b) in the case of warehoused goods, the proper officer may,

> where the duty finally assessed is in excess of the duty provisionally assessed, require the importer to execute a bond, binding himself in a sum equal to twice the amount of the excess duty.
>
> (3) The importer or exporter shall be liable to pay interest, on any amount payable to the Central Government, consequent to the final assessment order under sub-section (2), at the rate fixed by the Central Government under section 28AB from the first day of the month in which the duty is provisionally assessed till the date of payment thereof.
>
> (4) Subject to sub-section (5), if any refundable amount referred to in clause (a) of sub-section (2) is not refunded under that sub-section within three months from the date of assessment, of duty finally, there shall be paid an interest on such unrefunded amount at such rate fixed by the Central Government under section 27A till the date of refund of such amount.
>
> (5) The amount of duty refundable under sub-section (2) and the interest under sub-section (4), if any, shall, instead of being credited to the Fund, be paid to the importer or the exporter, as the case may be, if such amount is relatable to –
>
> (a) the duty and interest, if any, paid on such duty paid by the importer, or the exporter, as the case may be, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;
>
> (b) the duty and interest, if any, paid on such duty on imports made by an individual for his personal use;
>
> (c) the duty and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person; (d) the export duty as specified in section 26; (e) drawback of duty payable under sections 74 and 75."

23. Section 25 of the Act lays down as under:-

> **"25. Power to grant exemption from duty.**– (1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt

generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon.

(2) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from the payment of duty, under circumstances of an exceptional nature to be stated in such order, any goods on which duty is leviable.

(2A) The Central Government may, if it considers it necessary or expedient so to do for the purpose of clarifying the scope or applicability of any notification issued under sub-section (1) or order issued under sub-section (2) insert any explanation in such notification or order, as the case may be, by notification in the Official Gazette at any time within one year of issue of the notification under sub-section (1) or order under sub-section (2), and every such explanation shall have effect as if it had always been the part of the first such notification or order, as the case may be.

(3) An exemption under sub- section (i) or sub- section (1) in respect of any goods from any part of the duty of customs leviable thereon (the duty of customs leviable thereon being hereinafter referred to as the statutory, duty) may be granted by providing for the levy of a duty On such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable and any exemption granted in relation to any goods in the manner Provided in this sub- section shall have effect subject to the condition that the duty of customs chargeable on such goods shall in no case exceed the statutory duty.

Explanation.-" Form or method", in relation to a rate of duty of customs, means the basis, namely, valuation, weight, number, length, area, volume or other measure with reference to which the duty.

(4) Every notification issued under sub-section (1) or sub-section 92A) shall,—

(a) Unless otherwise provided, come into force on the date of its issue by the Central Government for publication in the Official Gazette;

(b) also be published and offered for sale on the date of its issue by the Directorate of Publicity and Public Relations of the Board, New Delhi.

(5) Notwithstanding anything contained in sub-section (4), where a notification comes into force on a date later than the date of its issue, the same shall be published and offered for sale by the said Directorate of Publicity and Public Relations on a date on or before the date on which the said notification comes into force.

(6) Notwithstanding anything contained in this Act, no duty shall be collected if the amount of duty leviable is equal to, or less than, one hundred rupees."

24. Section 27 of the Customs Act lays down as Under:

"27 Claim for refund of duty.– (1) Any person claiming refund of any duty –

(i) paid by him in pursuance of an order of assessment; or

(ii) borne by him,

may make an application for refund of such [duty and interest, if any, paid on such duty] to the [Assistant Commissioner of Customs or Deputy Commissioner of Customs]–

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, before the expiry of one year;

(b) in any other case, before the expiry of six months,

from the date of payment of [duty and interest, if any, paid on such duty] [in such form and manner] as may be specified in the regulations made in this behalf and the application shall accompanied by such documentary or other evidence (including the documents referred to in section 28C) as the applicant may furnish to establish that the amount of [duty and interest, if any,

paid on such duty] in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such [duty and interest, if any, paid on such duty] had not been passed on by him to any other person:

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section and the same shall be dealt with in accordance with the provisions of sub- section (2):

Provided further that the limitation of one year or six months, as the case may be, shall not apply where any [duty and interest, if any, paid on such duty] has been paid under protest:

[Provided also that in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 25, the limitation of one year or six months, as the case may be, shall be computed from the date of issue of such order]:

[Provided also that where the duty becomes refundable as a consequence of judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any court, the limitation of one year or six months, as the case may be, shall be computed from the date of such judgment, decree, order or direction.]

Explanation [I]. – For the purposes of this sub- section," the date of payment of [duty and interest, if any, paid on such duty] in relation to a person, other than the importer, shall be construed as" the date of purchase of goods" by such person.

[Explanation II. – Where any duty is paid provisionally under section 18, the limitation of one year or six months, as the case may be, shall be computed from the date of adjustment of duty after the final assessment thereof.]

25. Before we elucidate upon Section 18, we would like to examine the provisions of Section 25 of the Act. The said Section empowers the Central Government to issue a notification in the Gazette and exempt generally either absolutely or subject to such conditions, which may have to be fulfilled before or after clearance of the goods, from the customs

from whole or any part of customs duty leviable thereon. It is important to note that the notification can only grant exemption absolutely or subject to certain conditions. Thus, notification under Section 25(1) has to be liberal, indulgent or benevolent and reduce/delimit the rigours of the statute. Imposition of increased or higher tax by a notification under Section 25 is impermissible and prohibited. Only exemption can be granted but harsher or higher duty or more rigorous or harsher terms than those mentioned and stipulated under the Act cannot be imposed and stipulated.

26. Sub-section (3) of section 25 clarifies and affirms that notification issued under sub-section (1) shall be subject to the condition that the duty on customs chargeable on such goods shall not exceed the statutory duties. Sub-section (3) further states that the notification under Section 25(1) can relate to rate of duty expressed in a form or method different from the form or method in which the statutory duty is leviable, but subject to the condition that the rate of duty shall not exceed the statutory duty. The words .form or method. as per the explanation mean, basis of the duty, i.e., valuation, weight, number, length, area, volume or any other measure but explanation does not refer to the time limit and the right of the Government, by issue of a notification, to reduce the statutory time limit for claim of refund in Section 27 of the Act.

27. The word .exemption, as used in sub-section (1) to Section 25 can and should include extension or increase in time but cannot be stretched and expounded to include power of the Government to, by a circular, reduce the statutory time for a claim of refund stipulated under the principal enactment, i.e., the Customs Act, 1962. That would make the circular ultra vires the statute and beyond the scope of the Act, Rules etc. Circulars might depart from the strict tenure of the statutory provision and might mitigate rigours of law thereby granting administrative relief beyond terms of the relevant provisions of the statute, but the Central Government is not empowered to withdraw benefits or impose harsher or stricter conditions than those postulated by the statute. In later cases, circulars can supplant the law but not supplement the law.

28. Section 27 of the Act is a general provision relating to refund of any duty. Dictionary meaning of the word 'any' can indicate 'all' or 'every' as well as 'some' or 'one'. Usage depends upon the context of subject matter. In the context of Section 27 of the Act, the word 'any duty' should and would encompass 'all' and 'every' type of refund

payable under the Act and in terms of the notification issued under Section 25.

29. Third proviso to Section 27 clears any possible ambiguity and this proviso refers to special order under Section 25(2), which is like a notification and states that the period of limitation of one year or six months as the case may be, shall be computed from the date of issue of such order. Contention of the respondent that notification under Section 25 must specifically invoke Section 27 is misconceived. Notification under Section 25 of the Act is issued under the statute i.e. the principal enactment itself and refund of duty under Section 27 means and includes any type of refund whether payable in view of appellate orders, adjudication order or pursuant to a notification or exemption etc. Bare perusal of Section 27(1), indicates the wide amplitude and the broad parameters under which the said provision operates. The provision is not applicable or restricted to refund pursuant to a decree, judgment, order or direction of the appellate authority, tribunal etc. The very fact that the first notification dated 14th September, 2007 issued under Section 25 of the Act did not refer or prescribe any period of limitation, is sufficient to reject the contention that Section 27 of the Act is not applicable to notifications. The question under which provision and time limit refund under the notification dated 14th September, 2007 was payable, cannot be and is not answered by the respondents. Subsequent circular dated 28th April, 2008 was issued nearly after seven months of the notification.

30. Notification dated 1st August, 2008 refers to the expression the 'date of payment' of said additional duty of customs and the limitation period fixed is one year from the said date. The expression used in Section 27(1) is .from the date of payment of duty and interest, if any, paid on such duty.. The connotation of the words 'date of payment' is identical in the notification dated 1st August, 2008 and in sub-clause (1) to Section 27 of the Act. Explanation I to Section 27 clarifies the position and states that for any duty paid provisionally under Section 18, the limitation period as applicable shall be computed from the date of adjustment of duty after final assessment. Thus, the expression 'date of payment of duty' used in sub-clause (1) to Section 27 has to be read with Explanation II i.e. the date of adjustment of duty after final assessment and not the date on which duty was paid provisionally under Section 18.

31. Section 18 of the Act, postulates payment of duty which is ad-

hoc or interim duty which is paid but subject to final assessment. Ultimately, the duty payable is determined and decided by final assessment and the said determination is mandatory, when provisional assessment is made. Difference between the final duty payable and provisional duty paid will either result in a demand or a refund. Until final assessment is done, the duty paid is merely provisional and not fully ascertained or quantified. It can fluctuate.

32. The reason why explanation II to Section 27 refers to final assessment and not provisional assessment is apparent and logical. Till final adjudication order is passed and duty is ascertained, quantum of the duty paid or payable is uncertain. The amount of refund will be determinable upon final assessment and not earlier. Even when there is an exemption and duty is refundable post import, the refund cannot be ascertained and will be fluctuating till final assessment order is passed. The quantum of refund would depend upon the final adjudication and not upon provisional assessment. No person can lodge a claim for refund without knowing or quantifying the amount which is to be refunded. As per the final adjudication, refund may not be payable, or quantum thereof may increase or decrease.

33. Explanation II to Section 27 should not create any difficulty as one should expect that the final adjudication order would be passed within a reasonable time or shortly after provisional assessment. 34. In the present case, for the three claim of the petitioner, the relevant dates are as under:

Provisional payment date	**Final Assessment date**	**Claim lodging date**
31.12.2008 to 13.03.2009	09.07.2010	30.07.2010
04.04.2009 to 12.08.2009	09.07.2010	22.12.2010
15.09.2009 to 14.10.2009	09.07.2010	27.10.2010

35. The impugned circular No. 23 of 2010 was issued on 29.07.2010 stipulating a limitation of one year from the date of payment of the duty at the time of clearance of the imported goods. If the period in the

circular was to be followed then some of the refund claims of the petitioner would become time barred and in others hardly any time would be left for the petitioner to make a claim.

36. The problem in the present case has arisen largely due to failure of the respondents to pass final adjudication orders which were belatedly made. Bills of exchange between the period 20th December, 2008 to 6th March, 2009; bills of exchange between 27th March, 2009 to 12th August, 2009; and bills of exchange between 8th September, 2009 to 9th October, 2009 were finally adjudicated on 9th July, 2010. There is no explanation for this delay and the cause thereof.

37. Circular No. 23 of 2010/custom issued on 7th September, 2010 stipulates that the date of payment of provisional duty and not the date of final adjudication is determinative for computing the limitation period of refund under notification No. 93 of 2008 issued on 1st August, 2008, can be faulted for many reasons. These are as under:

i. As per Section 25(1), Central Government is empowered to issue a notification granting exemption i.e. grant exemption generally or absolutely or subject to conditions from whole or any part of custom duty leviable on goods. A notification cannot restrict the benefit or impose more rigorous or severe terms than the one prescribed under the Act. Notification can liberalise and grant exemption. Indulgence and benevolence can be an objective of a notification and restricted or shorter period of refund is not postulated. Notification cannot impose more deleterious terms and reduce the period of limitation for refund of claim. (Sub – section 2A to Section 25 is not applicable)

ii. Section 27 of the Act prescribes period of limitation. The period of limitation under the said Section cannot be curtailed by way of a notification but a notification can extend and increase the period of limitation. Similarly, a circular cannot reduce the period of limitation for seeking refund stipulated in Section 27 of the Act.

iii. Section 27 applies to all refunds whether due and payable pursuant to appellate orders or court orders or otherwise in terms of exemption notification under Section 25(1) or special orders under Section 25(2) of the Act.

iv. The expression 'date of payment' used in notification No. 93 of 2008 dated 1st August, 2008 can mean the date of final assessment. The said interpretation would be in accordance and as per explanation II to Section 27. Similar expression has been used in Section 27(1). Circular issued on 29th July, 2010 accepts that in some cases refunds under the notification dated 1st August, 2008 had been issued on a claim being made within one year from date of final assessment and beyond one year from the date of provisional assessment. The circular however, stipulates that the claim for refund would be entertained under the notification dated 1st August, 2008, if it is made within one year from payment of duty and not final assessment. This, may result in reducing the period. Assuming that the issue of date of payment was debatable, the Board did not deem it appropriate to fix a period or time limit during which claims of refund should be entertained in cases where the Assessee bonafidely believed and were acting on the presumption that period of one year was to be computed from the date of final assessment. The said belief was not ill founded but based on sound logic and reasoning. The Board while issuing the circular would have been fair and just and fixed a time limit during which past claim of refund could be entertained with a reference to the date of final assessment.

38. In view of the above discussion, we feel that it will be proper to harmoniously construe and interpret notification dated 1st August, 2008 and Section 27 read with Circular dated 29th July, 2010 by holding that an Assessee can make a claim for refund under notification No. 93 of 2008 dated 1st August, 2008 either by filing an application for refund within the limitation period specified under Section 27 of the Customs Act, 1962 or within the extended limitation period of one year from the actual date of payment even, if the said payment made was pursuant to provisional assessment. The longer of the two periods i.e. the period specified under Section 27 or the notification dated 1st August, 2008 read with Circular No. 23/2010–Custom dated 29th July, 2010 would be applicable.

39. To sum up:

a. where the imported goods are released on payment of CVD on regular assessment, the application seeking refund can be made within one year of the payment of the CVD in terms of the notification dated 1st August, 2008 read with Circular No. 23/2010–Custom dated 29th July, 2010.

b. where the goods are released on provisional assessment followed by the final assessment, the application seeking refund can be made within the period of one year or six months, as the case may be, of the final assessment as stipulated by Explanation II to section 27 of the Act or within the enlarged period of one year from the date of provisional release as stipulated by the notification dated 1st August, 2008 read with Circular No. 23/2010–Custom dated 29th July, 2010.

40. The Circular No. 23/2010-Custom in so far as it stipulates that the provisions of section 27 of the Act do not apply to the Notification cannot be sustained to the extent indicated above.

41. In view of the construction given by us to the circular hereinabove, the Judgment relied upon by the counsel for the Petitioner of the High Court of Madras in the case of **KSJ Metal Impex Private v. Under Secretary, Customs and Others** in Writ Petition No. 959/ 2013 decided on 21.01.2013 need not be referred to. Even otherwise the said judgement is not applicable in the facts of the present case as the same was dealing with the issue of interest on delayed refunds.

42. Since the petitioner has filed the claims within the period stipulated by section 27 of the Act, in view of the construction given by us, the same could not have been rejected on the ground of limitation.

43. In view of the above, the impugned Circular No. 23/2010-Custom to the extent it holds that section 27 of the Act has no application is held ultra-vires the statute and quashed. The impugned orders dated 21.3.2011 and 27.4.2011 passed by respondent No.2 relying on Circular No. 23/2010-Custom dated 29.07.2010 are hereby set aside and the matter is remanded to respondent No.2 to assess the claim of the petitioner for refund on imports and to process the same in accordance with the provisions of Section 27 of the Act.

44. The writ petition is, accordingly, disposed of with no order as to costs.

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UNION OF INDIA & ORS. ....APPELLANTS

VERSUS

RADHARANJAN PATTANAIK & ORS. ....RESPONDENTS

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

LPA NO. : 677/2013 DATE OF DECISION: 16.09.2013

Constitution of India, 1950—Article 14—Respondent employees has filed writ petition and had sought entitlement to pension as was available to other employees of Visa Bharati University who had completed ten years of continuous service—Learned Single Judge quashed notification of respondent University that had stopped pension by its order to AERC staff of University—Impugned order challenged before Division Bench in appeal—Plea taken, Allahabad High Court had dismissed a claim for a similar relief which was sought against Allahabad University by members of AERC attached to that University—Held—Learned Single Judge distinguished facts of cited was with present case and found that ruling to be inapplicable to present case—Language employed in Memorandum of Understanding is clear as daylight and requires no interpretation with respect to its intent and import—Objective was clearly that employees of AERC attached to respondent University should be merged with and treated at par with other

employees of said University and all benefits would be available to these newly merged employees entering into a larger pool of employees as it were—A perusal of language used in MOU would clearly set out intent of Union of India to first merge and integrate employees of AERC and put them at par with those of University—Having done so on its own, appellants would be estopped from subsequently disowning them or denying them pensionary benefits that were otherwise guaranteed under MOU—Although said employees were not party to MOU, benefits having been granted to them w.e.f. 1995 cannot be unilaterally withdrawn from or denied to them thirteen years later in 2008—Responsibility towards post retirement benefits with respect to employees of AERC was settled between Government and respondent University by transferring same to latter on assurance that former would give grants-in-aid and adequate annual budgetary allocation to meet responsibility and relevant contingencies—Employees were never consulted for a part of shift in such responsibility—They were content in fact that their terms of employment had not been altered to their detriment and had indeed been improved—This cannot be altered unilaterally now, to their detriment—Withdrawing benefits as per impugned order would be to leave them in lurch and to virtually disown them by subterfuge—This act would be unfair and impermissible and would warrant to be quashed.

Important Issue Involved: Having merged and integrated the employees of a Centre and put them at par with those of the University, authorities would be estopped from subsequently downing them or denying them pensionary benefits that were otherwise granted under the MOU.

[Ar Bh]

APPEARANCES:

FOR THE APPELLANTS : Mr. Ruchir Mishra, Mr. Sanjiv K. Saxena and Mr. Ramneek Mishra, Advocates for appellants.

FOR THE RESPONDENT : Mr. Ruchir Mishra, Mr. Sanjiv K. Saxena and Mr. Ramneek Mishra, Advocates for appellants.

RESULT: Dismissed.

NAJMI WAZIRI, J.

1. In these appeals, the appellant seeks the setting aside of the common order of the Learned Single Judge passed on 13th May, 2013 ("impugned order") in WP(C)/8032/2009 and WP(C)/8090/2009. The respondent employees in these appeals (the successful Writ Petitioners), had sought entitlement to pension as was available to other employees of the Visva-Bharati University ("respondent University") who had completed ten years of continuous service. The respondent University, on the basis of a memo issued by the appellant on 30th August, 2007, had stopped pension by its letter/order dated 20th December, 2008 ("impugned letter") to the AERC staff of the University. The Learned Single Judge, having examined the facts of the case, had quashed the said notification and directed the appellants to make necessary budgetary allocations to ensure that the respondent University gets the finances for payment of pensionary benefits to the petitioners. Likewise, the respondent University was directed to release the pensionary benefits within three months of the order. Feeling aggrieved by the aforesaid directions, the appellants have preferred the aforesaid appeals.

2. The facts are that the Agro Economic Research Centre ("AERC") were established in 1954 under the Ministry of Agriculture, Government of India and, over the years, spawned into fifteen such centres in different states. The objectives of the AERCs were:

> "(i) To conduct investigations into specified Agro Economic problems of the Country.
>
> (ii) To carry out continuous studies on the rural economy.
>
> (iii) To carry out research work on structural changes and

fundamental problems of Agriculture economy and rural development.

(iv) To give technical advise (sic: advice) to the Union Government and the State Government."

Essentially, they were supplementing the functions of the Ministry of Agriculture. Deeming it necessary for the effective functioning of the AERCs, the Government approved the proposal to merge the AERCs with the respective universities where they were functioning. As a corollary, the AERC functioning at Santiniketan was merged with the respondent University, by a Memorandum of Understanding dated 23rd March, 2000, ("MOU") but with effect from 1st April, 1995.

3. Upon the respondent-employees, being denied pensionary benefits, they approached this court in writ proceedings. The Learned Single Judge, in his reasoning, noted the categorical language employed in the MOU particularly where it stated that (a) "the Centre will be integrated to the University"; (b) "the Ministry will release the grants-in-aid according to the approved budget provisions every year"; (c) "the staff of the Centre would be considered at par with the regular employees of the University for all the privileges enjoyed by the regular staff of the University, i.e., pension..."; and (d) "future revisions in the scale of pay, of pay and allowance in the posts in the Centre, will (sic) as per provisions effective for similar posts in the University". The impugned judgment reasoned that the MOU clearly placed the employees of the AERC completely at par with the employees of the respondent University, and that in terms of benefits towards pay scales, pension, provident fund, residential accommodation, and other service benefits, they would be treated identically. It was noted in particular that the Union of India had undertaken to provide sufficient grants-in-aid apropos these employees in terms of regular annual budgetary allocation. He reasoned that it was therefore not open to the Union of India to deny the grants-in-aid / budgetary allocation on the basis of subsequent correspondence with the University, stating that making payments towards pension of these employees was against its policies, the direct result of which would be the denial of pensionary benefits to the petitioners from 23rd December, 2008.

4. The Learned Single Judge further held that:

"...a reading of the MoU dated 23.3.2000 which came into

effect from 1.4.1995 leaves no manner of doubt that the respondent No. 1 will provide all grants-in-aid/financial resources which would be consequent upon employees of AERC becoming employees of the respondent No. 4-University pursuant to MoU without in any manner freezing of budgetary allocation. I am surprised that the respondent No. 1 is in fact taking up a stand which does violation to the language of the MoU because MoU both in letter and spirit provides for entitlement of respondent No. 4-University to necessary budgetary allocation consequent upon employees of AERC becoming employees of the respondent No. 4-University. As already stated above, no less than the Secretary of the respondent No. 1/Ministry of Agriculture signed the MoU. I do not understand therefore how can there at all be any doubt of necessary budget allocation by respondent No.1 to respondent No. 4. Not only there can be no doubt that the budgetary allocation will be given each year so required for the employees of AERC who had become employees of the University, the MoU also takes into care by virtue of Clause (xii) the requirement of additional budgetary allocation because of future revision of scales of pay and allowances. I therefore do not understand how Union of India can argue on the basis of the notification dated 21.5.1990 that clause (3) of the said notification states that there will be no extra financial implications on account of making AERC permanent and the current level of expenditure will not be exceeded. Though para (3) of the notification dated 21.5.1990 surely cannot be read as making level of expenditure because surely there were bound to be appropriate pay revisions, in any case, the notification which is relied upon is 21.5.1990 and the same clearly stands superseded by the categorical terms of the later MoU dated 23.3.2000. Therefore, it is not open for the UOI to canvass and contend that budgetary allocation will remain fixed by virtue of the notification dated 21.5.1990, and which in my opinion quite clearly was no longer operative once the MoU dated 23.3.2000 becomes operative.

He then concluded that:

"The petitioners have legal rights as the employees of respondent No. 4, and as per rules/regulations/circulars of respondent No. 4. Refusal to give petitioners pension is arbitrary and violative

of Article 14 of the Constitution. Refusal by respondent No. 1 to give necessary budgetary allocation is also arbitrary hence also violative of Article 14 in view the categorical language of the MoU. Petitioners have enforceable legal rights which are violated."

5. In this appeal, the same arguments were reiterated as were made before the Learned Single Judge. It was also contended that the Allahabad High Court in the case of *Dr. Rajendra Singh v. Vice Chancellor, University of Allahabad & Ors,* in C.M.W.P. No. 6801 of 2002, decided on 22nd February, 2007 dismissed a claim for a similar relief which was sought against Allahabad University by members of the AERC attached to that university. On the strength of the Dr. Rajendra Singh case, it was sought to be urged before this Court that the Learned Single Judge ought to have similarly dismissed the Writ Petition and held the respondent employees to not be entitled to any pensionary benefits. This court notices that the Learned Single Judge, distinguished the facts of Dr. Rajendra Singh with the present case and found that ruling to be inapplicable to the present case. In Dr. Rajendra Singh, the Allahabad High Court had held, on the basis of the terms of the MOU therein and / or the correspondence, that "there was nothing to indicate any promise or representation made or held out to the AERC employees, which was intended to be acted upon", with respect to pensionary benefits. Accordingly that petition was dismissed. In this case, however, the Learned Single Judge had found the language of the MOU to be categorical and unambiguously in favour of the petitioners – claiming the right to be treated at par with the other employees of the University. He found the impugned letter to be arbitrary and in violation of Article 14 of the Constitution of India, with respect to the enforceable legal rights of the petitioners.

6. This court has considered the arguments of the appellants and finds no reason to interfere with the impugned order. The language employed in the MOU is clear as daylight and requires no interpretation with respect to its intent and import. The objective was clearly that the employees of the AERC attached to the respondent University should be merged with and treated at par with the other employees of the said University and all benefits would be available to these newly merged employees entering into a larger pool of employees as it were. A perusal of the language used in the MOU would clearly set out the intent of the

Union of India to first merge and integrate the employees of the AERC and put them at par with those of the University. Having done so on its own, the appellants would be estopped from subsequently disowning them or denying them pensionary benefits that were otherwise guaranteed under the MOU. It is noteworthy that although the said employees were not party to the MOU, the benefits having been granted to them with effect from 1995 cannot be unilaterally withdrawn from or denied to them thirteen years later in 2008. The responsibility towards post-retirement benefits with respect to the employees of the AERC was settled between the Government and the respondent University by transferring the same to the latter on the assurance that the former would give grants-in-aid and adequate annual budgetary allocation to meet the responsibility and relevant contingencies. The employees were never consulted for a part of the shift in such responsibility. They were content in the fact that their terms of employment had not been altered to their detriment and had indeed been improved. This cannot be altered unilaterally now, to their detriment. Withdrawing the benefits as per the impugned order would be to leave them in the lurch and to virtually disown them by subterfuge. This act would be unfair and impermissible and would warrant to be quashed. The learned Single judge had done just that.

7. For the reasons aforesaid this court finds no merit in the appeals. Both the appeals are dismissed.

ILR (2014) II DELHI 824
W.P. (C)

UNION OF INDIA ....APPELLANT

VERSUS

DEEPAK SHARMA ....RESPONDENT

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

W.P. (C) NO. : 5547/2012 DATE OF DECISION: 18.09.2013

CCS (Pension) Rules, 1972—Rule 48-A—Petitioner challenged order of CAT directing it to consider

applicant's letter dated 31.08.2007 requesting for voluntary retirement as per provisions of Rule 48-A and also to release retiral benefits—Plea taken, letter dated 31.08.2007 is unambiguous in its language and meaning—Letter firstly requests for a voluntary retirement, failing which, it offers resignation with immediate effect—Respondent/applicant did not wait even for a day to receive any response from Government and proceeded to join UN Mission—Aforesaid letter could not be treated as a request under Rule 48-A (1) for being considered for voluntary retirement—Per contra plea taken, under Rule 48-A (3-A) (b) it was always open for Government to curtail period of three months on merits and on appointing authority being satisfied that period of notice would not cause any administrative inconvenience, period could be relaxed (on condition that Government servant would not apply for commutation of a part of his pension before expiry of notice period)—Respondent/applicant had categorically offered to Government that three months, salary be recovered in lieu of three months, mandatory notice for voluntary retirement from leave due to him—Respondent/applicant had duly complied with requirement for Rule 48-A but appellant had failed to act diligently, fairly and responsibly—Held—Requirement under Rule 48-A (1) is that Government servant, upon being eligible for voluntary retirement, must first give a notice in writing under to appointing authority, of not less than three months—It is only after this specific request is made, that applicant could invoke benefit of sub-rule (3-A) (a) whereby "government servant referred to in Sub-rule (1) may make a request in writing to appointing authority to accept notice of voluntary retirement of less than three months giving reasons therefor"—So it is only upon application being made three months prior to intended date of retirement that request for lessening or waiving period of waiting for three months

could be made—When request is made in this manner, Appointing Authority could exercise discretion, based upon exigencies of case, for relaxation of three months period under Rule 48-A (3-A) (b)—In present case, just exact opposite was done, i.e., application for voluntary retirement was made to be with immediate effect and three months, notice period was sought to be adjusted against pay for subsequent three months; respondent/applicant had misconstrued relevant Rule—Insofar as respondent/applicant had not made any request in writing three months earlier, and had instead notified government to accept his resignation with immediate effect from 31.08.2007, aforesaid provision for relaxation of three months period would not be available to him—In circumstances, government was well within its rights to accept resignation as was done in instant case.

Important Issue Involved: It is only upon the application for voluntary retirement being made three months prior to the intended date of retirement that request for lessening or waiving the period of waiting for the three months could be made. When the request is made in this manner, the Appointing Authority could exercise the discretion, based upon the exigencies of the case, for relaxation of the three months period under Rule 48-A (3-A) (b).

[Ar Bh]

APPEARANCES:

FOR THE APPELLANT : Mr. R.V. Sinha with Mr.A.S. Singh, Advocates.

FOR THE RESPONDENT : Mr. Naresh Kaushik, Advocate.

CASES REFERRED TO:

1. *Dr. Praba Atri vs. State of Uttar Pradesh,* (2003) 1 SCC 701.
2. *Yashwant Hari Katakkar vs. UOI,* (1996) 7 SCC 113.

3. *P.K. Ramachandra Iyer vs. Union of India,* (1984) 2 SCC 141.

RESULT: Allowed.

NAJMI WAZIRI, J. (ORAL)

1. The petitioner being aggrieved by an order of the Central Administrative Tribunal in O. A. 4162 of 2010 dated 5th March, 2012, ("impugned order") has preferred this petition. The impugned order directs the petitioner to:

> "...consider the applicant's letter dated 31.08.2007 requesting for voluntary retirement, as per the provisions of Rule 48-A within a period of nine weeks from the date of receipt of a certified copy of this order. It goes without saying that subsequent to the issue of acceptance of his voluntary retirement, the applicant would be entitled to all the retrial (sic: retiral) benefits including Pension, Gratuity, Leave Encashment etc. as per law and the respondents – MEA would be entitled to adjust the amount equivalent to the notice period that would be as per the prescribed rules. It is noticed that applicant is partly responsible for the confusion. Therefore, we make it clear that the applicant will not be entitled to any interest on the arrear amount of his entitled retirement due. Let the exercise as ordained in the above orders be completed within a period of three months from today."

2. The facts of the case are that the respondent/applicant, having worked with the appellant, by a letter of 31st August, 2007 sought voluntary retirement after completing twenty two years of service. The genesis of this request lay in the petitioner's need to respond to his letter of appointment for the post of FS-4 from the United Nations Integrated Mission in Timor-Leste which he had received a few weeks prior thereto. The said letter required him to convey his acceptance within seven days from the date it was issued, i.e. 18th July, 2007. By a letter of 20th July, 2007, he sought the requisite permission to accept the offer of appointment and by another letter of 13th August, 2007 he reiterated his request. Sensing that the time available with him was very little, by a letter dated 31st August, 2007 he requested for voluntary retirement with effect from the next day, i.e., 1st September, 2007. He felt he was eligible to invoke this option under the applicable Service Rules, i.e. after the completion

of twenty two years of service. He also stated that if for any reason the application for voluntary retirement was not acceptable, then the letter may be treated as notice for resignation from government service with immediate effect. He then proceeded to join the United Nations' service. Vigilance clearance was accorded to him on 25th July, 2007. His resignation was accepted with effect from 12th September, 2007.

3. The respondent/applicant's contention before the Tribunal was that his offer of resignation was purely conditional and was to be considered only in case the application for voluntary retirement was not acceptable for any reason. Even in such eventuality, he would have expected to be intimated the reasons for the declination of the application for voluntary retirement. However, the letter of 12th September, 2007 accepting his resignation did not contain even a whisper of why his request for voluntary retirement was rejected. He made representations to the Government seeking review, i.e. that the acceptance of the resignation be treated as voluntary retirement from government service and that the term of service with the United Nations be treated as his being on deputation. This request was declined by an order dated 9th June, 2010. Incidentally, this consideration of review and the communication of the government decision were made pursuant to an order dated 18th April, 2010, passed by the Tribunal in an earlier O. A. filed by the respondent/applicant.

4. In the present impugned order, the Tribunal has considered whether the respondent/applicant would be entitled under Rule 48-A of the CCS (Pension) Rules, 1972, and reasoned that although it required three months' notice in writing to the appointing authority to retire voluntarily from the service, there was urgency in this case and that the respondent/applicant had already requested more than forty days earlier, i.e., on 20th July, 2007, seeking to be relieved so that he could join the United Nations Mission, but the appellant / government failed to respond. That it was out of exasperation that the letter of resignation was written. Indeed, the Additional Secretary (Admin), MEA, had noted in the official file on 31st August, 2007: "He came to see me to request that he be given a sympathetic hearing. I do not know if there is any constraint in relieving him, if there is a way without infringing any regulations, and would request that it be done". The Tribunal reasoned that the resignation had to be clear and unconditional. It held the respondent/applicant's letter to be a conditional resignation and relied upon the judgements of the Supreme

Court in **P. K. Ramachandra Iyer v Union of India,** (1984) 2 SCC 141 and **Dr. Praba Atri v State of Uttar Pradesh,** (2003) 1 SCC 701. In those cases, the Supreme Court had set aside the communication purporting to accept the resignations concerned. The Tribunal held that although the circumstances in the present case may be different, but the law in **Dr. Praba Atri's** case (supra) would hold the field and would apply. Further relying on the ratio in **Yashwant Hari Katakkar v UOI,** (1996) 7 SCC 113 the Tribunal reasoned that in this case too, the government should favourably consider the grant of retiral benefits, since the respondent/applicant had already put in more than twenty two years of qualifying service. The Tribunal found that the respondent/applicant had applied forty days earlier (to the letter of voluntary retirement cum resignation) for permission to join the United Nations Mission and in any case the government had twelve clear days to decide the application for voluntary retirement before it accepted – on 12th September, 2007 – the offer of resignation. Therefore, the argument of the government that only one day's notice was given for responding to the respondent/applicant's letter was found untenable and the order dated 9th June, 2010, though speaking, was considered arbitrary and was accordingly quashed.

5. Learned Counsel for the appellant, Mr. R. V. Sinha, submitted that the impugned order is unsustainable. He contended that the letter dated 31st August, 2007 is unambiguous in its language and meaning. He submits that the letter firstly requests for a voluntary retirement, failing which, it offers resignation with immediate effect. The respondent/applicant did not wait even for a day to receive any response from the Government and proceeded to join the United Nations Mission. His was an I-couldn't-care-less-and-do-as-you-wish-as-I-have-resigned attitude. He contended that the aforesaid letter could not be treated as a request under Rule 48-A (1) for being considered for voluntary retirement.

6. Mr. Naresh Kaushik, learned counsel for the respondent/applicant reiterated the contentions made on behalf of the respondent/applicant before the Tribunal. He further argued that under Rule 48-A (3-A) (b), it was always open to the Government to curtail the period of notice of three months on merits and on the appointing authority being satisfied that the period of notice would not cause any administrative inconvenience, the period could be relaxed (on the condition that the Government servant would not apply for commutation of a part of his pension before the expiry of the notice period). He also submitted that the respondent/applicant had categorically offered to the government that three months' salary be recovered in lieu of the three months' mandatory notice for voluntary retirement from the leave due to him. He further submitted that the respondent/applicant had duly complied with the requirement of Rule 48-A, but the appellant had failed to act diligently, fairly and responsibly. It had, without application of mind, rejected the bona fide request for voluntary retirement and instead rushed to accept his resignation from government service.

7. This Court has considered the contentions of the parties and notices that the requirement under Rule 48-A (1) is that the Government servant, upon being eligible for voluntary retirement, must first give a notice in writing under to the appointing authority, of not less than three months. It is only after this specific request is made, that the applicant could invoke the benefit of sub-rule (3-A) (a) whereby the "government servant referred to in sub-rule (1) may make a request in writing to the appointing authority to accept notice of voluntary retirement of less than three months giving reasons therefor". So it is only upon the application being made three months prior to the intended date of retirement that a request for lessening or waiving the period of waiting for the three months could be made. When the request is made in this manner, the Appointing Authority could exercise the discretion, based upon the exigencies of the case, for relaxation of the three months' period under Rule 48-A (3-A) (b). In the present case, just the exact opposite was done, i.e., the application for voluntary retirement was made to be with immediate effect and the three months' notice period was sought to be adjusted against pay for the subsequent three months; the respondent/applicant had misconstrued the relevant Rule. Insofar as the respondent/applicant had not made any request in writing three months earlier, and had instead notified the government to accept his resignation with immediate effect from 31st August, 2007, the aforesaid provision for relaxation of three months' period would not be available to him. In the circumstances, the government was well within its rights to accept the resignation as was done in the instant case. The Tribunal had misdirected itself in construing the applicability of Rule 48-A (3-A) (b) and in concluding that twelve days were sufficient for the government to process the request of the respondent/applicant for voluntary retirement.

8. For the reasons aforesaid, the impugned order is set aside and the petition is allowed. There shall be no order as to cost.

ILR (2014) II DELHI 831
CO.A.

DINESH SUD **....APPELLANT**

VERSUS

STITCHWELL QUALITEX PVT. LTD. & ORS. **....RESPONDENTS**

(R.V. EASWAR, J.)

CO.A. (SB) NO. : 69/2011 **DATE OF DECISION: 18.09.2013**

Companies Act, 1956—Appeal U/s 10 F of the impugning order of CLB dismissing application for rectification of register of members—Petition filed after 16 years from when the name of appellant was omitted from the register.

Held even assuming that the Limitation Act 1963 does not apply to proceedings before the CLB and that Sub—section 4 of Section 111 does not provide for any period of limitation, the delay was not enough and appellant was guilty of latches.

Also held the appellant for 15—16 years accepted the settlement and acted upon it and also his other family members acted upon the settlement. In several judgments, it has been held by the Supreme Court that a family settlement is given effect to by the courts on the broad and general principle that it brings about peace and harmony in the and family and puts an end to existing or future disputes regarding property amongst the family members.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. H.L. Tiku, Sr. Advocate with Mr.Ajay Goyal, Mr.Shubhankar sengupta, Mr. Shailabh Tiwari, Mr. Bikash Mohanty and Ms. Ritu Chabbra, Advocates.

FOR THE RESPONDENT : Mr. Anish Dayal with Mr. Siddharth Vaid, Advocates

CASES REFERRED TO:

1. *Dale and Carrington Investments (P.) Ltd. & anr.* vs. *P. K. Prathapan & ors.* (2004) 122 Comp. Cas. 161 (SC).
2. *N. S. Nemura Consultancy India P. Ltd. & anr.* vs. *A. Devarajan* (2010) 155 Comp. Cas. 175 (Mad.).
3. *Farhat Sheikh* vs. *Escman Metalo Chemical Pvt. Ltd. & anr.* (1991) 71 Comp. Cas. 88 (Cal.).
4. *Mannalal Khetan & ors.* vs. *Kedar Nath Khetan & ors.* (AIR 1977 SC 536).
5. *Kale* vs. *Deputy Director of Consolidation & ors.* (1976) 3 SCC 119.
6. *Shanmugham Pillai & ors.* vs. *K. Shanmugham Pillai & ors.* (1973) 2 SCC 312.
7. *Ram Charan Das* vs. *Girijanandini Devi & ors.* (AIR 1966 SC 323).
8. *Tek Bahadur Bhujil* vs. *Debi Singh Bhujil & ors.* (AIR 1966 SC 292).
9. *Maheshwari Khetan Sugar Mills (P.) Ltd. & ors.* vs. *Ishwari Khetan Sugar Mills & ors.* (1963) 33 Comp. Cas. 1142 (All.).
10. *Sadhu Madho Das* vs. *Pandit Mukand Ram & anr.* (AIR 1955 SC 481).
11. *Kanhaiya Lal* vs. *Brij Lal* (AIR 1918 PC 70).

RESULT: Appeal Dismissed.

R.V. EASWAR, J.

1. This is an appeal filed under Section 10F of the Companies Act, 1956, the order impugned being that of the Company Law Board passed on 04.07.2011 in Co. Pet. No.10/111/2009, in an application filed by the appellant herein under section 111(4) of the Act for rectification of the register of members.

2. M/s. Stitchwell Qualitex Pvt. Ltd., the first respondent herein, is a company incorporated on 23.07.1980. Its initial shareholders were members of the family of S.N. Sud – S.N. Sud himself, his son Dinesh Sud who is the appellant herein and Ms. Manju Shiv Sud, his daughter (and sister of the appellant). Each of them held 50 equity shares of Rs. 10 each. In the year 1983, the issued share capital was raised to 10,000 shares of Rs.10 each. These shares were held as follows: Ms. Manju Shiv Sud 2000 shares, S.N. Sud 2500 shares, Mrs. Krishna Sud, the wife of S.N. Sud 3000 shares and Dinesh Sud 2500 shares. No physical share certificates were given to them, apparently because they were all family members.

3. The appellant and his father, S.N. Sud, were also carrying on business in partnership in the name and style of Stitchwell Qualitex.

4. On 01.10.1993, the appellant resigned from the directorship of the company. Mrs. Krishna Sud, his mother, died intestate on 03.01.1995 and S.N. Sud, his father, died on 11.02.2001, leaving a will dated 25.06.1998.

5. Trouble appears to have started when the appellant wrote to the company on 10.01.2009, through his advocate, that he came to know from some documents that he was not being shown as a shareholder of the company and demanded to know how many shares stood in his name. He also wanted to inspect the records of the company. The company wrote back, through its advocate, on 20.01.2009 that (a) the appellant was not a shareholder of the company; (b) he was not a shareholder for the past 15 years; (c) that pursuant to a family settlement effected by S.N. Sud in 1993 the appellant had relinquished all his shares in the company and it is a mala fide attempt on is part to rake up a closed issue after several years; (d) no enquiry, as claimed, had been made by the appellant with the company at any earlier point of time about his shareholding; (e) inspection of the company's records cannot be given.

6. In a series of correspondence exchanged thereafter, the appellant kept claiming that he was one of the original shareholders of the company with equal holding with his sister and father, that his holding was increased by 2500 shares in 1983, that though he resigned as a director of the company on 01.10.1993 he continued to hold his shares which amounted to 25% of the total shares, that after the death of both his father and mother a part of their shares also came to his share by succession/ devolution and thus he held 5250 shares in the company which came to 52.5% of the total shares and therefore he was entitled to be taken into confidence about the manner in which the company was being run, the meetings held etc. He also claimed that there were irregularities in the manner of conducting the affairs of the company and fudging of records, forging his signatures and the like. He also demanded to be supplied with a copy of the family settlement said to have been effected by his father.

7. The company's response, through its advocate's letter dated 09.04.2009 was this. There was a family settlement in 1993 under the guidance of late S.N. Sud, under which it was decided that the appellant would resign from the company and take up the operations of the firm M/s. Stitchwell Qualitex at A-11, Sector 57, Noida, S.N. Sud would continue in the firm only as a sleeping partner, that too only till March, 1994. The company would continue to run the operations at G-58, Sector-6, Noida. It would be managed by S.N. Sud and the appellant (Dinesh Sud) would withdraw from his rights in the company. This arrangement was informed to the NOIDA authority on 31.12.1993 by a letter, which was also signed by the appellant. Pursuant to the family settlement as above, he had also resigned from the directorship of the company. He was thus aware of the family settlement. In the further letter written to the NOIDA authority on 25.01.1994, read with the reply dated 23.02.1994 of the said authority the shareholding pattern of the company was set out, which did not show the appellant as a shareholder, but showed only S.N. Sud, his wife Krishna Sud, daughter Manju Shiv Sud and her son Pankaj Shiv Sud as shareholders. Thereafter, Krishna Sud transferred her shares to Manju Shiv Sud and Pankar Shiv Sud, as evidenced by the letter dated 28.11.1994 addressed to the board of the company. She passed away in 1995. In the year 1998, S.N. Sud, the father, transferred his shares in the company to Manju Shiv Sud and Pankaj Shiv Sud and accordingly informed the Registrar of Companies by letter date 31.03.1998. Thereafter, the only shareholders of the company were Manju

Shiv Sud and her son Pankaj Shiv Sud. The fact that there was a family settlement in 1993 was also adverted to in the will left by S.N. Sud. He passed away in 2001. The annual returns were filed with the RoC only on the above basis, that is to say, that Manju Shiv Sud and Pankaj Shiv Sud were the only shareholders of the company. It is inconceivable that a person claiming 52.5% shareholding in the company would have kept away from the affairs of the company and would not have shown any interest in them or would not have made any enquiry about the business of the company for a period of 15 years (from 1993). The appellant had no stake in the company and therefore granting inspection of the records of the company was out of the question. So ran the reply of the company.

8. The appellant thereupon moved Co. Pet. No.10/111/2009 before the CLB under section 111(4) of the Act, seeking registration as a member of the company and challenging the action of the company in not recognising him as a shareholder as claimed by him. The following points were raised by him: (i) he did not sign any document giving up the shares; (ii) the shares held by S.N. Sud and Krishna Sud were also got transferred to themselves by Manju Shiv Sud and Pankaj Shiv Sud, who were arraigned as respondents before the CLB; (iii) the respondents were preventing the appellant from exercising his role as majority shareholder of the company holding 52.5% of the shares; (iv) the company, which was the first respondent before the CLB, was wrong in denying inspection to the appellant; (v) the appellant was denied information about the affairs of the company and its accounts, as well as about the meetings held; (vi) the mere separation of the family business into agricultural implements business and bag-closing machines and conveying systems which took place in 1993 is being deliberately twisted to show as if it was a family settlement; (vii) facts were misrepresented to the Noida authority; (viii) the petitioner was ill with acute ulcerative colitis and severe eye problem between 2001 and 2008, which prevented him from raising his claim with the company; there was no negligence on his part.

9. On behalf of the respondents before the CLB, the following points were made: (i) the petition filed after 16 years from 1993, when the name of the appellant was said to have been omitted from the register of members, is vexatious; (ii) the petitioner was not justified in denying the family settlement, of which he was part, and was thus within his knowledge; (iii) the petitioner cannot avail of the remedy under section 111 which provides for a summary proceeding, and the proper remedy

was to file a civil suit; (iv) the family settlement was oral, under which the petitioner (appellant herein) got the erstwhile partnership business with S.N. Sud continuing only as a sleeping partner till 31.03.1994; (v) that for a period of 16 years the petitioner accepted the family settlement and without any reason and justification, and out of spite and ill-will towards his sister and her son, has filed the petition to harass and humiliate them; (vi) that the family settlement was acted upon by all parties including the petitioner and it was not open to him, after a period of 16 years, to claim that there was no such settlement; (vii) that there was ample documentary record to show that the family settlement was acted upon; (viii) there was no evidence to show that the petitioner was entitled to any shares held by S.N. Sud and Krishna Sud, on their death; (ix) the petition was liable to be dismissed on the ground of limitation itself, having been filed after 16 years from the date on which his name was omitted from the register of members, or in the alternative, the petition was liable to be rejected on the ground of laches or unreasonable delay.

10. The CLB was inclined to look upon the company as a family concern, run without any pretence to professionalism; no share certificates were issued, no formal meetings were held and annual returns were not filed with any regularity. It noted that all the members of the family resided in the same house, in different floors. The petitioner did not claim any share in the shares left by his mother on her death in 1995, nor did he claim any share in the shares left by the father on his death in 2001. There is no written communication by him asking for details of his shareholding as registered in the record of the company, nor is there any evidence of oral requests or demands to that effect. In any case, in summary proceedings under section 111 it is not permissible to examine the facts and insist on evidence in a formal manner. From 1993, for a period of 16 years the petitioner has kept quiet. According to the CLB, there was therefore inordinate and unexplained delay on his part, amounting to laches which disentitles him from claiming any relief under the section. The allegations of fraud remain mere allegations without any proof. The CLB held that there was no answer to the settlement effected in the life-time of S N Sud. In this view of the matter, the petition was dismissed.

11. It is the above order of the CLB that is under challenge in the appeal before me.

12. The learned counsel for the appellant Dinesh Sud confined his claim to the 2500 shares allotted to him in 1983, apparently realising the difficulty in pitching his claim higher to include the shares which the appellant claimed on the death of his parents, which would have involved complicated questions relating to the proving of the will etc. that are really matters for a civil court to deal with. He contended that firstly there was no period of limitation prescribed by sub-section (4) of section 111 for filing an application to the CLB seeking rectification of the register of members and therefore the observations of the CLB regarding laches and unreasonable delay on the part of the petitioner-appellant were of no relevance. He pointed out that section 108 is mandatory in nature, in the sense that no transfer of shares can be registered by the company unless there is a written transfer deed; in the present case, there was no communication from the appellant to the company to transfer his shares. Therefore, it was contended, the removal of the appellant from the register of members was illegal and unauthorised and in blatant violation of the section. He cited **Mannalal Khetan & ors. vs. Kedar Nath Khetan & ors.** (AIR 1977 SC 536) and **Dale and Carrington Investments (P.) Ltd. & anr. vs. P. K. Prathapan & ors.** (2004) 122 Comp. Cas. 161 (SC) in support of his contention that section 108 was mandatory in nature. It was further contended that there can be no question of any waiver or acquiescence of the rights of a shareholder as laid down in **Sha Mulchand & Co. Ltd. (in liquidation) vs. Jawahar Mills Ltd.** (AIR 1953 SC 98). Alternatively, it was contended that limitation, if any, commenced from the time at which the appellant had knowledge about the acts of the company. At any rate, it was contended, the appellant was afflicted by acute ulcerative colitis and severe eye problem during the period 2001 to 2008 which explained the delay, if any. In support of his submissions, learned counsel relied on the following further authorities: **Maheshwari Khetan Sugar Mills (P.) Ltd. & ors. vs. Ishwari Khetan Sugar Mills & ors.** (1963) 33 Comp. Cas. 1142 (All.); **Farhat Sheikh vs. Escman Metalo Chemical Pvt. Ltd. & anr.** (1991) 71 Comp. Cas. 88 (Cal.) and **N. S. Nemura Consultancy India P. Ltd. & anr. vs. A. Devarajan** (2010) 155 Comp. Cas. 175 (Mad.).

13. Per contra, the submissions of the learned counsel for the respondents were as follows. There are at least five documents which are consistent with the oral family settlement effected by the father S.N. Sud in 1993 and they are: (i) the letter dated 31.12.1993 written to Noida

authority which was also signed by the appellant; (ii) the letter dated 25.01.1994 written to the said authority (read with the reply dated 23.02.1994 of the said authority) giving the details of the shareholding in which the appellant's name did not figure; (iii) the annual return made upto 30.09.1994 filed with the RoC; (iv) the letter written by S.N. Sud to the RoC on 31.03.1998 intimating that he has transferred all his shares in the names of Manju Shiv Sud and Pankaj Shiv Sud, a copy of which was marked to the auditors of the company and (v) the will dated 25.06.1998 executed by S.N. Sud in which there is no reference to the shares in the company (as they had been transferred in the names of Manju Shiv Sud and Pankaj Shiv Sud earlier), but containing a reference to the terms of the family settlement effected earlier. Moreover, there was complete silence on the part of the appellant during a period of 16 years from 1993 till the date of filing the petition before the CLB, which is wholly inconsistent with the claim now made. The long and inordinate delay has not been explained; there was thus laches on his part. Further, there is no medical certificate filed in support of the illness from which the appellant was said to have been suffering during 2001-2008, and in any case, it covers only a part of the long period, the period between 1993 and 2001 remaining to be explained. The extracts from the minutes-book for the meeting held on 20.06.1997 filed by the appellant himself, do not show his name as a shareholder, and show only S.N. Sud, Manju Shiv Sud and Pankaj Shiv Sud as shareholders. A letter had also been written by Krishna Sud on 28.11.1994 to the company asking it to transfer her shares in the name of her husband, daughter and grandson; no shares were given to the appellant, her son. Strong reliance was placed on the judgment of the Supreme Court in **Kale vs. Deputy Director of Consolidation & ors.** (1976) 3 SCC 119 in which the sanctity to be accorded to a family settlement was stressed in the interests of peace, amity and goodwill amongst the family members and it was held that no person who was party to such a settlement shall be permitted to resile from or impeach the same at any later point of time, after the settlement had been acted upon by the parties.

14. In his rejoinder, the learned counsel for the appellant submitted that even the CLB has observed that there was no regular filing of the annual returns by the company, which was run as a family concern and therefore no reliance can be placed upon them. Further, in the annual return made up to 30.09.1994, it has been stated by the company that

no transfer of shares took place since the last annual general meeting, which must have been in 1993; that shows that the shares of the appellant were not transferred or given up by him pursuant to the so-called family settlement. Further, the chartered accountants in their inspection report have stated that no annual returns relating to the year 1990-91 to 1998-99 were available with the RoC. He finally submitted that the appeal may be allowed and the appellant's name be directed to be included in the register of members or in the alternative the matter may be remanded to the CLB for fresh disposal.

15. On a careful consideration of the facts in the light of the rival contentions and the authorities cited, I am unable to see any question of law arising out of the decision of the CLB. The key issue in this case is whether there was an oral family settlement in 1993 under which the appellant gave up his shares in the company. In several judgments, it has been held by the Supreme Court that a family settlement is given effect to by the courts on the broad and general principle that it brings about peace and harmony in the family and puts an end to existing or future disputes regarding property amongst the members of a family: **Sadhu Madho Das vs. Pandit Mukand Ram & anr.** (AIR 1955 SC 481); **Ram Charan Das vs. Girijanandini Devi & ors.** (AIR 1966 SC 323). It has also been held that a family arrangement or settlement need not be in writing and registered; it can even be oral: **Tek Bahadur Bhujil vs. Debi Singh Bhujil & ors.** (AIR 1966 SC 292). In Halsbury's Laws of England, Vol.17, Third edition, it has been stated – and that has been approvingly cited by the Supreme Court in **Kale and others vs. Deputy Director of Consolidation and Ors.** (supra) – that a family settlement may be implied from a long course of dealing. Since it is assumed that there is some sort of antecedent title vested in the parties to the settlement which the settlement recognises and acknowledges, no conveyance is required in these cases to pass the title from the one in whom it resides to the person receiving it under the settlement: **Sadhu Madho Das vs. Pandit Mukand Ram** (supra). In **Ram Charan Das** (supra) it was further observed that the consideration in the case of a family arrangement is the expectation that it will result in establishing or ensuring amity and goodwill amongst persons bearing relationship with each other and therefore the rights obtained thereunder cannot be permitted to be defeated thereafter. The courts strongly lean in favour of family arrangements or settlements because they ensure peace, harmony, amity and goodwill amongst the

members of the family and settle present disputes and avoid future disputes. In **Mathuri Pulliah's** case (supra) it was further held that the disputes need not involve legal claims, and bona fide disputes, present or possible, are sufficient. In **Kanhaiya Lal vs. Brij Lal** (AIR 1918 PC 70), the Privy Council held that a party to a family settlement is bound by it and would be estopped from making a claim contrary to the terms of the settlement. Again, in **Ram Charan Das** (supra) it was held that the settlement was binding on all the parties to it; the court noted that the family arrangement had been acted upon by the parties and therefore none of them can be permitted to impeach it thereafter. In **S. Shanmugham Pillai & ors. vs. K. Shanmugham Pillai & ors.** (1973) 2 SCC 312 it was held that equitable principles such as estoppel, election, family settlement, etc. are not mere technical rules of evidence; they have an important purpose to serve in the administration of justice and courts have been liberally relying on these principles. In **Kale's** case (supra), it was held that the parties to the family settlement were estopped from impeaching or questioning it if they have conducted themselves consistent with the arrangement and have also "kept their mouths shut for full seven years and later try to resile from the settlement". All this is subject to the caveat that the family settlement or arrangement should be entered into bona fide.

16. The above principles relating to a family settlement, if applied to the present case, would show that the appellant cannot question it or act contrary to the terms of the settlement at any later point of time. It is not denied by him that he was a signatory to the letter dated 31.12.1993 written jointly by him and his father S.N. Sud to the Noida authority, under which he withdrew his rights in the company which was allotted the premises at G-58, Sector 6, Noida. There was some debate at the Bar as to what this letter meant, the contention of the learned counsel for the appellant being that the letter referred only to the rearrangement of the partnership business carried on by the appellant and his father and did not refer to the company at all, and the contention of the respondent's counsel being that the reference to the withdrawal of the appellant from his rights was only to the shares in the company, since the appellant did not withdraw from the firm and on the contrary he practically became the full owner of the partnership business, S.N. Sud having decided to become a sleeping partner and that too only till March, 1994. The letter reads as follows:

"STITCHWELL QUALITEX
POST BOX N.1, A-11, SECTOR 67, NOIDA
COMPLEX-201301, DISTRICT GAZIABAD (U.P.)

31.12.1993

Ref no.S:SN:103:93:VN

The Chairman
Noida.

Dear Sir,

We wish you very Happy New Year. We have to inform you that in the interest of efficient working, bout the partners of M/s Stitchwell Qualitex have decided to divide the operation of the business into two independent units, one. At A-11, Sector 57 of Closing Machines and conveying systems to be looked after and managed by Sri Dinesh Sud and the other, at G-58, Sector-6 for the manufacture of Agricultural Machines to be looked after and managed by Shri S.N.Sud exclusively, Shri Dines Sud having withdrawn from his rights. It is also understood that Shri S.N.Sud shall continue to be sleeping partner is stitchwell qualitex till end March 1994.

It was also agreed that necessary stage be taken to approach you for making such amendments in your records. We have no objection to the division of the properties as mentioned above.

An early action on your part shall be very much appreciated.

Thanking you

Yours truly For Stitchwell Qualitex

1. Dinesh Sud
2. S.N.Sud"

There may be some ambiguity in the words used in the letter, but the argument of the learned counsel for the respondent appears plausible to me. Moreover, the letter stated that S.N. Sud would exclusively look after and manage the business of agricultural machines which was being carried on from G-58, Sector-6, Noida, which was allotted to the company

and not to the partnership business. Therefore it is possible to attribute to the words "withdraws from his rights" the meaning that the appellant would be giving up his shares in the company and become the exclusive proprietor of the business of bag-closing machines and conveying systems, which was the business of the partnership firm. This is further fortified by the subsequent letter written by S.N. Sud to the Noida authority on 25.01.1994. In this letter, the shareholders' names were given, which showed only S.N. Sud, his wife Krishna Sud, their daughter Manju Shiv Sud and her son Pankar Shiv Sud as shareholders. The name of the appellant was not shown as a shareholder. The letter in the earlier part also referred to the fact that the premises at G-58, Sector 6, Noida will henceforth be used by the company M/s. Stitchwell Qualitex (P) Ltd. Both the letters, taken together, certainly show that the intention of the settlement was to constitute the appellant as the exclusive owner of the partnership business which was that of bag-closing machines and conveying systems and to give more shares in the company to Manju Shiv Sud and induct her son Pankaj Shiv Sud. It appears that the appellant was 37 years of age and his sister Manju Shiv Sud was 41 years of age at the time of the family settlement. She had unfortunately lost her husband by that time and it was the intention of S.N. Sud to provide for her and her son Pankaj Shiv Sud, which obviously was the driving force behind the family settlement. The company was, right from its incorporation, run only as a family concern, as rightly noted by the CLB and the internal formalities were hardly a priority. The family members, as found by the CLB, were living in the same house, though in different floors – the appellant and his parents in one floor and Manju Shiv Sud and Pankaj Shiv Sud (mother and son) were living in another floor of the same building. In happier times, the members of the family may not have even thought about formalising the transfer of shares; the other reason perhaps was that no share certificates had even been issued, as noted by the CLB.

17. A very crucial aspect of the case is the long period of 15-16 years in which the appellant had accepted the settlement and acted upon it. Not only the appellant, but also the other members of the family did act upon the settlement. It should not be forgotten that the appellant himself got the bag-closing and conveying systems business, earlier carried on by the partnership firm of himself and his father, only in terms of the family settlement. He also resigned from the directorship of the company

as he no longer had any interest in the working of the company, having foregone his shares in favour of the other family members. It would therefore be counter-productive for him to question the very existence of the family settlement. But the contention was that the long period of silence or inaction on his part does not amount to acquiescence or estoppel. A shareholder, it was contended, did not have to do anything except hold on to his shares which is what he did in all these years. He also became ill due to acute ulcerative colitis and severe eye problem between 2001 and 2008. But when once he came to know that his name did not appear in the register of members, he immediately hastened to take action.

18. I am afraid that I cannot accept that things were so simple. The appellant very well knew of the settlement, because it was only under the settlement that he was getting the bag-closing and conveying systems business, which was henceforth to belong to him exclusively, at least from April, 1994, in return for giving up the shares. He could not have been oblivious to the anxiety of his parents to provide for his sister and nephew, given the fact that they were all staying in the same premises and being aware of the tragedy that had fallen upon her. If he had not accepted the terms of the settlement, he would have made his intentions known at a very early stage and would have resisted when asked to part with the shares. He kept his mouth shut, when there was no compulsion upon him to do so, which can only mean acceptance of the settlement. His long silence for a period of 15-16 years was in conformity and consistent with the family settlement. He had consciously given up his shares in the company. For reasons best known to him, he now wants to resile from the earlier position. That, in the light of the authorities to which I have referred, cannot be permitted. There is no explanation for his long silence. The illness from which he was said to have been suffering is not supported by any medical reports. That does not appear to have hampered the business which he was carrying on – at any rate, no evidence has been brought on record to show that his individual business also suffered on account of his illness.

19. Even assuming that the Limitation Act, 1963 does not apply to proceedings before the CLB and that sub-section (4) of section 111 does not provide for any period of limitation, it is expected of the appellant to claim his rights within a reasonable period. The delay from 1993 to 2001 is long enough; the further delay from 2001 to 2008 is said to be due

to acute illness, for which there is no proof. The appellant is thus guilty of laches or unreasonable delay in asserting his claim.

20. The findings of the CLB regarding the conduct of the appellant and the finding that he was guilty of laches, are findings of fact from which no question of law can be said to arise. Those findings can in no way be characterised as perverse. The principles relating to the family settlement are well-settled by a series of judgments by the Supreme Court (supra). There is total absence of any explanation for the long delay or laches. Moreover, the appellant has confined his claim to the 2500 shares which were allotted to him in 1983 and has not made any claim over the shares left by his deceased parents who died in 1995 and 2001. Further, the copy of the extracts from the minutes-book as on 20.06.1997, filed by the appellant himself, shows that on that date there were only three shareholders: S.N. Sud, Manju Shiv Sud and Pankaj Shiv Sud. The appellant had referred to the inspection report of the chartered accountant which stated that the annual returns for the years 1990-91 to 1998-99 were not available in the records of the RoC; the same inspection report, in the opening paragraph, notes that as per the records available with the RoC, as on 31.03.2000, the status of the shareholding of Rs.6,50,000 was that Manju Shiv Sud held 39,650 shares of Rs.10 each amounting to Rs.3,96,500 and Pankaj Shiv Sud held 25,350 shares of Rs.10/- each amounting to Rs.2,53,500. This shows that even on 31.03.2000, the appellant was not a shareholder.

21. In the light of the above discussion, I do not consider it necessary to refer to the other authorities cited by both the sides.

The result is that the appeal is dismissed with costs of Rs. 25,000/-.

ILR (2014) II DELHI 845
W.P. (C)

HARISH CHANDER ....PETITIONER

VERSUS

UNION OF INDIA AND ORS. .....RESPONDENT

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) : 5051, 5336/2012 DATE OF DECISION: 23.09.2013

Constitution of India, 1950—Petitioners preferred writ petitions aggrieved by non-payment of Bhutan Compensatory Allowance (BCA)—It was alleged by them, they were compensated under DANTAK in Bhutan but were not paid as per rules and regulations—As per respondent, petitioners did not fulfill eligibility criteria for posting to BCA, thus, not entitled to BCA—Petitioners received without any objection payment of Dearness Allowance and House Rent Allowance during alleged periods .

Held:- Petitioners not entitled to BCA as neither posted to 504 SS & TC under BCA criteria nor physically served in the area where BCA was applicable for their entire posting—Moreover, no complaint or representation was made by them promptly and they also received amounts of Dearness Allowance and House Rent Allowance.

We may advert to the submissions made by the learned counsel for the petitioner to the fact that this court was pleased to accept a similar plea made by Amar Nath in LPA 618/2002 vide pronouncement dated 27th October, 2010. A perusal of the order dated 27th October, 2010 would show that petitioner/ Amar Nath was posted under non-BCA criteria but rendered his service physically in Bhutan along with

those personnel who were posted under BCA criteria. The petitioners/Harish Chander and Satwinder Singh were neither posted to 504 SS & TC under BCA criteria nor physically served in the area where BCA was applicable for their entire posting. Hence the judgment delivered by this court in case entitled as **Amar Nath Prasad v. Union of India** is of no avail to the petitioners. **(Para 15)**

It is noteworthy that the petitioners were posted out from West Bengal as back as in the year 2001. Admittedly, no complaint was initiated by the petitioners while they were receiving the amounts of Dearness Allowance (DA) and House Rent Allowance (HRA). No grievance/representation was made before any authority at any stage that the petitioners were entitled to Bhutan Compensation Allowance. The petitioners never made any representation from the year 1998 till the year 2012 , when the judgment in the case titled **Amar Nath v. Union of India** was delivered by this court. It was only after the pronouncement in Amar Nath that the instant writ petitioners filed the writ petitions. **(Para 17)**

Important Issue Involved: Petitioners not entitled to BCA as neither posted to 504 SS & TC under BCA criteria nor physically served in the area where BCA was applicable for their entire posting—Moreover, no complaint or representation was made by them promptly and they also received amounts of Dearness Allowance and House Rent Allowance.

APPEARANCES:

FOR THE PETITIONERS : Mr. Dhiraj, Adv.

FOR THE RESPONDENT : Mr. Rajeeve Mehra, ASG.

RESULT: Writ petitions dismissed.

GITA MITTAL, J. (ORAL)

1. These two writ petitions have been preferred by the petitioners

being aggrieved by the non-payment of Bhutan Compensatory Allowance (hereinafter referred to as "BCA") by the respondents.

2. The brief facts giving rise to the writ petitions are noted hereafter. The petitioner in W.P.(C) 5051/2012 namely Sh. Harish Chander was recruited on 1st June, 1989 in GREF (Border Roads Organization) and was posted to 504 SS & TC under project "DANTAK. from HQCE (P) where he reported on 2nd August, 1997. The petitioner joined there on 2nd August, 1997 and rendered service in the aforesaid project upto 4th January, 2001.

3. Sh. Satwinder Singh, the petitioner in W.P.(C)5336/2012 was also recruited in GREF and was posted to 504 SS & TC project 'DANTAK' from HQCE (P) HIRAK. He joined the said project on 16th May, 1998 and rendered service at the project upto 13th May, 2001.

4. The petitioner/Satwinder Singh claims in the writ petition that despite having served in the project "DANTAK" in Bhutan upto 13th May, 2001, he has been given the Bhutan Compensatory Allowance only for 89 days contrary to the applicable rules and regulations. It is undisputed that the petitioner retired from services on 31st July, 2008 without making any grievance/representation on the above aspect.

5. The writ petitions No. 5051/2012 & 5336/2012 have been preferred/filed only on 17th July, 2012 and 17th August, 2012 respectively and deserve to be rejected on the sole ground of unexplained delay and laches. However, the petitioners have placed reliance on an order dated 27th October, 2010 passed by this court in a matter titled as **Amar Nath Prasad v. Union of India and others.** It is stated that the petitioners Satwinder Singh and Harish Chander are similarly situated to the petitioner/ Amar Nath in LPA 618/2002 who was granted Bhutan Compensatory Allowance (BCA) in similar circumstance.

6. We have, therefore, considered the instant writ petitions on the merits of the rival contentions.

7. The respondents have filed counter affidavits as well as additional affidavits explaining the circumstances under which the employees are entitled to Bhutan Compensatory Allowance. It has been pointed out that postings of personnel are short listed based on criteria enumerated in HQ-DGDR Policy letter No. 13001/POL/POs/DGBR/EIA dated 24th February, 1998.

8. It is further stated that the petitioner/Satwinder Singh was posted to the location of Jaigaon, West Bengal, India. Hence no BCA was applicable to him and therefore it was not paid to him. The petitioner/ Satwinder Singh was paid BCA for the period for which he remained on temporary attachment with HQ 19 BRTF (GREF), BCA area located at Phuentsholing, Bhutan for a period of 89 days w.e.f. 18th August, 1998 to 14th November, 1998.

9. It is submitted that the petitioner did not fulfil the eligibility criteria for posting to BCA. The petitioner neither posted to 504 SS & TC under BCA criteria nor physically served in the area where BCA was applicable. The petitioner was paid BCA as per actual period of attachment with 19 BRTF i.e. for 89 days which is the actual period of days of physical service rendered by the petitioner in Bhutan. The Attendance Register filed in support of the petition is a non auditable document and purely administrative in nature. This Register only ensures that the official was on duty on a given date. Moreover, being a part of Project 'DANTAK' per se does not qualify the individuals to Bhutan Compensatory Allowance.

10. Similarly petitioner/Harish Chander was posted from 510 SS & TC (P) (Project) Pushpak to 504 SS & TC (GREF) (General Reserve Engineer Force) (P) 'DANTAK' under Non-Bhutan Compensatory Allowance Area (Non-BCA area criteria) also located at Jaigon, West Bengal, India. The petitioner/ Harish Chander remained temporarily posted/ attached with HQ 19 BRF (GREF), BCA located at Phuentsholing, Bhutan for a period of 46 days. The details of such postings are enumerated below :

i 16.8.1997 to 17.8.1997

ii 29.8.1997 to 1.9.1997

iii 9.6.1998 to 13.6.1998

iv 7.11.1998 to 11.12.1998.

11. The counter affidavit filed by the respondents discloses that the petitioner/Harish Chander also actually received the Bhutan Compensation allowance @ Rs.14417/- per month for the above period. The petitioner was neither posted to 504 SS & TC under BCA criteria nor physically served in the area where BCA was applicable. The petitioner was posted to HQ 504 SS & TC (GREF) in non BCA area located in Jaigaon, West

Bengal in India a normal posting, as he lacked the eligibility criteria for posting to the area where BCA is applicable. The personnel posted on non-BCA criteria, as and when deployed in Bhutan due to exigencies of service, were given BCA. The petitioner was also paid BCA as and when he was deployed in BCA area.

12. Both these petitioners after completion of the normal tenure in 504- SC & TC were transferred and posted with other platoons of the organization.

13. The above factual narration is not disputed by the petitioners.

14. For the period for which the petitioners were serving in the location at Jaigaon, West Bengal in terms of the applicable policy, they were entitled to payment of Dearness Allowance and House Rent Allowance. The respondents have submitted that these amounts were paid to them and have been duly received by both the petitioners without any objection. It is admitted before us that if Dearness Allowance and House Rent Allowance were paid, BCA would not be admissible.

15. We may advert to the submissions made by the learned counsel for the petitioner to the fact that this court was pleased to accept a similar plea made by Amar Nath in LPA 618/2002 vide pronouncement dated 27th October, 2010. A perusal of the order dated 27th October, 2010 would show that petitioner/ Amar Nath was posted under non-BCA criteria but rendered his service physically in Bhutan along with those personnel who were posted under BCA criteria. The petitioners/Harish Chander and Satwinder Singh were neither posted to 504 SS & TC under BCA criteria nor physically served in the area where BCA was applicable for their entire posting. Hence the judgment delivered by this court in case entitled as **Amar Nath Prasad v. Union of India** is of no avail to the petitioners.

16. The judgment rendered in **Amar Nath** (supra) was perused. We were not called upon to consider any plea by the respondents that Amar Nath was temporarily attached in Bhutan and not posted there for the entire period of his posting. We were not called upon to effect adjudication on the issue raised herein . In the factual background placed before us, we had decided that Amar Nath was entitled to the Bhutan Compensation Allowance for the period for which he remained posted in Bhutan alone. We have not held that Amar Nath was entitled to Bhutan

Compensatory Allowance for any period for which he was serving in India. Therefore, this judgment does not provide assistance and support to Harish Chander and Satwinder Singh.

17. It is noteworthy that the petitioners were posted out from West Bengal as back as in the year 2001. Admittedly, no complaint was initiated by the petitioners while they were receiving the amounts of Dearness Allowance (DA) and House Rent Allowance (HRA). No grievance/ representation was made before any authority at any stage that the petitioners were entitled to Bhutan Compensation Allowance. The petitioners never made any representation from the year 1998 till the year 2012 , when the judgment in the case titled **Amar Nath v. Union of India** was delivered by this court. It was only after the pronouncement in Amar Nath that the instant writ petitioners filed the writ petitions.

18. For all the reasons discussed above, we find that these writ petitions are devoid of merits. The writ petitions are hereby dismissed.

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W.P. (C)

AVTAR SINGH .....PETITIONER

VERSUS

UNION OF INDIA AND ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 6563/2011 DATE OF DECISION: 23.09.2013

(A) Constitution of India, 1950—Article 14, 19 (1) (g) and 21—Navy Act, 1957—Regulation 159, 161, 163, 169—petitioner by way of writ petition challenged order dated 01/11/1990 in terms of Regulation 156 of Act convening court martial of petition on 27 charges—He also challenged order dated 15/03/1991 of Court Martial

finding him guilty of commission of 8 charges and order of sentence awarding him sentence of 24 months RI, dismissal from service and fine of Rs. 1,000/- or 6 months imprisonment in default of payment of fine—Petitioner further challenged order dated 27/08/1991 passed by Chief of Naval for maintaining conviction of petitioner on all charges except on Charge 20 and reducing sentence of imprisonment to period already undergone by him—Also, order dated 08/12/2010 and 23/12/2010 passed by Armed Forces Tribunal was challenged by petitioner whereby findings of guilty of Court Martial on all charges other than charge no. 7 was set aside—According to petitioner, he had illustrious, unblemished career of over 20 years of service with Indian Navy and was committed soldier till he was wrongly implicated in the case—It was urged on behalf of petitioner that court martial was convened without application of mind on the material placed before Convening Authority as documents were so voluminous which could not have been considered on the same day by Authority to pass order to convene court martial.

Held: Convening Authority is required to satisfy himself not only that charges are properly framed but also that evidence if uncontradicted or unexplained would probably suffice to ensure conviction should have sufficient time to scrutinize requisite records before taking a decision.

The scrutiny of and application of mind to the circumstantial letter; charge sheet; summary of evidence; exhibits dealing with minute statistical details; decision to amend and retyping of the charge sheet; issuance of various orders relating to the court martial, is claimed to have been completed by the Convening 1st Authority on receipt of this voluminous record on the of November, 1990 itself. Interestingly all claimed to have done after 16:00 hours (when the hearing of charges

was completed), only a couple of working hours remain available. It is humanly impossible to have meaningfully completed the above exercise within the available working hours. **(Para 39)**

In this regard, learned counsel for the petitioner has also drawn our attention to the pronouncement reported at AIR 2009 SC 1100, **Rajiv Arora v. Union of India** wherein the court held as follows:-

> "14. The High Court in its impugned judgment proceeded to consider the issue on a technical plea, namely, no prejudice has been caused to the appellant by such non-examination. If the basic principles of law have not been complied with or there has been a gross violation of the principles of natural justice, the High Court should have exercised its jurisdiction of judicial review. Before a court martial proceeding is convened, legal requirements therefore must be satisfied. Satisfaction of the officer concerned must be premised on a finding that evidence justified a trial on those charges. Such a satisfaction cannot be arrived at without any evidence. If an order is passed without any evidence, the same must be held to be perverse."
>
> (Underlining by us) **(Para 40)**

(B) Constitution of India, 1950—Article 14, 19 (1) (g) and 21—Navy Act, 1957—Regulation 159, 161, 163, 169—Petitioner urged summary of evidence along with charge sheet placed before Convening Authority did not contain iota of evidence on charge no. 7 for which petitioner was found guilty by Armed Forces Tribunal. Held:- Convening Authority is required to satisfy himself not only that the charges are properly framed but also that the evidence if uncontradicted or unexplained would probably suffice to ensure a ' conviction'.

On the issue of what would constitute 'satisfaction', reference may usefully be made to the pronouncement of the Supreme Court reported at (1997) 7 SCC 622, **Manusukhlal Vithaldas Chauhan v State of Gujarat** wherein the court held thus:-

> "19. Since the validity of "Sanction" depends on the applicability of mind by the sanctioning authority to the facts of the case as also the material and evidence collected during investigation, it necessarily follows that the sanctioning authority has to apply its own independent mind for the generation of genuine satisfaction whether prosecution has to be sanctioned or not. The mind of the sanctioning authority should not be under pressure from any quarter nor should any external force be acting upon it to take a decision one way or the other. Since the discretion to grant or not to grant sanction vests absolutely in the sanctioning authority, its discretion should be shown to have not been affected by any extraneous consideration. If it is shown that the sanctioning authority was unable to apply its independent mind for any reason whatsoever or was under an obligation or compulsion or constraint to grant the sanction, the order will be bad for the reason that the discretion of the authority "not to sanction" was taken away and it was compelled to act mechanically to sanction the prosecution."
>
> (Underlining by us) **(Para 47)**

Important Issue Involved: (A) Convening Authority is required to satisfy himself not only that charges are properly framed but also that evidence if uncontradicted or unexplained would probably suffice to ensure conviction should have sufficient time to scrutinize requisite records before taking a decision.

(B) Convening Authority is required to satisfy himself not only that the charges are properly framed but also that the evidence if uncontradicted or unexplained would probably suffice to ensure a 'conviction'.

APPEARANCES:

FOR THE PETITIONER : Mr. D.J. Singh, Adv.

FOR THE RESPONDENTS : Ms. Jyoti Singh, Sr. Adv. with Mr. Himanshu Bajaj, CGSC, Ms. Tina Singh, Adv. and Lt. Commander Varun Singh (Navy) for R-1 and 3.

CASES REFERRED TO:

1. *Ramesh Ahluwalia* vs. *State of Punjab* 2012 (12) SC 331.
2. *Devinder Singh* vs. *Municipal Council, Sanaur* AIR 2011 SC 2532.
3. *Harjinder Singh* vs. *Punjab State* (2010) 3 SCC 192.
4. *Rajiv Arora* vs. *Union of India* AIR 2009 SC 1100.
5. *M/s. Crawford Bayley & Co. & Ors.* vs. *Union of India & Ors.,* AIR 2006 SC 2544.
6. *State of West Bengal &Anr* vs. *Alpana Roy & Ors.,* (2005) 8 SCC 296.
7. *Rudrappa Ramappa jainpur and Others* vs. *State of Karnataka* AIR 2004 SC 4148.
8. *Khalil Khan* vs. *State of M.P.* 2003 (11) SCC 19.
9. *Union of India* vs. *Charanjit Singh Gil* JT 2000 (5) SC 135.
10. *S.S. Mehta* vs. *Union of India & Ors.,* 74 (1998) DLT 42
11. *Zahoor Ahmed* vs. *Union of India* 1998 (5) Bom CR 620.
12. *Daya Ram Dayal* vs. *State of Madhya Pradesh* : AIR 1997 SC 3269).

13. *Manusukhlal Vithaldas Chauhan* vs. *State of Gujarat* (1997) 7 SCC 622.
14. *Union of India & Ors.* vs. *Ex Sepoy Chander Singh,* Civil Special Appeal No.1007/1997.
15. *Sub Divisional Inspector (Postal) and Ors.* vs. *K.K. Pavitheran :* (1996) 11 SCC 695.
16. *Malkiat Singh* vs. *State of Punjab* : (1996) IIL LJ 432 SC.
17. *Santosh Yadav* vs. *State of Haryana and Ors.* : AIR 1996 SC 3328.
18. *Ramesh Chandra and Ors.* vs. *Delhi Administration and Ors.* : (1996) 10 SCC 409.
19. *Deputy Commissioner of Police and Ors.* vs. *Akhlaq Ahmad* 1995 SCC (L/S) 897].
20. *B.C. Chaturvedi* vs. *Union of India* (1995) 6 SCC 749.
21. *Raj. State Road Corporation* vs. *Bhagyomal and Ors.* 1994 Suppl (1) SCC 573.
22. *Managing Director ECIL Ltd.* vs. *B. Karunakar*: (1994) ILLJ 162 SC.
23. *Manorma Verma* vs. *State of Bihar and Ors.* 1994 Suppl (3) SCC 671.
24. *State of U.P. and Ors.* vs. *Atal Bihari Shastri and Ors.* 1993 Suppl. (2) SCC 207.
25. *Ranjit Thakur* vs. *Union of India* 1987 4 SCC 611.
26. *Indian Oil Corporation Ltd.* vs. *State of Bihar and others,* (1986) 4 SCC 146.
27. *Rajinder Kumar Kindra* vs. *Delhi Administration* (1985) SCR (1) 866 SCR.
28. *Sansar Chand* vs. *Union of India & Ors.* 1980 (3) SLR 124.
29. *Hindustan Tin Works Pvt. Ltd.* vs. *Employees of Hindustan Tin Works Pvt. Ltd. :* (1978) IIL LJ 474 SC.
30. *S. Parthasarathi* vs. *State of Andhra Pradesh* (1974) 3 SCC 459.

31. *A.K. Kraipak and Others* vs. *Union of India & Others* AIR 1970 SC 150.
32. *Metropolitan Properties Co. (F.G.C.) Ltd.* vs. *Lannon* (1969) 1 QB 577, 599.
33. *Lord Denning M.R. in Metropolitan Properties Co. (F.G.C.) Ltd.* vs. *Lannon* (1968) 3 WLR 694 at P. 707etc.
34. *Sumer Chand Jain* vs. *Union of India,* W.P.(C) No.237/1966 dated 4th May, 1967.
35. *Syed Yakoob* vs. *K.S. Radhakrishnan* AIR 1964 SC 477.
36. *Punjab National Bank Ltd.* vs. *P.N.B. Employees Federation* : (1959) IILLJ 666 SC.
37. *Tehsildar Singh and Another* vs. *State of U.P.,* AIR 1959 SC 1012.
38. *Gullapalli Nageswara Rao and others* vs. *Andhra Pradesh State Road Transport Corporation and Another* (1959) Supp.1 SCR.319.
39. *Vassiliades* vs. *Vassiliades* AIR 1945 PC 38.
40. *R.* vs. *Dean and Chapter of Rochester* [(1851) 17 QB 1].

RESULT: Writ Petition allowed.

GITA MITTAL, J.

1. The present writ petition has been filed by the petitioner assailing the following:

(i) the order dated 1st November, 1990 passed in terms of Regulation 169 of the Navy (Discipline and Miscellaneous Provisions) Regulations, 1965 convening the court martial of the petitioner which was communicated by Commander B.K. Ahluwalia, Trial Judge Advocate on the 2nd of November, 1990 on twenty seven charges.

(ii) the order dated 15th March, 1991 of the court martial finding the petitioner guilty of commission of eight charges, i.e, 4th 6th 7th 20th (of Rs.13,852/- only) 23rd 25th 26th and 27th charge (out of the 27 charges for which he was tried) as well as the order of same date awarding the sentence of 24 months rigorous

imprisonment, dismissal from service and fine of Rs.10,000/- or six months imprisonment in default of payment of fine which was imposed on him.

(iii) the order dated 27th August, 1991 passed by Admiral L.R. Ramdas, Chief of the Naval Staff under section 163 of the Navy Act, 1957 maintaining the conviction of the petitioner on all charges except the charge 20 and reducing the sentence of imprisonment to the period of imprisonment already undergone while maintaining the other punishments.

(iv) the order dated 8th December, 2010 passed by the Armed Forces Tribunal in T.A.No.23/2009

(v) and the order dated 23rd December, 2010 passed in M.A.No.448/2010 by the Armed Forces Tribunal.

2. The writ petitioner complains of violation of his Fundamental Rights under Articles 14, 19(1)(g) and 21 of Constitution of India as well as his statutory rights under the Navy Act, 1957 and principles of natural justice.

Factual Narration

3. The petitioner was commissioned into the Indian Navy on 1st July, 1970 as Sub-Lieutenant. It is an admitted position that the petitioner was awarded the Sword of Honour for being the Best Mid-Shipman of his course. He has held various important assignments ashore and afloat during his career with the Navy having specialized in "Clearance Diving". Between 1977-78, he was deputed to undergo a specialist course in the USSR. He is an alumna of the prestigious Defence Services Staff College, Wellington. So far as operational activities in which the petitioner has participated are concerned, the petitioner took part in the 1971 Indo-Pak war on the western front; in 1985, he was deputed to Ireland to recover the Black Boxes of the ill-fated Jumbo "Kanishka", which he successfully recovered; in 1989, the petitioner participated in the IPKF operations at Sri Lanka for which he was awarded by the President of India on Republic Day in 1990 and was honoured being "mentioned in dispatches" for his devotion to duty.

4. The appointment of Command Diving Officer in Headquarters Eastern Naval Command, Vishakhapatnam was the last assignment held

by him. By 1988, the petitioner had an unblemished record of over 20 years of dedicated service with the Indian Navy. The petitioner submits that he had an illustrious career and was a committed soldier till such time he was wrongly implicated in the case under consideration. This narration of facts is not disputed in the counter affidavit which has been filed before us.

5. So far as the case against the petitioner is concerned, it becomes necessary to refer to his posting in August, 1988 as Commanding Officer of INS Magar, a ship which was based at Vishakhapatnam. The petitioner has contended that during his tenure as the Commanding Officer, the ship remained very active operationally and participated in events of national importance including the President's Review of the Indian Navy; the IPKF operations in Sri Lanka as well as other tasks.

6. The petitioner states that the INS Magar was the first of its class and had been built by a Public Sector Undertaking, that is M/s Garden Reach Ship Builders and Engineers Ltd. ('GRSE' hereafter). Certain repair and modifications termed as the ship's 'refit' were required in 1987 which were effected in the ship.

7. The case against the petitioner commenced on receipt of an anonymous letter in 1989 by the authorities. In respect of charges leveled in this anonymous letter, a Board of Enquiry was instituted by the Vice Admiral L. Ramdas (the then Flag Officer Commanding-in-Chief, Eastern Naval Command).

8. After receipt of the report of the Board of Inquiry, Vice Admiral L. Ramdas appointed an Investigating Officer under Regulation 148 who recorded the Summary of Evidence in the matter. We are informed that the petitioner was not associated with this.

9. The petitioner has submitted that Commander B.K. Ahluwalia was the then Judge Advocate of the Command, who helped the investigating officer in drafting the chargesheet and the circumstantial letter i.e. the application for trial by court martial of the petitioner.

10. It is also necessary to note that the then Vice Admiral L. Ramdas who was the Flag Officer Commanding-in-Chief, Eastern Naval Command was the Convening Authority who took the 1st decision on November, 1990 to try the petitioner by court martial.

11. We may also note that the petitioner had filed a writ petition before the Andhra Pradesh High Court on 2nd January 1991 praying, inter alia, for a stay of the court martial proceedings. The High Court granted a stay of the court martial proceedings on 4th January 1991. This order was vacated on 26th February 1991.

12. The court martial proceedings recommenced which culminated in the finding of guilt against the petitioner on the 15th of March, 1991 on eight out of 27 charges which had been framed against him and the award of punishment of rigorous imprisonment as class A prisoner; dismissal from Naval service; fine of Rs.10,000/- for six months imprisonment in default. The petitioner was kept in close custody since 15th March, 1991. The petitioner's request dated 16th March, 1991 for suspension of sentence till judicial review by the Judge Advocate General (Navy) was rejected by an order dated 17th March, 1991 passed by the Chief of the Naval Staff and on the 18th of March, 1991, the petitioner was committed to jail.

13. The petitioner again approached the High Court of Andhra Pradesh for stay of the order dated 15th March, 1991. By order dated 28th Mach, 1991, the sentence was stayed conditionally furnishing of personal bond in the sum of Rs.20,000/- with two sureties of like amount while the other two sentence were maintained. The petitioner was released from custody on furnishing two sureties to the Convening Authority.

14. It is on record that on 8th March, 1991, the said Convening Authority moved Andhra Pradesh High Court for recall of the previous order of suspension of sentence which was recalled by an order dated 24th June, 1991. On 21st July, 1991, the petitioner was again confined to custody. In the record produced before us, it is pointed out that though the Andhra Pradesh High Court had directed that the petitioner be kept in Naval Custody, he was committed to Central Jail (Tihar) up to 30th July, 1991.

15. The petitioner's writ petition was disposed of by the Division Bench of the Andhra Pradesh High Court on 22nd July, 1991 permitting the petitioner to seek other remedy under Section 160 or 162 of the Navy Act as well as interim suspension of sentence under Section 164 of the Navy Act.

16. The petitioner was given liberty to urge all claims and contentions raised by him in the writ petition which were required to be considered on their own merits though the court extended the suspension of sentence upto and inclusive of 30th August, 1991 to enable to the petitioner to approach the Naval Authority for judicial review.

17. An application on 29th of July, 1991 seeking judicial review under Section 160 of the Navy Act, 1957 by the Judge Advocate General (Navy) by the petitioner was made. This review was held at New Delhi on 19th – 20th August, 1991. It is noteworthy that by the time the petitioner's judicial review came up for consideration, Vice Admiral L. Ramdas stood promoted as Admiral and had also been appointed as Chief of the Naval Staff.

18. An order dated 27th August, 1991 was passed by Admiral L. Ramdas in judicial review of the order of conviction and sentence of the petitioner. By this order, Admiral L. Ramdas dropped one charge i.e. Charge No.20 against the petitioner and reduced his sentence of imprisonment to the period already spent in jail. The other two punishments were however maintained. We are informed that in order to avoid further imprisonment of six months, the petitioner deposited the fine of Rs10,000/- on the 5th of September, 1991 in terms of order of punishment.

19. Aggrieved by the above orders of the respondents, the petitioner filed WP(C) No.3582/1997 in this court. This petition was transferred to the Armed Forces Tribunal where it was registered as T.A.No.23/2009. The Armed Forces Tribunal considered the matter at length. By the judgment dated 8th December, 2010 the Tribunal set aside the findings of guilt of the court martial on all charges other than the charge no.7. The Tribunal also sustained the sentence of dismissal from service.

20. So far as the challenge in the present writ petition is concerned, a legal objection has been premised by learned counsel for the petitioner on the violation of Regulation 156 Navy (Discipline and Miscellaneous Provisions) Regulations, 1965 ('Navy Regulations. hereafter) by the respondents.

21. Before considering the working of Regulation 156 (Navy Discipline and Miscellaneous Provisions) Regulations, 1965, we may for the convenience set out the provisions of Regulations 153, 155, 156 and 157 which read as follows:-

"153. **Application for Trial – Circumstantial Letter.** (1) An application for the trial by the court martial of any person shall be made as follows:-

There shall be forwarded to the convening authority through the usual channels a letter, hereinafter called the circumstantial letter, reporting the circumstances on which the charges or charges are founded in the order of their occurrence, and in sufficient detail to show the real nature and extent of the offence; when words constitute the substance of the offence, they are to be fully and exactly set out. The letter shall not refer in any way to the previous character, conduct or conviction of the accused, or contain any reference to facts prejudicial to him than such as bear directly on the charges.

(2) When a charge is drawn under section 55 the circumstantial letter shall contain specific details of every respect in which it is alleged that the accused was at fault.

(3) Any statement made by the accused in the course of inquiries or during an investigation or after he had been charges shall not be included in the circumstantial letter unless it constitutes an essential part of the alleged offence, such as in a charge of perjury and such statement shall be forwarded as an annexure to the circumstantial letter in a separate document and reference shall be made in the circumstantial letter itself to the fact that such statement was made and to its inclusion in the annexure.

(4) If the Commanding Officer should desire to enter into further explanations as to his reasons for asking for a court martial which would necessarily refer to the previous conduct or antecedent of the accused, he shall do so orally or by separate letter to the convening authority.

155. The Charge Sheet. (1) The charge sheet shall contain the list of charges on which it is proposed to try the accused.

(2) Subject to the provisions of the Act, a charge sheet may contain one or more charges.

(3) Every charge sheet shall begin with the name and description of the person charged and state his rank, the number and the

ship to which he belongs. (4) Each charge shall deal with a distinct offence and in no case shall an offence be described in the alternative in the same charge.

(5) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

(6) If the law which creates an offence does not give it any specific name, so much of the definition of the offence must be stated so as to give the accused notice of the matter with which he is charged.

(7) The law and the section of the law against which an offence is said to have been committed shall be mentioned in the charge.

(8) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged with is fulfilled in the particular case.

(9) The charge shall contain such particulars as to time and place of the alleged offence and of the person, if any against whom or the thing, if any, in respect of which it was committee, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(10) When the nature of the case is such that the particular mentioned in the foregoing sub-regulation do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose, unless such particulars are stated in the circumstantial letter.

(11) When the accused is charged with criminal breach of trust or dishonest misappropriation of money or stores, it shall be sufficient to specify the gross sum or the aggregate of all items of stores in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge for one offence, provided that the time included between

the first and last of such dates shall not exceed one year.

(12) Where an accused person is believed to have committed an offence of being absent without leave in addition to some other offences, a charge of absence without leave shall also be included in the charge sheet in order that the court may have the power to sentence the accused to mulcts of pay and allowances.

(13) Where it is intended to prove any facts in respect of which any mulcts of pay and allowances may be awarded to make good any proved loss or damage occasioned by the offence charged, the charge shall contain particulars of these facts and the sum of the loss or damage it is intended to charge.

(14) In every charge, words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable.

(15) A charge sheet shall be in the prescribed form or in a form as near thereto as circumstances admit.

156. Examination of Charges and Evidence – (1) When the convening authority has received the circumstantial letter and other documents herein before referred to, he shall, before he orders a court martial to assemble, satisfy himself that the charges are correct and sufficient and that they are properly framed and carefully drawn up.

(2) The convening authority shall not convene a court martial unless he has satisfied himself that the evidence if uncontradicted or unexplained will probably suffice to ensure a conviction.

(underlined by us)

157. Amendment of Charges by Convening authority. (1) The convening authority may amend the charges submitted to him and thereupon a fresh charge sheet shall be drawn up and signed by the convening authority and the charge sheet so amended shall stand substituted for the original charge sheet.

(2) Where the charge sheet has not been amended, it shall be counter signed by the convening authority."

Violation of Regulation 156 -non application of mind by the Convening Authority.

22. Two fold submissions are made by Mr.D.J. Singh, Advocate in support of this objection. The first rests on the proceedings and steps undertaken by the respondents from reading of the charges (under Reg 153) to convening of the court material (under reg 156) on the 1st of Nov 1990). The second submission is that there was no material or evidence to support the charges against the petitioner and that the commanding officer and the Convening Authority acted in great haste overlooking this important aspect of the matter while directing the court material to be convened. It is pointed out that the Tribunal has found the petitioner guilty of only Charge No.7. 1st On the of November, when the trial by court martial was ordered, there was not a word of evidence to support the charge.

23. On the 1st of November, 1990, a charge sheet was read out to the petitioner which contained 28 charges in accordance with Regulation 153 of the (Navy Discipline and Miscellaneous Provisions) Regulations, 1965. As per the Regulation 153, after the final charge sheet was read out to the petitioner, a circumstantial letter which was in the nature of an application for trial by court martial was required to be prepared by Rear Admiral S.K. Das, the Commanding Officer.

24. In this application, details of the charges and the material on which they were framed, were required to be set out. The statement 1st to this effect is found in para 56 of the application dated November, 1990 made by the Commanding Officer to the Convening Authority. The initial charge sheet along with circumstantial letter and other documents including the list of witnesses in the prosecution as well as summary of evidence in support of the charges were thereafter required to be forwarded to the Convening Authority.

25. The petitioner has drawn our attention to Regulation 155 which sets out the requirement of the list of charges on which the accused person is proposed to be tried. Each charge is required to deal with a distinct offence and in no case, can an offence be described in the alternative for the same charge.

26. It is evident from the above that Regulations 156 and 159 come into operation on receipt of the circumstantial letter as well as the

aforenoticed documents by the Convening Authority. As per the mandate of Regulation 156, the Convening Authority is required to satisfy himself that the charges are correct and sufficient, that they are properly framed and carefully drawn up. In addition, the Convening Authority is required to be satisfied that the evidence, if uncontradicted or unexplained, will probably be sufficient to ensure conviction. The Convening Authority can exercise his discretion only thereafter to direct that the court martial be convened. The Commanding Officer is to make a recommendation to the Commander-in-chief. The decision as to whether to convene a court martial has to be taken by the Commander-in-chief.

27. The importance of the compliance of Regulation 156 is writ large from the jurisdiction conferred upon the Convening Authority under Regulation 157 to even amend the charges submitted to him and thereafter direct a fresh charge sheet to be drawn up. As per Regulation 157, the Convening Authority was to take such decision on the circumstantial letter as may be necessary on the basis of the charge sheet and the summary of evidence.

28. After satisfaction in terms of the above regulations, under Regulation 159, the Convening Authority is required to issue warrants to the officer nominated by him as the President of the court martial directing him to assemble a court martial.

29. It appears that there was an inconsistency between the charge sheet and the contents of the circumstantial letter. In the charge sheet, allegations of misappropriation had been made whereas in the circumstantial letter, reference was made to diversion of funds for the purposes of the ships ward room and captain's cabin in lieu of various repair work.

30. Mr. D.J. Singh, learned counsel appearing for the petitioner has urged at length that reading of the charge sheet to the petitioner (which commenced at about 14:30 hours on the 1st of November, 1990) was a long drawn out process and was completed only at about 16:00 hours on the same day. In accordance with the Regulations aforenoticed, the circumstantial letter ought to have been prepared only thereafter. Such a circumstantial letter accompanied by the initial charge sheet, list of witnesses, summary of evidence of 58 witnesses and list of 148 exhibits of the prosecution was required to be forwarded for the consideration of the Convening Authority. As per the respondents, this was also done on the 1st of November, 1990 itself, obviously after 1630 hours.

31. The petitioner has pointed out that this bunch of documents ran in excess of thousand pages and included large number of documents with minute statistical data and details, given the number and nature of charges which had been leveled against the petitioner.

32. Learned counsel has submitted that the consideration by the Convening Authority under Regulation 156 is a very important stage of the whole matter. Mr. Singh has painstakingly urged that the large number of documents which were placed before the Convening Authority required detailed consideration and proper application of mind by the Convening Authority as the Regulations require his 'satisfaction' to the charges and the evidence in support. The respondents claim that the Convening Authority examined the circumstantial evidence and all these documents also on the 1st of November, 1990 itself.

33. So far as Convening Authority is concerned, an amended charge sheet under Regulation 157 of the Navy Regulations was also signed and issued by him on the 1st of November, 1990. Charge No.27 of the original charge sheet was dropped in the amended charge sheet. In addition thereto, the Convening Authority also ordered the court martial and effected the appointment of the Trial Judge Advocate on the 1st of November, 1990 itself.

34. Significantly the reading of the charges commenced only at about 14:30 hours on this date and ended at about 16:00 hours. This is undisputed. The circumstantial letter was prepared thereafter. The petitioner has urged that very timing of the events on 1st November, 1990 belies the respondents, stand that there was due compliance with Regulation 156 and application of mind by the Convening Authority in terms thereof.

35. The amended charge sheet, circumstantial letter and documents were served upon the petitioner on the very next day i.e. the 2nd of November, 1990 by the Trial Judge Advocate, Commander B.K. Ahluwalia.

36. Learned counsel for the petitioner points out that as a result of the dropping of the charge, concerned portions in the circumstantial letter required modifications. This was not done. This circumstance is also pressed in support of the petitioner's contention that there was no application of mind to the material which was placed before the Convening Authority.

37. If the respondent's plea were to be accepted, it would require acceptance of the suggestion that preparation of the circumstantial letter and compilation of the record which included documents in excess of 1000 pages; summary of evidence of over 55 witnesses; copies of exhibits, etc. for perusal of the Convening Authority was undertaken after completion of the reading of the charges to the petitioner after about 16:00 hours on the same day. It further means that the Convening Authority examined the Circumstantial Letter as well as the accompanying record, charge sheet, applied his mind thereto and passed the order convening the court martial, appointing the Trial Judge Advocate as well as amending the Charge Sheet.

38. In support of this submission that there was no application of mind by the Convening Authority as there was insufficient time to do so, learned counsel for the petitioner has placed reliance on the pronouncement of the Bombay High Court reported dated 10th October, 1998 (5) Bom CR 620 **Zahoor Ahmed v Union of India**. This case arose in the context of preventive detention under COFEPOSA. It was urged on behalf of the petitioner that having regard to the voluminous documents, the detaining authority did not have sufficient time to consider the material before issuing the order of detention and as such there was no application of mind by the detaining authority. Mr. D.J. Singh, learned counsel for the petitioner has referred to para 22 of this pronouncement and submits that the factual narration in this paragraph is on all fours with the instant case. The relevant portion of the same is set out hereafter:

> "22. It is true that in **(Umesh Chandra Verma v. Union of India),** Criminal Appeal No. 878 of 1985 decided on December 20, 1985, the Apex Court had set aside the order of detention, which was passed on the night of 13th June, 1985 when large quantity of contraband gold was recovered from the detenu. The detenu was interrogated almost the whole day on the 13th June, 1985 and at 6-00 P.M. he was formally arrested under section 104 of the Customs Act. The order of detention was made on the same night. Relying upon the documents, which included the arrest memo prepared at 6-00 P.M., the Court came to the conclusion that the documents and the proposal for detention must have been placed before the detaining authority after 6-00 P.M. in which case it would certainly have been difficult for the detaining authority to make the order the same night. It was in

> these peculiar facts that the Court came to the conclusion that the detaining authority could not have possibly applied its mind to the voluminous documentary evidence which was placed before him and, therefore, quashed the order of detention. With respect, we do not think that the ratio of the above decision has any application to the facts of the case before us. We have already indicated earlier, and we will elaborate later, that the proposal had reached the detaining authority along with 2272 out of 2301 pages much earlier. The proposal was sent to the Head Office on 18th April, 1996 which consisted of as many as 2272 pages. It was only the additional material in few pages, (in all 29 pages) which was sent on subsequent dates, which, in turn was forwarded by the Head Office of the sponsoring authority to the detaining authority immediately.
>
> 23. Both the learned Counsel Shri Khan and Shri Gupte placed reliance on three un-reported decisions of this Court. In Criminal Writ Petition No. 397 of 1992 of Mohd. Ahmed Ibrahim, decided on 22nd April, 1992 (Puranik & Chapalgaonkar, JJ.), the proposal consisted of 262 pages. The order of detention was issued by the detaining authority in Delhi on 9th April, 1991 though the papers were sent by the sponsoring authority from Mumbai on 9th April, 1991 itself, alongwith the documents to Delhi. Some of the documents had come into existence on 9th April, 1991 itself. Some documents had come into existence on the 4th and 8th April, 1991 and they have been referred to as having taken birth in the week preceding the order of detention. It was in these peculiar facts that this Court came to the conclusion that the material was so voluminous and the time left with the detaining authority was so short that there was non-application of mind on the part of the detaining authority to the material placed before him and, therefore, the order of detention was liable to be struck down. While doing so, this Court made it clear that it did not propose to lay down a general proposition that if the order of detention is passed on the same day on which the proposal was received or immediately thereafter, the order of detention will be bad. On the facts of the case, the learned Judges came to the conclusion that the evidence was so voluminous and the time at the disposal of the detaining authority was so short that the only

conclusion that could be reached was that there was non-application of mind on the part of the detaining authority. These observations are to be found in para 6 of the Judgment in Mohd. Ahmed Ibrahim's case.

24. In Criminal Writ Petition No. 991 of 1992 of **Smt. Varsha Vilas Jadhav v. The State of Maharashtra and others,** decided on 23rd October, 1992 (Puranik & Da'Silva, JJ.,), the order of detention was passed on 15th July, 1992. The proposal consisted of number of documents running into 240 foolscape closely typed pages. The detaining authority received the proposal and the documents at 4-00 P.M. on 15th July, 1992 itself and the order of detention was passed at 7-00 P.M. on the same day. It was in these peculiar facts that looking into the voluminous record of the case, running into 240 foolscape closely typed pages, including several documents in vernacular, this Court came to the conclusion that it would not have been possible for the detaining authority to go through the entire documents, apply its mind to them, formulate the grounds of detention and issue the orders of detention and get it typed and sign the same -all within three hours as contended. It was, therefore, that the order of detention was held to suffer from non-application of mind and was, therefore, set aside. These findings are to be found in para 14 of the Judgment."

(Underlining by us)

Undoubtedly this judgment has been rendered in the context of an order of preventive detention. However, it underlines the importance of availability of sufficient time to scrutinise the requisite records before taking a decision, to support a plea that the decision was an informed one, and arrived at after due application of mind.

39. The scrutiny of and application of mind to the circumstantial letter; charge sheet; summary of evidence; exhibits dealing with minute statistical details; decision to amend and retyping of the charge sheet; issuance of various orders relating to the court martial, is claimed to have been completed by the Convening 1st Authority on receipt of this voluminous record on the of November, 1990 itself. Interestingly all claimed to have done after 16:00 hours (when the hearing of charges was completed), only a couple of working hours remain available. It is

humanly impossible to have meaningfully completed the above exercise within the available working hours.

40. In this regard, learned counsel for the petitioner has also drawn our attention to the pronouncement reported at AIR 2009 SC 1100, **Rajiv Arora v. Union of India** wherein the court held as follows:-

"14. The High Court in its impugned judgment proceeded to consider the issue on a technical plea, namely, no prejudice has been caused to the appellant by such non-examination. If the basic principles of law have not been complied with or there has been a gross violation of the principles of natural justice, the High Court should have exercised its jurisdiction of judicial review. Before a court martial proceeding is convened, legal requirements therefore must be satisfied. Satisfaction of the officer concerned must be premised on a finding that evidence justified a trial on those charges. Such a satisfaction cannot be arrived at without any evidence. If an order is passed without any evidence, the same must be held to be perverse."

(Underlining by us)

41. The respondents have not even ventured to give an explanation for this turn of events. We therefore, find substance in the petitioner's objection that the Convening Authority did not comply with the requirements of Regulation 156. There was no application of mind to the material available with the respondents. The Convening Authority did not examine the material on record to be satisfied about the charges levelled against the petitioner.

Charges were finalised when the Summary of Evidence was not completed.

42. We may now examine the second leg of the submission that Regulation 156 has been violated by the Convening Authority. The charge sheet dated 1st November, 1990 included charge no.7. This is the only charge of which the petitioner has been found guilty by the Armed Forces Tribunal. Learned counsel for the petitioner has submitted that the Summary of Evidence which was placed before the Convening Authority did not contain an iota of evidence on this charge against the petitioner.

43. The prosecution was aware that there was no evidence at all

on charge no.7 when the trial of the petitioner had been directed and commenced. PW4 – Lt. A.K. Ahuja, who made deposition on this charge in court, had not spoken a word on this charge in his statement recorded on 27th of June, 1990 in the Summary of Evidence.

44. After the court martial had commenced proceeding, additional statements were recorded in the Summary of Evidence. The statement of Shri D.K. Das, Branch Manager, State Bank of India was recorded on the 8th of November, 1990 while that of Wing Commander K.C. Dawra (Retd), Director Finance, Air Force Naval Housing Board was recorded on the 30th of November, 2011 as part of the Summary of Evidence. This was in an attempt to find evidence on charge no.7 against the petitioner on this charge.

45. The above circumstance lends substance in the petitioner's contention that the statement of Shri D.K. Das, Branch Manager, State Bank of India and Wing Commander Dawra were manipulated by the prosecution on 8th of November, 1990 and 30th of November, 1990. Shri Das was examined thereafter as PW 12 while Shri Dawra was examined as PW 8 during the petitioner's trial by court martial.

46. It appears that the order directing convening of court martial as well as the order of appointment of the Trial Judge Advocate were passed when there was no evidence/material on record in support of charge no.7.

47. As per Regulation 156, the Convening Authority is required to satisfy himself not only that the charges are properly framed but also that the evidence if uncontradicted or unexplained would probably suffice to ensure a 'conviction'. On the issue of what would constitute 'satisfaction', reference may usefully be made to the pronouncement of the Supreme Court reported at (1997) 7 SCC 622, **Manusukhlal Vithaldas Chauhan v State of Gujarat** wherein the court held thus:-

> "19. Since the validity of "Sanction" depends on the applicability of mind by the sanctioning authority to the facts of the case as also the material and evidence collected during investigation, it necessarily follows that the sanctioning authority has to apply its own independent mind for the generation of genuine satisfaction whether prosecution has to be sanctioned or not. The mind of the sanctioning authority should not be under pressure from any

> quarter nor should any external force be acting upon it to take a decision one way or the other. Since the discretion to grant or not to grant sanction vests absolutely in the sanctioning authority, its discretion should be shown to have not been affected by any extraneous consideration. If it is shown that the sanctioning authority was unable to apply its independent mind for any reason whatsoever or was under an obligation or compulsion or constraint to grant the sanction, the order will be bad for the reason that the discretion of the authority "not to sanction" was taken away and it was compelled to act mechanically to sanction the prosecution."
>
> (Underlining by us)

48. In (2005) 8 SCC 296 **State of West Bengal &Anr v. Alpana Roy & Ors.,** the Supreme Court has noted that providing sufficient reasons for a decision could indicate an application of mind on the part of a judicial or quasi-judicial authority.

49. We may also note the authoritative and binding laid down in (1985) SCR (1) 866 SCR **Rajinder Kumar Kindra v Delhi Administration** wherein the court was concerned with an employee charged with misconduct for his alleged negligent handling of a company chequebook. This charge was overturned on the basis that the arbitrator failed to apply his mind to the submissions of the appellant. An issue was also raised as to whether there was any evidence to substantiate the charge. It was concluded by the court that where a quasi-judicial tribunal or arbitrator records findings based on no legal evidence and the findings are based on conjectures and surmises, the enquiry suffers from the infirmity of non-application of mind and stands vitiated.

50. The petitioner has further pointed out that the proceedings of the court martial commenced on the 10th of November, 1990. However, the summary of evidence was not complete and recorded even between 8th of November, 1990 to 3rd December, 1990. It is complained that this was in violation of Regulation 149 of the Navy Regulations (Part – II) which envisages recording of the complete summary of evidence before an application for trial can be made. These facts clearly support the petitioner's contention that recording of the summary of evidence was undertaken on different occasions by the respondents to fill the gaps and lacunae in the prosecution case. It also substantiates the petitioner's

grievance that the summary of evidence was given to him on different occasion by the Trial Judge Advocate.

51. So far as application of the principles laid down in the aforenoticed judicial precedents to the instant case is concerned, it is an admitted position that on 1st of November, 1990, there was no evidence on charge no.7 in the Summary of Evidence which could have been considered by the Convening Authority to direct a trial on this charge. It therefore, has to be held that the direction of the Convening Authority to direct the court martial was based on conjectures and surmises rather than any material in support of the charges. There was no evidence before the Convening Authority at all on charge no.7. The Convening Authority failed to comply with the mandate of Regulation 156.

Failure to permit inspection of documents

52. The petitioner asked for inspection of documents on the 7th of November, 1990 on which the prosecutor was directed to permit inspection to the petitioner. The petitioner's defending officer, (the present counsel) who was stationed in Delhi, visited Vishakhapatnam on 19th November, 1990 for inspection of the documents. It is complained that no meaningful inspection was permitted inasmuch as the documents relied upon by the prosecutor had not been segregated but were part of bulky files and records which contained irrelevant data and documents not relating to the case. This was the only inspection granted to the petitioner before the Trial.

53. A request for photocopy of the documents was made which was turned down by the Trial Judge Advocate. A total of two hours was granted for inspection of voluminous documents. The petitioner's defending officer recorded his protest vide letter dated 20th November, 1990 and 21st November, 1990. In view of this protest, the Trial Judge Advocate vide letter dated 23rd November, 1990 instructed the prosecutor to provide photocopy of documents and vide letter dated 29th November, 1990 directed the prosecutor to flag the relevant documents. In answer, the prosecutor addressed a letter dated 30th November, 1990 expressing his inability to do so as it would disclose his strategy. The petitioner was thus neither permitted a proper inspection of the records nor furnished copies thereof.

Change of Judge Advocate

54. The petitioner has also made a grievance with regard to the appointment of the Trial Judge Advocate and challenged the legality thereof. The submission is that wide powers are conferred on the Trial Judge Advocate during the court martial proceedings. Therefore it is essential to have an independent, unbiased and fair Trial Judge Advocate ('TJA.) especially someone who has not engaged with the subject matter of the trial prior to the court martial.

55. In this regard, it is pointed out that Regulation 159 of the Navy Regulations mandates the appointment of Trial Judge Advocate who is to conduct the court martial proceedings. The duties of the Trial Judge Advocate are specified under the Regulation 159 of the Navy Regulations which provides as follows:-

> **"159. Convening of Court Martial.** (1) When the convening authority is satisfied that all the documents are in order and that a court martial ought to be convened, he shall issue a warrant in the prescribed form together with a copy of the charge sheet to the officer nominated by him as president of the court martial directing him to assemble a court martial at the place and on the date mentioned in the warrant.
>
> (2) The circumstantial letter shall not be communicated to the president or to the other members of the court until the court assembles and is duly sworn.
>
> (3) The summary of evidence shall on no account be given to the president or the other members of the court at any stage of the proceedings."

56. The Trial Judge Advocate ('TJA.) is legally required to ensure that the trial is conducted in accordance with the Provisions of the Indian Navy and the Regulations framed thereunder. From the above, it appears that the Trial Judge Advocate does not sit with the members of the court martial at the time they give their findings on the charges but he sits with them at the time of deciding the sentence under Regulation 157.

57. The Regulations confer further powers on the TJA. Any objection against the question put to a witness is required to be decided by the TJA under Regulation 179. By virtue of Regulation 182, the TJA is permitted

to allow a witness to be called or recalled by the prosecutor. The final summing up of the evidence is also done by the TJA. Under Regulation 191, the TJA is also responsible for ensuring that the proceedings of the court martial are duly recorded and prepared. It is therefore imperative that the TJA is an independent person who acts in an unbiased and impartial manner and ensures that the court martial is conducted in due compliance of the requirements of law as well as the principles of natural justice.

58. The petitioner points out that the Commander B.K. Ahluwalia was the Judge Advocate of the Eastern Naval Command at the relevant time. Therefore he was the Head of the Legal Department of that Command. It is undisputed that Commander Ahluwalia was associated with the drawing of the charge sheet against the petitioner and drafting of the circumstantial letter. He advised the authorities before the convening of the court martial and thereafter, was advising the prosecutor as well. Yet by the order dated 1st November, 1990 he was appointed the Trial Judge Advocate for the petitioners court martial as well.

59. In view of the involvement of Commander B.K. Ahluwalia, the Trial Judge Advocate in the drafting of the charge sheet and his having tendered advice to the prosecutor in drawing up the charges, involvement in framing the circumstantial letter and the records, the petitioner's defending officer had addressed a letter dated 20th November, 1990 requesting for change of the Trial Judge Advocate as his participation in the pre-trial proceedings would have clouded his objectivity and impartiality. It has been urged that the failure of the TJA to follow up with his instructions with regard to the documents, manifests his lack of neutrality.

60. The petitioner voiced his apprehensions about the impartiality of the Trial Judge Advocate in his letter dated 1st December, 1990 also. However, his request for change of Trial Judge Advocate was rejected vide letter dated 5th December, 1990 sent by the Convening Authority.

61. The petitioner has also contended that the circumstantial letter and the records were processed by the same Judge Advocate General who made recommendations to the Convening Authority premised on the board of inquiry and the summary of evidence. He had also participated in the court martial. The judicial review requested by the petitioner pursuant to the provisions in the Regulations was placed before this very Judge Advocate General. The petitioner had thus objected to his objectivity.

62. It has been submitted that having taken a prima facie view in the matter and having actively engaged in the processing of the records coupled with the recommendations which had been made, the proceedings and orders against the petitioner are vitiated on account of the institutional bias on the part of the Judge Advocate General also.

63. On the aspect of institutional bias of the Trial Judge Advocate, learned counsel for petitioner has placed reliance on the pronouncement of the Himachal Pradesh High Court reported at 1980 (3) SLR 124, **Sansar Chand v. Union of India & Ors.** In this case also an objection was taken with regard to bias of the Judge Advocate in a general court martial under the Army Act. On this issue, the court has observed as follows:-

> "32. It must be borne in mind that not only a bias but a real likelihood of bias will also result in disqualification. The Supreme Court in **S. Parthasarathi v. State of Andhra Pradesh** 1974 (1) SLR 427, dealing with a similar question observed thus:
>
> > The question then is: whether a real likelihood of bias existed is to be determined on the probabilities to be inferred from the circumstances by court objectively or, upon the basis of the impressions that might reasonable be left on the minds of the party aggrieved or the public at large.
> >
> > The tests of real 'likelihood' and 'reasonable suspicion' are really inconsistent with each other. We think that the reviewing authority must make a determination on the basis of the whole evidence before it. Whether a reasonable man would in the circumstances infer that there is real likelihood of bias. The court must look at the impression which other people have. This follows from the principle that justice must not only be done but seem to be done. If right minded persons would think that there is real likelihood of bias on the part of an inquiring officer, he must not conduct the inquiry, nevertheless, there must be a real likelihood of bias. Surmise or conjecture would not be enough. There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will be prejudiced against the delinquent. The court will not inquire whether he was really prejudiced.

If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision. [See per **Lord Denning M.R. in Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon** (1968) 3 WLR 694 at P. 707etc]."

64. In support of this submission reliance has also been placed on the pronouncement of the Supreme Court reported at JT 2000 (5) SC 135 **Union of India v. Charanjit Singh Gil**.

65. Given the extent of the involvement of Commander B.K. Ahluwalia with every step in the matter at the pre-court martial stage as noticed above, he is bound to have an interest in the outcome of the case. Having been instrumental in drawing up of the charges and drafting of the circumstantial letter, the possibility of his nursing bias against the petitioner.

Denial of a fair Judicial Review -Non compliance of Section 160 and 161 of the Navy Act

66. On behalf of the petitioner, it was submitted that he was denied fair judicial review under Section 160 of the Navy Act, 1957 by the respondents. The petitioner made an application dated 29th July, 1991 for judicial review by the Judge Advocate General in terms of Section 162 of the Navy Act. It is submitted that the judicial review was improperly conducted by the very person who had prima facie found merit in the charges and had passed the order dated 1st November, 1990 convening the court martial. The factual narration in this regard is undisputed.

67. The order dated of November, 1990 amending the charge sheet against the petitioner as well as the order of the same date directing court martial to be convened was passed by the Vice Admiral L. Ramdas (as the then Flag Officer Commanding-in-Chief of the Easter Naval Command). Prior thereto, in 1989, he had initiated the board of inquiry as well. Thereafter, on receipt of its report, he had appointed the Investigating Officer and ordered recording of the Summary of Evidence. The then Vice Admiral, Ramdas had passed the orders on 1st November, 1990 appointing the Trial Judge Advocate and the prosecutor.

68. In 1991, on receipt of the petitioner's application dated 29th July, 1991, the Judge Advocate General carried out the review under Section 160 of the Navy Act. In accordance with Section 160 of the

Navy Act, his report was placed before the Chief of the Naval Staff. On this date, Vice Admiral L. Ramdas stood promoted as Admiral and had been appointed as the Chief of the Naval Staff. The report of the Judge Advocate General was thus placed before the very person who had already examined the matter at the initial stages, prima facie found merit in the charge sheet and directed the court martial to be convened.

69. Learned counsel for the petitioner has relied upon Sections 160 & 161 of the Navy Act while objecting to manner in which the judicial review was undertaken. Before proceeding to examine the petitioner's contention, we may note the statutory regime which applies. In this regard, Sections 160 and 161 of the Navy Act deserves to be considered in extenso and reads as follows:-

"160. **Judicial review by the Judge Advocate General of the Navy** (1) All proceedings of trials by court-martial or by disciplinary courts shall be reviewed by the Judge Advocate General of the Navy either on his own motion or on application made to him within the prescribed time by any person aggrieved by any sentence or finding, and the Judge Advocate General of the Navy shall transmit the report of such review together with such recommendations as may appear just and proper to the Chief of the Naval Staff for his consideration and for such action as the Chief of the Naval Staff may think fit.

(2) Where any person aggrieved has made an application under sub-section (1), the Judge Advocate General of the Navy may, if the circumstances of the case so require, give him an opportunity of being heard either in person or through a legal practitioner or an officer of the Indian Navy.

161. **Consideration by the Chief of the Naval Staff** (1) On receipt of the report and recommendations if any, under section 160, the Chief of the Naval Staff shall in all cases of capital sentence and in all cases where the court-martial is ordered by the President, and may in other cases transmit the proceedings and the report to the Central Government together with such recommendations as he may deem fit to make.

(2) Nothing in section 160 or this section shall authorise the Judge Advocate General of the Navy or the Chief of the Naval

Staff to make any recommendation for setting aside, or the Central Government to set aside, an order of acquittal passed under this Act.

70. A reading of the section 160 would show that the review by the Judge Advocate General can be either suo moto or an application made to him by an aggrieved person. The Judge Advocate General is required to transmit the report of such review with such recommendations as may appear just and appropriate, to the Chief of the Navy Staff for his consideration and for such action as the Chief of the Navy Staff deems fit. In the instant case, the petitioner sought the review by an application under Section 160 of the Navy Act.

71. We notice that there is no statutory mandate under Section 161 that the Chief of the Naval Staff must necessarily consider the report of the JAG himself.

Section 161 of the Navy Act permits the Chief of the Naval Staff to transmit the proceedings as well as report of the Judge Advocate to the Central Government in cases as the present with such recommendations as he may deem fit. Thus discretion is conferred on the Chief of the Naval Staff, in cases other than cases of capital sentence, whether to consider the report of the Judge Advocate General on judicial review or to refer the matter to the Central Government.

72. The question which arises is as to whether there was real likelihood of bias in the mind of the Chief of the Naval Staff against the petitioner and therefore he should not have considered the report of the Judge Advocate General himself and should have forwarded it for consideration to the Central Government.

73. The challenge by the petitioner rests on the well settled principle that no one can be a judge in his own cause. We are required to examine as to whether the examination by the Chief of the Naval Staff of the report of the Judge Advocate General tantamounts to his having as acted as judge in his own cause. In this regard reference may usefully be made to the binding principles laid down in the judgement reported at AIR 1970 SC 150 **A.K. Kraipak and Others v. Union of India & Others.** In this case the Supreme Court was concerned with the constitution of a Selection Board. One of the members was to be considered for selection. In that context, it was observed that it was against all canons of justice for a

man to judge in his own cause. The court observed that the real question was not whether he was biased or not as it is difficult to prove the state of mind of a person. What is required to be seen is whether there is reasonable ground for believing that a person is likely to have been biased. A mere suspicion of bias is not sufficient. There has to be reasonable likelihood of bias. The Supreme Court emphasised that while deciding the question of bias, the Court is required to take into consideration human probabilities and ordinary course of human conduct.

74. The principles governing the "doctrine of bias" vis-a-vis judicial tribunals were laid down in (1959) Supp.1 SCR.319 **Gullapalli Nageswara Rao and others v. Andhra Pradesh State Road Transport Corporation and Another**. The two principles emphasised were that:

> (i) no man shall be a judge in his own cause; (ii) justice should not only be done but manifestly and undoubtedly seem to be done. These two maxims have the consequence that if a member of a judicial body is subject to a bias (whether financial or other) in favour of, or against, any party to a dispute, or is in such a position that a bias must be assumed to exist, he ought not take part in the decision or sit on the tribunal.

75. We may usefully refer to the decision of the Supreme Court reported at 1987 4 SCC 611 **Ranjit Thakur v. Union of India**. In this case the Appellant was dismissed from the Army for disobeying superior's orders and the very officer whose orders he alleged to have disobeyed, sat as a member of the court martial. It was held that the proceedings were vitiated by bias. We may usefully extract the relevant observations of the Supreme Court which read as follows:-

> "15. The second limb of the contention is as to the effect of alleged bias on part of respondent 4. The test of real likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely and is whether respondent 4 was likely to be disposed to decide the matter only in a particular way.
>
> 16. It is the essence of a judgment that it is made after due observance of the judicial process; that the Court or Tribunal passing it observes, at least the minimal requirements of natural justice, is composed of impartial persons acting fairly and without

bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trial "corm non-judice". (See **Vassiliades v. Vassiliades** AIR 1945 PC 38.)

17. As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the judge is not to look at his own mind and ask himself, however, honestly, "Am I biased?" but to look at the mind of the party before him.

22. Thus tested the conclusion becomes inescapable that, having regard to the antecedent events, the participation of Respondent 4 in the Courts-Martial rendered the proceedings corm non-judice."

76. In (1974) 3 SCC 459 **S. Parthasarathi v. State of Andhra Pradesh,** an issue was raised with regard to an enquiry by an inquiry officer against whom bias was pleaded and established. The court was thus concerned with the test of likelihood of bias. It was held that if right minded persons would think there is a real likelihood of bias on the part of an officer, he must not conduct the inquiry. It was further observed that surmises or conjectures would not be enough, there must exist circumstances from which reasonable man would think that it is probable or likely that the inquiring officer will be prejudiced against the delinquent officer.

77. At this juncture, we may usefully reproduce a passage from the judgment reported at (1969) 1 QB 577, 599 **Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon** wherein Lord Denning M.R. observed thus:-

"...in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if rightminded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit."

78. The observations of the Supreme Court in the judgment reported at AIR 2006 SC 2544 **M/s. Crawford Bayley & Co. & Ors. v. Union of India & Ors.,** referred to the circumstances under which the doctrine of bias, i.e., no man can be judge in his own cause, can be applied. It was held that for this doctrine to come into play, it must be shown that the officer concerned has a personal bias or connection or a personal interest or was personally connected in the matter concerned or has already taken a decision one way or the other which he may be interested in supporting.

79. Mr. Singh, learned counsel for the petitioner has drawn our attention also to the judicial pronouncement reported at 2012 (12) SC 331 **Ramesh Ahluwalia v. State of Punjab**. In this case, the school principal had supported the case of the school management against the delinquent employee. A question arose about the propriety of the participation by the same school principal in the disciplinary proceedings. It was held that the participation of the principal was inappropriate inasmuch as he had already supported the case of the school management. The Supreme Court reiterated the established legal principle that justice must not only be done but it must also appear to be done.

80. Mr. Singh, learned counsel for the petitioner has also placed reliance on the principle laid down by the Supreme Court in 2011 8 SCC 380 **P.D. Dinakaran (I) Judges Inquiry Committee**.

After a detailed discussion, binding principles were laid down by the Supreme Court in para 43 of the pronouncement, the court cited with approval a judgment of Queen's Bench which reads as follows:-

"43. In **R. v. Rand** [(1866) LR 1 QB 230] the Queen's Bench was called upon to consider whether the factum of two Justices being trustees of a hospital and a friendly society respectively, each of which had lent money to Bradford Corporation on bonds charging the corporate fund were disqualified from participating in the proceedings which resulted in issue of certificate in favour of the corporation to take water of certain streams without permission of the mill owners. While answering the question in negative, Blackburn, J. evolved the following rule:

".....There is no doubt that any direct pecuniary interest, however small, in the subject of inquiry, does disqualify

a person from acting as a judge in the matter; and if by any possibility these gentlemen, though mere trustees, could have been liable to costs, or to other pecuniary loss or gain, in consequence of their being so, we should think the question different from what it is: for that might be held an interest. But the only way in which the facts could affect their impartiality, would be that they might have a tendency to favour those for whom they were trustees; and that is an objection not in the nature of interest, but of a challenge to the favour. **Wherever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act; and we are not to be understood to say, that where there is a real bias of this sort this Court would not interfere;** but in the present case there is no ground for doubting that the Justices acted perfectly bona fide; and the only question is, whether in strict law, under such circumstances, the certificate of such Justices is void, as it would be if they had a pecuniary interest; and we think that **R. v. Dean and Chapter of Rochester** [(1851) 17 QB 1] is an authority, that circumstances, from which a suspicion of favour may arise, do not produce the same effect as a pecuniary interest."

81. In W.P.(C) No.237/1966 dated 4th May, 1967 **Sumer Chand Jain v. Union of India,** the Supreme Court found that some indication of personal preference of a quasi-adjudicator might not vitiate proceedings on the basis of bias if "duty" and "interest" could be kept separate. The case dealt with a member of a departmental promotion committee who was favourable towards one of the candidates. Notwithstanding his favouritism, the proceedings of the committee were not vitiated because there was no conflict between duty and interest of the committee members and no one was a judge in his own cause.

82. In the instant case, there is nothing to show such independence on the part of the Chief of Naval Staff reviewing authority. Both had taken a view at several stages in the matter.

83. The Chief of the Naval Staff while functioning as the Flag

Officer Commanding-in-Chief, Eastern Naval Command had already taken a view at every stage of the matter after receipt of the anonymous complaint. It is unnecessary to go into the question as to whether or not the judicial review by the Chief of the Naval Staff was actually fair or not. Given his involvement in the prosecution of the petitioner at the earlier pre-trial stages; his having accorded his satisfaction with regard to the charges against the petitioner and ordered the court martial to convene, there is every possibility of his being biased against the petitioner. He had taken a view in the matter. It is reasonable to expect that he would be interested in supporting it. He was the authority who passed the orders appointing the prosecutor as well as the Trial Judge Advocate. To expect independence of mind from such person when judicial review of those very orders is sought is certainly a far fetched possibility. The decision to dispose of the report of the Judge Advocate General and not to refer the matter to the Central Government lacks the perception of fairness. This decision was violative of the principles of natural justice. It tantamounts to denial of an independent, impartial and fair judicial review under Section 161 of the Navy Act to the petitioner.

84. We may note that the respondents could not controvert any of these submissions. There is, thus, merit in the petitioner's grievance that he has been denied fair judicial review in terms of the spirit, intendment and purpose of the same under Section 161 of the Navy Act.

Plea that it was a case of 'no evidence' to support the charge

85. The petitioner has assailed the judgment dated 8th December, 2010 of the Armed Forces Tribunal finding him guilty of charge no.7 on the ground that there was no evidence to support the charge. He was absolved of all other charges for which the court martial has found him guilty.

86. Before examining this submission, it is essential to set down the parameters within which the High Court would exercise its power of judicial review into the orders passed by the court martial to the extent which has been affirmed by the Armed Forces Tribunal. In this regard, we may usefully set down the principles laid down by the Supreme Court on the scope of judicial review in the judgment reported at (1995) 6 SCC 749, **B.C. Chaturvedi v. Union of India** wherein a challenge was laid to the proceedings before the disciplinary authority even though the contours of the burden of proof before the disciplinary authority and a

court martial would be different inasmuch as the court martial tries a person for criminal offence by the special procedure, which in the instant case is provided under the Navy Act and the prosecution would be required to discharge the onus of proof beyond reasonable doubt; whereas disciplinary proceedings tests the evidence produced before it on a principles of preponderance of probabilities.

87. So far as appreciation of evidence in the judicial review under Article 226 of the Constitution of India is concerned, the court in para 12 held that the findings must be based on some evidence. The observation of the court reads thus:-

> "12. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to reappreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case"

88. On this very issue in a judgement reported at 74 (1998) DLT 42 **S.S. Mehta v. Union of India & Ors.,** the court held thus:-

> "58. The proposition of law is clearly laid down by the Supreme Court that the Court can examine the records to find out whether the finding or conclusion by the disciplinary authority is supported by evidence on record. The Court can analyse the evidence, to come to the conclusion whether the findings are supported by evidence on record. The Court is not concerned with the sufficiency of evidence. If the Court comes to the conclusion that the finding or the conclusion is perverse and it is not based on any evidence, the Court can interfere. In this case, I am clearly of the view that there is absolutely no evidence against the petitioner and the decision of the Court Martial is based on no evidence and it could be characterized as perverse."

89. In a judgment reported at 1998 (1) SCC 537 **Union of India v. Major A. Hussain** in para 23, the court reiterated that the court martial proceedings are subjected to judicial review by the High Court under Article 226 of the Constitution. The court noted that the High Court should not allow the challenge to the validity of the conviction and sentence of the accused inter alia when evidence is sufficient.

90. Before considering the rival contentions, it is necessary to set out the charge No.7 itself which reads as follows:

> "(7) Did on 30th December 1988, in his capacity as Commanding Officer, Indian Naval Ship Magar, dishonestly misappropriate certain movable property to wit a sum of Rs.20,000.00 (Rupees Twenty thousand only) from Saving Bank Account No.C3081 held in the name of Commanding Officer, Indian Naval Ship Magar for payment of Air Force Naval Housing Board, New Delhi towards a flat booked by him for his personal use, thereby committed an offence punishable under section 403 of Indian Penal Code read in conjunction with section 77(2) of the Navy Act 1957."

91. The charge thus related to preparation of a draft of rupees fifty thousand on behalf of the petitioner for payment to the Naval Housing Board.

92. The petitioner disputes that he has misappropriated any amount from S.B. Account no.C3081 which was held in the name of the Commanding Officer, INS "Magar". In support of this contention, reliance has been placed on the testimony of PW-12 – Shri D.K. Das, Branch Manager, State Bank of India recorded before the court martial. It is urged that confusion appears to have been arisen because of two saving bank accounts maintained with the State Bank of India and two cheques for the same amount (Rs.20,000/-) having been drawn on these accounts on the same day. One saving bank account being account No.C3081 was held in the name of the Commanding Officer, INS Magar which was operated jointly by the petitioner herein and the Staff Officer Lt. A.K. Ahuja. The petitioner was maintaining a separate personal account bearing S.B. No.C7635 in the same bank.

93. So far as the ship INS Magar was concerned, as noted above, M/s. Garden Reach Ship Builders and Engineers (GRSE), a public sector undertaking was responsible for its construction, all repairs and supplies. Mr. D.J. Singh, learned counsel for the petitioner has pointed out that the Managing Director of this public sector undertaking was a retired Admiral from the Indian Navy.

94. Certain repair and refit work was undertaken on the INS Magar in 1988 which was closely monitored by this public sector undertaking. In addition, the work undertaken and all supplies were overlooked by the Work Overseeing Team (WOT) which had been appointed during the ships refit. The WOT included representatives of the Naval Headquarters, a representative from the ship as well as a representative of M/s. Garden Reach Ship Builders and Engineers (GRSE).

95. It is an admitted position before us that the total sum of Rs.3,43,104.80 received towards repairs/refitting activities was actually deposited with the ship's saving bank account no.C3081. Against this, a total of Rs.3,22,404/- was spent from the account before 30th December, 1988. As such the amount of Rs.20,700.80 was left in the account as on 30th December, 1988. It is also undisputed that the ship was sailing after the completion of the refitting activities immediately thereafter.

96. Before examining the petitioner's explanation for the expenditure on which this amount has been expended, it is necessary to examine the prosecution's case against the petitioner on the charge as noted above.

97. In the Summary of Evidence, statement of Lt. A.K. Ahuja was recorded on 28th of January, 1990. In this statement, Lt. A.K. Ahuja did not disclose any misdoing by the petitioner relating to the charge No.7 levelled against the petitioner. He was brought in before the court martial as PW-4 whose statement was recorded on 2nd of March, 1991 to support the charge against the petitioner when he made material improvements over his statement dated 28th of January, 1990. This testimony has been assailed on the ground that the same deserves to be disbelieved, that this evidence was a clearly concocted and that he was tutored witness.

98. The pertinent evidence on this issue is that of Shri D.K. Das, Branch Manager, State Bank of India, who appeared as PW12.

99. It is noteworthy that the summary of evidence and the exhibits were placed before the Convening Authority before the court martial was ordered on 1st of November, 1990. On this date, there was no evidence to support charge No.7 in this material. Conscious of this, the prosecution recorded additional evidence even after the Convening Authority had ordered the court martial. The parties have placed before us a statement of Shri D.K. Das, Branch Manager so recorded on 8th of November, 1990 as part of the summary of evidence. In this statement, Shri Das had stated about the preparation of the bank draft for Rs.50,000/- which was the subject matter of the charge:

> "(n) A draft in favour of Air force Naval Housing Board was made by us on 30.12.88 for Rs.50,000/- Rs.20,000/- **was paid by cheque** No.184159 from the account of Commanding Officer, INS Magar a**nd balance Rs.30,000/- paid in cash**, signed by Commander Avtar Singh (Draft No.112759 **Rs.30,000/- was withdrawn on 30.12.88 from A/C No.C-7635, personal account of Commander Avtar Singh).**"

100. We may note that the above statement was made by Shri Das, the Branch Manager based on the letter dated 23rd June, 1990 wherein it was mentioned as follows:-

> "xxx xxx xxx
>
> 13. A cheque No.184159 for Rs.20,000/- fvg. Self paid by us on 30.12.88.

14. A draft in favour of Air Force Naval Housing Board was made by us on 30.12.88 for Rs.50,000/-, Rs.20,000/- was paid by cheque No.184159 from the account of Commanding Officer, INS Magar and balance Rs.30,000/- paid in cash, signed by Commander Avtar Singh INS Magar C/O Navy Officer Hastings, Calcutta (Draft No.112739 Rs.30,000/- was withdrawn on 30.12.88 from A/C. No.C-7635, personal account of Commander Avtar Singh.

xxx xxx xxx"

101. It is noteworthy that the witness categorically referred to a cash amount of Rs.30,000/- and cheque of Rs.20,000/- which went into the making of the draft of Rs.50,000/-. This draft was deposited on behalf of the petitioner to the Air Force Naval Housing Building Board. It appears that there was some confusion and mistake in the mind of Shri Das with regard to the account from which the cheque of Rs.20,000/- was given and the date on which the amount of Rs.30,000/- was withdrawn. Testifying as PW-12, Shri D.K. Das, Branch Manager gave the following clarification before the court martial in answer to question no.1008 put by the prosecutor:-

"Q.1008 I am showing this Exhibit P-56 which account do these details belong to?

A. These details which I have forwarded belong to the account No.C-3081 of CO INS Magar in our bank. In this letter we have detailed most of the transactions which took place in that account since its opening. I have given serial numbers and altogether 17 numbers have been given here. So just after the query was received regarding this account the whole details were submitted. Before coming to appear this court I had gone through records once again and I have brought the records with me, there I observed item No.14 reds draft in favour of AFHNB was made by us on 30 Dec 88 for Rs.50,000/- and Rs.20,000/- was paid by cheque No.184189 from the account of CO INS Magar and the balance of Rs.30,000/- paid in cash signed by Cdr Avtar Singh. **I submit before court part of this information was not correct. We have observed this as a general mistake. A draft in favour of AFHNB was made on 30 Dec 88 for Rs.50,000/- part of this portion upto this information** was

correct. Rs.20,000/-was paid by cheque was also correct. Whereas the cheque number which you have mentioned is not correct. The correct cheque number is 180854 for Rs.20,000/- instead of 184159 and the relevant cheque was on SBI account No.C7635 of Cdr Avtar Singh. This cheque was not on the account of CO INS Magar. However, the balance of Rs.30,000/- of the draft in question was paid in cash. It was general mistake occurred due to the fact that Rs.20,000/-was withdrawn from SBI account NoC7635 of Cdr Avtar Singh personal account and also from C3081 that is account of CO INS Magar."

(Emphasis by us)

102. The Branch Manager, State Bank of India has therefore clearly explained the mistake in the letter sent by the Bank (Exh.P-56) statement which was recorded in the summary of evidence.

103. The statement of account of the petitioner's Saving Bank account C7635 was proved on record which shows that an amount of Rs.50,000/- had been withdrawn by the petitioner shortly before the preparation of the bank draft. The prosecution had thus clearly established the availability of this cash amount in the hand.

104. PW-12 Shri D.K. Das, Branch Manager had deposed before the court that the bank had make a mistake when it stated cheque no.184159 for the sum of Rs.20,000/- pertaining to the ships account was used. Whereas, in actual fact, it was cheque no.180854 from the petitioner's account which was used for making the draft. The witness repeatedly refers to the balance amount of Rs.30,000/- having been received in cash. The following extract from the deposition of PW 12 Shri D.K. Das is relevant in this regard:-

"Q. 1028 For this draft 112759 how much money was in cash and how much was in the form of cheque or cheques?

A. Rs.30,000/- was deposited in cash and Rs.20,000/-was paid by means of a cheque.

Q. 1029 This cheque of Rs.20,000/-was from which account and given the cheque number also?

A. From the face of it I cannot say what is the cheque number and account from which it is paid. Since I had to go through the

records I have seen that there is one withdrawal of Rs. 20,000/- in Cdr Avtar Singh's personal account No.C7635 Cheque No. is 18054. There it is written also to cheque (draft). I may submit, on the same date there was another withdrawal of Rs.20,000/- from INS Magar account also. So that created the confusion for mistake occurred in giving the confusion for mistake occurred in giving the fact in P 56."

105. Questions on these aspects were put to this witness by the court as well, which may also be set out and read thus:-

Q. 1044 Mr. Das my experience when the customer presents to the banker normally an amount in cash or cheque the details of cheque etc. are written on bank draft slip. In this particular case Cdr Avtar Singh had requested for a bank draft or AFNHB for a sum of Rs.50,000/-. Could you check from your records and tell us further details on the DD slip?

A. Actually on the DD requisition slip which Cdr Avtar Singh submitted to us only deposit Rs.30,000/- in cash is mentioned and duly authenticated by the concerned officer and Rs.20,000/- by cheque. The details of the cheque are not mentioned."

"Q. 1049 How did this error occur that you quoted a wrong bank account number. What made you to look subsequently into the other account number and say that a mistake had occurred?

A. Actually when the IO came and asked for these vouchers and particulars we brought it out and going through the account of CO Magar the draft itself there was a payment by cheque for Rs.20,000/- rest by cash. I was seeing the debit in CO Magar's account of Rs.20,000/- which is identical with amount of cheque deposited against issuance of draft. I thought it was the same withdrawal. But after receiving the summons when I was required to produce the certified copies of the records I have to carefully scrutiny all the records and at that stage only the withdrawal in Cdr Avtar Singh's personal account for issuance of the draft had come to my notice."

106. The above testimony is unequivocal that the cheque of Rs.20,000/- from the petitioner's personal account was used for

preparation of the draft and the balance amount of rupees thirty thousand was by cash. Despite repeated efforts to persuade this witness to show that the cash amount withdrawn by cheque no.184159 from the ship's saving bank account no.C3081 on 30th December, 1990 was used towards preparation of the draft, the witness did not say so.

107. It is clearly evident that a total amount of Rs.30,000/- was given by cash to the bank and a cheque of Rs.20,000/-was given from the petitioner's personal account was used for the preparation of the bank draft.

108. The record placed before us would show that after prolonged adjournments, the respondents produced the then Lieutenant A.K. Ahuja as PW-4 as a witness. In his deposition, this witness went to the extent of saying that he had fraudulently affixed signatures on several documents at the instance of the petitioner who was the Commanding Officer of the ship. The witness has been disbelieved on all counts. The court martial also rejected his testimony in support of twenty charges on which the petitioner was acquitted while holding the petitioner guilty of seven charges. The Armed Forces Tribunal disbelieved the testimony of Lieutenant A.K. Ahuja on further six charges (for which he had been convicted by the court martial).

109. Before us, the respondents accept that Lt. A.K. Ahuja had uttered not a word of evidence on charge no.7 in the statement given by him in the summary of evidence on the 27th of June, 1990. However, while appearing in the court martial as PW-4 on 2nd of March, 1991, this witness for the first time claimed that the petitioner had given him only a sum of Rs.10,000/- in cash while an amount of Rs.20,000/- was withdrawn on 30th December, 1988 from the ship's account and utilized for preparation of the bank draft of Rs.50,000/- for payment to the Air Force Naval Housing board which was the subject matter of the charge.

110. It has been contended by Ms. Jyoti Singh, learned Senior Counsel for the respondents that PW4 – Lt. A.K. Ahuja was not cross-examined on behalf of the petitioner with regard to his testimony. We fail to see as to how this would absolve the respondents i.e. the prosecution of the burden of proof of the charge beyond reasonable doubt.

111. A perusal of the testimony of this witness would show that the prosecution was relying on answers to leading question suggesting

the case in the charge to the witness to which he merely answered in affirmative.

112. Placing reliance on AIR 1959 SC 1012 **Tehsildar Singh and Another v. State of U.P.,** it is contended that as PW-4 had made no previous statement on the charge, the petitioner had no occasion to confront him with the same.

113. On this aspect, we may note that Armed Forces Tribunal has noted the submission made on behalf of the petitioner that he had arranged an amount of Rs.50,000/- from his mother which was deposited in his aforesaid SB Account No.C-7635. We find that this deposit stands duly reflected in the statement of account of the petitioner's saving bank account proved by the prosecution on the record of the court martial as Exh.C-06. The petitioner had actually withdrawn an amount of Rs.50,000/-from his personal account on the eve of ship's departure from Calcutta for personal use. Our attention is drawn to the Exh.C-96 – which is the bank statement of account of SB account No.C-7635 (page 233). The deposit of Rs.50,000/-as well as withdrawal of Rs.50,000/-(just before the cheque transaction of Rs.20,000/-on 30th December, 1988) are reflected therein. This document thus establishes that the petitioner had available a large amount and had the capacity to pay Rs.30,000/- in cash and the cheque of Rs.20,000/- dated 30th December, 1988 towards preparation of the said bank draft of Rs.50,000/-. The evidence of the independent witness PW 12 Sh. D.K. Das clearly supports this position who has referred to cash amount of Rs.30,000/-.

114. There is yet another important circumstance which has been overlooked in this matter. Mr. Singh, learned counsel for the petitioner has drawn our attention to the several documents which were the subject matter of the charges on which the petitioner was tried by the court martial to which PW 4 – Lt. A.K. Ahuja was signatory. PW4 – Lt. A.K. Ahuja's main evidence was to the effect that he had signed fraudulent bills and documents at the instance of the petitioner.

His testimony therefore would be in the nature of accomplice evidence.

115. It is an admitted position that so far as Charge No. 7 is concerned, there is no evidence to support the same, other than the sole testimony of PW4 Lt. A.K. Ahuja. It would be unsafe and legally

impressible to use uncorroborated testimony of an accomplice witness to bring home a finding of guilt for a criminal offence against a person. For this reason as well, the finding of guilt of the petitioner premised on the uncorroborated testimony of PW-4 is not sustainable.

116. Learned Senior counsel for the respondent has urged that PW4 – Lt. A.K. Ahuja was a right hand man of the petitioner and had been appointed as staff officer. Learned counsel for the petitioner has urged that the there were disciplinary issues so far as this officer was concerned and the petitioner had given responsibility to him in order to enable officer to get his act together.

117. We find that this was never the case of the prosecution in the court martial and the petitioner never had any chance to explain as to what was the position of the PW4 – Lt. A.K. Ahuja on the ship. In any case, the same is irrelevant for the purpose of the present case. The testimony of PW4 – Lt. A.K. Ahuja is a belated after thought and concocted long after the trial had started. The petitioner was taken by surprise so far as this testimony is concerned. The petitioner was also faced with 27 charges during trial involving matters of minute accounting details, voluminous documents relied upon by the petitioner and evidence of a large number of witnesses. The refusal of the prosecution to permit inspection of records and other difficulties have been pointed out by learned counsel for the petitioner. The complete contradiction between the oral testimony of PW4 – Lt. A.K. Ahuja as against the evidence of PW12 – Shri D.K. Das, Branch Manager, State Bank of India, Fort William Brach, Calcutta which is supported by documentary evidence leave us with no manner of doubt that PW 4 Lt. A.K. Ahuja was a tutored witness unworthy of reliance. It is the testimony of PW 12 an independent witness must be accepted.

118. Mr. D.J. Singh, learned counsel appearing for the petitioner has brought out the important circumstance that PW4 – Lt. A.K. Ahuja was certainly nursing vengeance against the petitioner. During cross-examination, PW4 – Lt. A.K. Ahuja gave evidence with regard to an occasion when the petitioner had roughed him up on board the ship. PW 4 Lt. A.K. Ahuja has further stated that he felt humiliated by the treatment meted out to him by the petitioner.

It is pointed out that PW 4 was taken heavy drinking. PW11-Lt. (SDG) Dr. G.S. Deol has also deposed about the fact that PW4 – Lt.

A.K. Ahuja was taken to excessive drinking, on occasions from the time the bar opened till it closed even. In answer to question Nos.2225 and 2259 PW-30 Cdr George has also testified with regard to the addiction to alcohol of PW4 – Lt. A.K. Ahuja. Before the Tribunal, the petitioner had also highlighted the testimony of PW-53 in question no. Q/A 4349 to the effect that his own batch mates kept away from Lt. A.K. Ahuja as they felt that he was not a right sort of person to deal with.

119. This factual position regarding the habits of PW 4; the episode between the petitioner and him; as well as his culpability/participation in the alleged offences; certain gave him the animus to depose against the petitioner.

120. Reference is made to the judgment of the Supreme Court reported at 2003 (11) SCC 19 **Khalil Khan v. State of M.P.** In this case, the court was concerned with material improvement in the statement made by PWs-1, 2,5 and 8 in court over than the statement made to the police. On this aspect, the Supreme Court has ruled thus:-

> "6. We have heard the learned counsel for fee parties and perused the records as noted above. The prosecution case rests mainly on the fact that the deceased had make a dying declaration. This fact assumes all importance because there was no eye witness to the incident Apart from all other discrepancies in the evidence of PWs. 1,2,5 & 8, we notice that this important fact, namely, that the deceased did make a statement implicating the appellant as the assailant, was not made to the investigating officer when their statements were first recorded and their saying for the first time before the court this fact raises some doubts as to the veracity of said fact. Taking into consideration the nature of injuries suffered and the prosecution evidence itself that the deceased while being taking to the hospital had become unconscious, we think it is not safe to rely upon the evidence of these witnesses who have made this important statement as to the dying declaration for the first time before the Court While holding so, we have borne in mind the fact that all these witnesses are very closely related to the deceased."

121. On this aspect, a reference has been made to yet another pronouncement of the Supreme Court reported at AIR 2004 SC 4148 **Rudrappa Ramappa jainpur and Others v. State of Karnataka** wherein

on a similar issue the court held thus:-(para 13 & 14)

> "13. ....So far as the other accused are concerned, the evidence is not consistent. PW-2, the informant alleged in the course of her deposition that A-6 and A-7 had also assaulted the deceased with the wooden handle of the axe and a cycle chain respectively. However, the informant in her first information report did not say so and, therefore, her evidence in court as against A-6 and A-7 assaulting the deceased was not found acceptable by the trial court.
>
> 14. PW-6 asserted that A-4, A-5 and A-7 had also assaulted the deceased but it was found that he had not said so in the course of investigation in his statement recorded under Section 161 Cr. P.C . The trial court, therefore, did not accept this part of the evidence of PW-6, PW-4 stated that as many as 5 other accused, apart from A-1 and A-2 assaulted the deceased and in this connection he involved A-3, A-4, A-6, A-7 and A8. No other witness had stated so and, therefore, the trial court did not accept this part of his evidence. On the other hand PWs. 3, 5 and 8 deposed that only A-1 and A-2 had actually assaulted the deceased. On the basis of such evidence on record, we do not find any fault with the finding of the trial court that only A-1 and A-2 assaulted the deceased and no other accused assaulted him."

122. Learned counsel for the petitioner urges that the petitioner's conduct was completely above board and all transactions transparent. It is urged that all amounts received for the ship were properly accounted for. The petitioner has also explained the manner in which the amount of Rs.20,000/-which was withdrawn from the account of the ship on the 30th of December, 1988 was appropriated. It has been urged that during the ship refit, it had been proposed to purchase an Admiral's Deck Chair and a tilting chair for the Captain. This proposal had the approval of Garden Reach Ship Builders and Engineers and with their consent, these chairs were supplied by M/s Art and Kraft.

123. The payments for these chairs had to be made, before they could be supplied. Processing of bills was a time consuming process. As per a practice prevalent on ships, the amounts were taken from the canteen fund (non-public fund) against a temporary receipt to be reimbursed to the canteen fund when the payment was received after

being processed.

124. It is pointed out by learned counsel for the petitioner that the prosecution witnesses have supported the petitioner with regard to the existence of the practice. Our attention has been drawn to question No.896 which was put to PW 11 -Lt. Commander (Special Duty Gunner) Dr. G.S. Deol in his cross examination. The question and the answer of the witness deserves to be considered in extenso and reads as follows:-

> "Q.896 I would like to invite your attention to a very common practice on board ships. Namely if I want to buy something in a hurry and money is not available in a particular fund we take some money from a non-public fund on a ty. receipt and buy the item. Subsequently when we get the money from a source then we restore the money and tear off the sheet. Was this practice in vogue in Magar?
>
> (Witness sought the protection of the court which was granted to him.)
>
> A. Yes, Sir."

125. It was thus in evidence that though irregular, but on board ships, if money required for affecting a purchase was not available in a particular fund, it was temporarily taken from a non-public fund on a temporary receipt to buy the item. This amount is restored to the non-public fund, on receipt of the payment under the appropriate head. In this writ petition, we are not concerned with the legality or propriety of this practice. However, what stood established from the deposition of PW 11 that such practice was in vogue on board not only the INS Magar but on board all ships.

126. It is important to note that the bills of M/s. Art and Kraft dated 8th October, 1988 for a revolving/tilting chair for the amount of Rs.6,720/- was submitted on 31st October, 1988 to M/s. Garden Reach Ship Builders and Engineers Limited who released the amount after due scrutiny to the Commanding Officer of the ship (the petitioner) only on the 23rd of November, 1988.

127. The bill dated 11th October, 1988 of M/s. Art and Kraft for the high back/titling/revolving chair for the amount of Rs.7,000/- was submitted to M/s. Garden Reach Ship Builders and Engineers Limited on

23rd October, 1988 which released the amount on 23rd of November, 1988 again after an obvious scrutiny.

128. Our attention has also been drawn to communication dated 18th November, 1988 of INS Magar which included the aforenoticed bills dated 8th October, 1988 and 11th October, 1988 for the amount of Rs.6,720/- and 7,000/- in respect of two chairs.

A request was made for reimbursing the amounts of several bills which totalled Rs.1,89,350.00 mentioned in this letter. These bills included the bills for the chairs.

129. As per statement of account of S.B. A/c No.C3081 of the ship account, this amount of Rs.1,89,350/- was credited only on 29th of November, 1988.

130. In order to establish that these two chairs were actually received on board, INS Magar, PW11-Lt. CDR (SDG) Dr. G.S. Deol in his answers to question No.900, 901 and 902; PW9 – Lt. D. Bali Q/A 543, 544 (page 202) and PW4 – Lt. A.K. Ahuja (question Nos.Q/A 900,901,902 (page 267) and Q/A 4976 (page 1016) confirm the fact that these chairs actually came on board the ship.

131. Learned counsel for the petitioner has pointed out that the work being conducted on the ship by M/s Garden Reach Ship Builders and Engineers Limited was under the strict scrutiny of the Work Overseeing Team (WOT) which consisted of officials from the GRSE; Ship's Officer and an WOT/CG Inspector/Owner's representative (i.e, from the Naval Headquarter). It is pointed out that WOT was regularly conducting the inspection of the work being completed and reports under their signatures were submitted. These reports have also been relied upon by the respondents before the court marital.

132. Mr. D.J. Singh, learned counsel for the petitioner has further explained that in order to enable accounting while referring to different items, the respondents adopted alphabetic nomenclatures. For instances for engineering goods, the alphabet 'E' was used; for hull fittings and fixture; the alphabet 'H' is used (this would include the chairs in question) and reference to electrical items is prefixed by the alphabet 'L'. The respondents proved a Work Completion Report dated 4th November, 1988 on record as Exh.P42 before the court martial. This report is duly signed by the three members (which included the GRSE Officer; Ship's

Officer and the WOT/CG Inspector/Owner's representative i.e, an officer from the Naval Headquarter) has been placed before us. We find that at serial No.1126 of this work completion report, the following entry stands made:

> "1126. H.Mod 31. One No Admirals chair high back/tilting chair fully upholstered procured and supplied as per Bill No.10/A&K/ 88-89 dt.11.10.88 delivered to ship. Chair retaining arrangement welded on desk to suit in Ware House. Job found satisfactory."

133. Further at serial No.1155 (page 229) the following entry is contained:-

> "1155. H.Mod 54. One no. Captain's chair, revolving/Tilting chair fully upholstered for OPS Room delivered to ship. Retaining socket welded to deck at no.10. Job found satisfactory. Bill No.5(A&K) 88-89 dt.8-(illegible)."

This document was relied upon by the prosecution before the court martial. The document is handwritten and bears the signatures of three independent officials who had been constituted the Work Overseeing Team and had recorded the Work Completion Report. The respondents do not assail the correctness of this document.

134. It is noteworthy that there is no dispute so far as the correctness or the authenticity of the Work Completion Report is concerned which establishes that the two chairs had been duly supplied and installed on board the ship.

In view of the aforenoticed documents, the submission of the respondents before us that the chairs never came on board the ship has to be rejected.

135. Our attention has been drawn to the copy of the bills dated 8th October, 1988 (Ex.P-36), which contains 'H 54. in handwriting. The bill dated 11th October, 1988 (Ex.P37) similarly contains H 35 in handwriting. 'H-54. and 'H-31. have been mentioned by the authority while processing the bills, obviously after due scrutiny.

136. We also find in the communication dated 18th November, 1988 reference is made to the Work Completion Report which was signed by the WOT and the ship's officer in which again reference to 'H-54' and 'H-31' is made.

It is noted therein that these two are amongst the items which were brought by the ship and payment was sought.

137. The letter dated 28th November, 1988 from the ship to the Finance section seeks the amounts of several bills totalling Rs.1,89,350.00 including the said bills for the chairs. This letter refers to 'reimbursement' suggesting that payments stood made.

138. Ms.Jyoti Singh, learned Senior Counsel has referred to a receipt dated 25th June, 1990 issued by M/s. Art and Kraft for the amount of Rs.1,01,050/- towards three bills by a cheque dated 8th December, 1988. Learned Senior counsel would contend that the three bills included the bills for the chairs. On the other hand, it is pointed out by Mr.D.J. Singh for the respondent that the three bills referred to in this receipt were mentioned as being for the amounts of Rs.45,000/-; Rs.17,230.00 and Rs.6,720.00 bringing their total to Rs.68,950.00. The receipt for Rs.1,01,050/- is therefore, not for the mentioned bills.

139. It is pointed out that Garden Reach Ship Builders was using M/s Art and Kraft for undertaking the refit and making the supplies. The petitioner has placed on record the statement of account reflecting the amounts received by the ship from the authorities towards the refit; as well as the withdrawals and disbursement by the petitioner towards the bills for the various works and items. This statement of account reflects the following:-

(i) As on 30th December, 1988, the total amount received into account No.C3081 was Rs.3,43,104.80.

(ii) The total amount withdrawn therefrom was to the tune of Rs.3,43,004.80.

(iii) The amount received from M/s. Garden Reach Ship Builders and Engineers (GRSE)

(iv) The ship's account was opened by drawing Rs.100/- from the ship's canteen account.

(v) The total amount paid to M/s. Art and Kraft towards renovation of the wardroom and CO's cabin was to the tune of Rs.3,01,050/-. This is manifested from the bills and receipt available on record.

(vi) The remaining amount of Rs.42,054.80 was utilized to meet the following expenses:1. Returned to ship's canteen

account Rs.100/2. Purchase of purging cocks Rs.4900/3. Light fixtures and shades for wardroom and CO's cabin Rs.6354/4. Ship's Welfare Fund Rs.10,000/- Total Rs.21354/-

(vii) Thereafter only a balance of Rs.20,700.80 remained in the saving bank account. The amount of Rs.20,000/- was withdrawn by cash on the 30th of December, 1988 from the SB A/c No.C3081 which was used for making payment towards the godrej executive chairs and wooden beadings for the wardroom and wooden boxed for ship's speakers.

(viii) The bills proved on record shows that the total cost of the two chairs was Rs.13,200/-

(ix) The amount of the bills for the chairs had been taken on temporary receipt from the non-public fund (canteen fund) and returned to it from the amount of Rs.20,000/-

(x) The balance amount was used to make payment for the wooden beadings and wooden boxes for speakers. This aspect has not been considered in detail inasmuch as the same is not the subject matter of the charge.

(xi) Thus, after utilization of the amount of Rs.20,000/- in the above manner, amount of Rs.20,000/- was not available for misappropriate by the petitioner.

140. It is an admitted position before us that an audit was conducted of the accounts of the ship. No complaint or objection whatsoever with regard to the manner in which funds released to the ship have been utilized was made or received by or from the auditors.

141. M/s. Garden Reach Ship Builders and Engineers Limited was a public sector undertaking effecting the refit which had made no complaint at all.

142. The Work Completion Report recorded by the Work Overseeing Team which included a representative of the Naval HQs, reflects no discrepancy or doubt with regard to the work and supplies.

143. The above discussion would show that the case of the prosecution so far as charge no.7 is concerned rests on suspicion and conjectures only because two cheques for the same amount, one from

the ship's account and another drawn on the petitioner's personal account, were issued on the same date by him.

144. The court martial was held on 28 charges. One charge was dropped by the Convening Authority. The court martial upheld 8 charges while dismissing others. These charges were of serious nature and included the offence of misappropriation. In Judicial Review, under Section 160 of the Navy Act, one more charge was dropped. The Armed Forces Tribunal found that the respondents had been unable to prove further six charges on the same evidence and convicted the petitioner only with regard to charge no.7.

145. We may note that even the Armed Forces Tribunal was not satisfied with the evidence led by the prosecution on the charge in question on which it has made the following observations in the impugned order:-

> "13. ....This account was not supposed to be operated by the appellant for his personal benefit. In that backdrop, it can be presumed that the appellant has misappropriated Rs.20,000/- by drawing it from the account of CO, INS Magar. The manner in which the appellant allegedly acted may or may not involved fraudulent conduct, but it covers dishonest intention to misappropriate money, that is to say, the appellant misappropriated the money which was allotted for a different purpose."

146. The Tribunal has drawn a presumption against the petitioner based on the testimony of PW4 – Lt. A.K. Ahuja whereas the testimony of PW12 – Shri D.K. Das, Branch Manager, State Bank of India is supported by documentary evidence of bank statements of the two accounts and the cheques. The testimony of PW 4 Lt. A.K. Ahuja is tenuous and unbelievable. It merits disbelief by the very fact that if the stated facts were true, Lt. Ahuja would have made disclosure thereof on the first occasion. In fact he would have lodged the complaint against the petitioner.

147. It is important to note that PW12 – Shri D.K. Das, Branch Manager, State Bank of India had deposed with regard to cash payment of Rs.30,000/- and payment of Rs.20,000/- by cheque. This witness has nowhere stated that cash amount of Rs.30,000/-, comprised of Rs. 20,000/- drawn from the ships account No.C3081 and only Rs.

20,000/- in cash was handed over to PW-4.

148. The observations of the tribunal also show that the prosecution has failed to establish the charge beyond reasonable doubt. The presumption which has been drawn by the Tribunal is not based on any material evidence. The Tribunal also refers to using an amount for a "different purpose" which itself reflects that the amount has not been misappropriated. Mr.D.J. Singh, Advocate refers to depositing or returning the amount to the canteen fund as a 're-arrangement.. There is however no evidence to support any element of misappropriation of amounts by the petitioner. This position has been accepted by the Armed Forces Tribunal as well.

149. The respondents have admitted before us that the bills raised towards the refit and the payments reflected as having been made by the petitioner fully tally with the receipt of the amount. In this background, nothing further is required to be examined so far as charge no.7 is concerned.

150. We may note that the respondents failed to examine the material witnesses that is the members of the Work Overseeing Team who included a representative of the Navy who had certified the works undertaken the processing of the bills and the making of the payments for the refit which supports the innocence of the petitioner.

151. The above discussion would show that charge no.7 was the sole charge for which the petitioner has been held guilty. In the instant case there was admittedly no evidence on charge No.7 before the Convening Authority. There was no evidence to support this charge against the petitioner before the court martial. The evidence of the independent witness before the court martial on the contrary supported the innocence of the petitioner. Even the Armed Forces Tribunal has premised the culpability of the petitioner on conjectures without being able to record that the allegations against the petitioner had been proved beyond the reasonable doubt before the court martial.

152. The Armed Forces Tribunal therefore failed to exercise jurisdiction vested in accordance with law in arriving at a finding of guilt of the petitioner so far as charge no.7 is concerned which error is liable to be corrected by way of appropriate writ in the present proceedings.

153. In a recent judgment reported at AIR 2011 SC 2532, **Devinder Singh v. Municipal Council, Sanaur,** the Supreme Court placed reliance

on prior judgments reported at AIR 1976 SC 232, **Swaran Singh v. State of Punjab** and AIR1964 SC 477, **Syed Yakoob v. K.S. Radhakrishnan** reiterating the principle that the Writ Court would intervene if the finding of the Tribunal is not supported by any evidence at all, because in such cases the error amounts to an error of law. It is well settled that Writ Court is not concerned with inadequacy or insufficiency of evidence as a ground for interference.

154. We are satisfied that the finding of the Armed Forces Tribunal in the instant case is based on no evidence at all. The impugned order manifests an error of law which is therefore, not sustainable and is liable to be corrected by issuance of appropriate writ.

155. Before parting with this case, we may note that though no objection has been raised by the respondents with regard to maintainability of the petition, the petitioner has stated that he had filed a Miscellaneous Application No.448/2010 before the Armed Forces Tribunal for leave to appeal to the Supreme Court which, by an order dated 23rd December, 2010 was rejected. The petitioner thereafter filed a Special Leave Petition being SLP(C)Nos.12430341/ 2011 before Supreme Court of India which was dismissed 'in limine' by an order dated 10th May, 2011. Placing reliance on the pronouncement of the Supreme Court reported at (1986) 4 SCC 146, **Indian Oil Corporation Ltd. v. State of Bihar and others,** the petitioner has filed the instant writ petition contending that his right to invoke extra writ jurisdiction of this court under Article 226 of the Constitution of India is preserved. No objection to the maintainability of the present petition on the ground that the petitioner had filed the special leave petition before the Supreme Court has been urged. We are guided by the principles laid down by the Supreme Court in **Indian Oil Corporation Ltd.** (Supra).

156. We therefore, hold that the order dated 8th December, 2010 passed by the Armed Forces Tribunal, Principal Bench, New Delhi; the orders dated 1st November, 1990 and 15th March, 1991 of the General court martial; the order dated 27th August, 1991 of the Chief of the Naval Staff are not sustainable.

157. We are informed that had the petitioners court martial not intervened, by now he would have retired in the normal course. The question which arises is what is the relief which the petitioner would be entitled to? A prayer has been made for grant of all consequential benefits

including the salary with effect from 15th March, 1991 as well as pension computed with effect from the date on which the petitioner would have retired had he continued with the respondents.

158. The record of the petitioner noticed by us in the opening paragraphs of this judgment is not disputed. There is no allegation that the petitioner was ever involved or implicated in any other case. As a result of the general court martial not only the promising career of the petitioner was extinguished but he has been deprived of his liberty when he has been imprisoned pursuant to the sentence awarded by the general court martial. The services of the petitioner were terminated and he has been deprived of all benefits of employment ever since.

159. In a judgment reported at (2010) 3 SCC 192, **Harjinder Singh v. Punjab State** Warehousing Corporation, the issue of wrongful termination of services of a workman arose in the context of an industrial dispute under the Industrial Dispute Act, 1947. The Labour Court had awarded reinstatement into service of the appellant with compensation of Rs.87,582. The Learned Single Judge of the High Court substituted the award with an order assuming that the appellant was initially appointed without complying with the equality clause enshrined in Articles 14 and 16 of the Constitution of India and the relevant regulations. The Supreme Court held that the learned Single Judge was not justified in entertaining this new plea raised on behalf of respondents. corporation for the first time during the course of arguments and over turn an otherwise well reasoned award passed by the Labour Court and depriving the appellant of what may be the only source of his sustenance and that of his family. In para 21 of this judgement, the Court quoted an extract from Justice Mathew treatise "Democracy, Equality and Freedom", the relevant part whereof reads as follows:-

> "27. ...Where large number of people are unemployed and it is extremely difficult to find employment, an employee who is discharged from service might have to remain without means of subsistence for a considerably long time and damages in the shape of wages for a certain period may not be an adequate compensation to the employee for non-employment. In other words, damages would be a poor substitute for reinstatement."

In the instant case, also, the petitioner was the bread earner of the family and by one stroke of the pen their complete means of support

would have been extinguished.

160. On this very aspect, we may carefully refer to Division Bench judgment of the Rajasthan High Court reported at 1998 (1) WLC 646 (decision dated 19th November, 1997 in Civil Special Appeal No.1007/1997, **Union of India & Ors. v. Ex Sepoy Chander Singh,** the court also considered the legality and validity of a sentence imposed upon the respondents by the summary court martial. In this case as well, the court held that the trial was vitiated for non compliance of the rules and also that the punishment was disproportionate and could not have been awarded. On the prayer for reinstatement and the backwages which the petitioner claimed, the opinion of the court authored by B.S. Chauhan, J. (as his lordship then was) the court held as follows:-

> "32. The issue of entitlement of back wages has been considered time and again by the Hon'ble Apex Court and it has been dealt with differently in different circumstances.
>
> (A) If the termination order is quashed, the employee would be entitled for reinstatement and full back wages, unless there are reasons on record which would justify a departure from the normal order and in that case, the party objecting to it must establish the circumstances necessitated departure. [vide **Punjab National Bank Ltd. v. P.N.B. Employees Federation** : (1959) IILLJ 666 SC; **Hindustan Tin Works Pvt. Ltd. v. Employees of Hindustan Tin Works Pvt. Ltd.** : (1978) IILLJ 474 SC; **Manorma Verma v. State of Bihar and Ors.** 1994 Suppl (3) SCC 671; **Santosh Yadav v. State of Haryana and Ors.** : AIR 1996 SC 3328; **Ramesh Chandra and Ors. v. Delhi Administration and Ors.** : (1996) 10 SCC 409 and **Daya Ram Dayal v. State of Madhya Pradesh** : AIR 1997 SC 3269).
>
> (B) If the impugned termination order is set aside only on the ground of being provided with a severe punishment i.e. where the competent court comes to the conclusion that the quantum of punishment was not commensurate with the gravity of misconduct, delinquent employee will not be entitled for back wages for the reason that "public money could not be spent as a premium for such deviant conduct". [Vide **Sub Divisional Inspector (Postal) and Ors. v. K.K. Pavitheran** : (1996) 11 SCC 695; **Raj. State Road Corporation v. Bhagyomal and**

Ors. 1994 Suppl (1) SCC 573; **Malkiat Singh v. State of Punjab** : (1996) IILLJ 432 SC; **Deputy Commissioner of Police and Ors. v. Akhlaq Ahmad** 1995 SCC (L/S) 897].

(C) If termination order is quashed on technical grounds, where the authority can further proceed against the delinquent employee, the question of payment of back wages, in case reinstatement is ordered, should invariably be left to be decided by the authority concerned according to law, after the culmination of the proceedings, and depending on the final outcome, [vide C.B. judgment in **Managing Director ECIL Ltd. v.B. Karunakar:** (1994) ILLJ 162 SC].

33. While considering the issue of entitlement of back wages, court must record a finding that employee was not otherwise gainfully employed during the relevant period and whether he was free from the blame, [vide **State of U.P. and Ors. v. Atal Bihari Shastri and Ors.** 1993 Suppl. (2) SCC 207]."

161. In the case in hand, the order of termination of the petitioner's service has been quashed on merits. The petitioner's case is covered under Serial No.'A' above. No circumstance which could disentitle the petitioner to grant of full salary has been pointed out. In view of the findings returned by us, the petitioner deserves to be compensated for his confinement which was unwarranted. So far as his dues of salary are concerned, no reason has been pointed out to justify deductions from the petitioner's dues. The respondents have not placed anything to show that the petitioner was in gainful employment after dismissal of service. The principles laid down in para 32 of **Union of India & Ors. v. Ex Sepoy Chander Singh** (Supra) would apply to the present case. However, the petitioner has also not made any disclosure in this regard.

162. Almost 23 years has passed since the petitioner was sentenced and has been dismissed from service. The present case is therefore, not a fit case for remitting the matter for reconsideration on this issue to the employers. The petitioner was also compelled to deposit the fine imposed by the court martial in order to avoid further imprisonment in default of the same. Taking a considered view from all angles, we are of the view that the petitioner deserves to be granted amount equivalent to 50% of his salary for the period that he was dismissed. The petitioner would be

entitled to the full amount of his pension from the date the same became due and payable.

In view of the foregoing discussion, we direct as follows:

(i) The order dated 8th December, 2010 passed by the Armed Forces Tribunal, Principal Bench, New Delhi; the orders dated 1st November, 1990 and 15th March, 1991 of the General Court Martial; the order dated 27th August, 1991 of the Chief of the Naval Staff are hereby set aside and quashed.

(ii) As a result, the petitioner would be entitled to notional benefits of reinstatement with all consequential benefits with effect from 15th March, 1991.

(iii) So far as arrears of salary are concerned, the petitioner shall be entitled to 50% thereof with effect from 15th March, 1991 till such date as the petitioner would have retired from service. He shall be entitled to the full amount of pension due and admissible to him from the date on which he would have retired.

(iv) The respondents shall effect computation of the amounts due and payable to the petitioner in terms of the above within six weeks from today and communicate the same to the petitioner.

(v) The payment of the amount in terms of the above judgment shall be made to the petitioner within a further period of six weeks thereafter.

(vi) The petitioner shall be entitled to refund of the amount of Rs.10,000/- deposited on 5th of September, 1991 which was deposited by him in compliance of the orders dated 15th March, 1991 and 27th August, 1991.

(vii) The petitioner shall be entitled to costs of litigation which is are quantified at Rs.25,000/- which shall be paid within six weeks.

This writ petition is allowed in the above terms.

ILR (2014) II DELHI 909
W.P. (C)

BHOLA RAM ....PETITIONER

VERSUS

GNCTD ....RESPONDENT

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

W.P. (C) NO. : 6941/2011 DATE OF DECISION: 27.09.2013

Land Acquisition Act, 1894—Section 4, 5A, 6, 9, 10, 17 (1) and (4)—Petition filed challenging Notification issued by respondent under Section 4 and 17 (1) and (4) of L.A. Act dispensing with hearing under Section 5A of Act as well as Notification under Section 6 of Act, declaring that land was required for 'public purpose'—Plea taken, notification under Section 6 was issued merely four days before expiry of one year statutory period for Section 6 declaration—Lackadaisical approach of Government shows that there was no real urgency for acquisition of property and it was only for denying a fair hearing under Section 5A that notification under Section 17 (4) was issued—Per contra plea taken, there was actually no delay in matter and that time taken in processing of file was on account of official movement of same and issuance of notifications was in ordinary course—Held—Power under Section 17(4) to dispense with hearing under Section 5-A must not only be exercised sparingly and only in cases where public purpose for which acquisition is sought brooks no delay, but Government ought to exhibit such urgency in its actions as well—During process of acquisition—Both pre and pose notification—While it cannot be held that delays by Government, whether by pre or post notification would, by itself be good ground for courts to interfere with State's invocation of power under Section 17(4), Court would rightly

exercise its power of judicial review and restore to land owner his/her right to be heard under Section 5A where delay is of such a nature as to negate very urgency claimed for invoking Section 17(4)—Perusal of file pertaining to property shows that subsequent to issuance of a letter to LAC on 13th May, 2009, there is a perplexing silence of inactivity till 20th April, 2010—This stares in face of aforesaid urgency which was otherwise vigorously emphasized by respondent for sake of invocation of Section 17(4)—It is evident that although acquisition was requisitioned in February, 2009 to remove paraneal traffic bottleneck coupled with sense of urgent for a smooth of traffic especially in view of then ensuing CWG in October, 2010 yet respondent itself took about 19 months to issue Section 4 notification—This , by no stretch of imagination, can be said to demonstrate any urgency—There was clearly no justification for invocation of urgency provision of Section 17 (4) and consequent denial to petition of valuable right of hearing under Section 5 A—Consequently notification under Section 17 (40 as well as under Section 6 along with notice issues under Sections 9 & 10 of Act quashed.

Important Issue Involved: Power under Section 17 (4) to dispense with the hearing under Section 5-A must not only be exercised sparingly and only in cases where the public purpose for which the acquisition is sought brooks no delay, but the Government ought to exhibit such urgency in its actions as well—During the process of acquisition—Both pre and post notification. While it cannot be held that delays by the Government, whether by pre or post notification would, by itself be good ground for the Courts to interfere with the State's invocation of the power under Section 17 (4), the Court would rightly exercise its power of judicial review and restore to the land owner his/her right to be heard under Section 5A where the delay is of such a nature as to negate the very urgency claimed for invoking Section 17 (4).

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Rakesh Tiku, Sr. Adv., with Mr. Prakash Gautam and Mr. Vivek Ohja, Advocates.

FOR THE RESPONDENT : Ms. Rachna Srivastava, Adv. for R1. Ms. Saroj Bidawat for UOI. Ms. Ferida Satarawala, Adv. for PWD-R3.

CASES REFERRED TO:

1. *Darshan Lal Nagpal (Dead) by LRs.* vs. *Government of NCT of Delhi and ors.,* (2012) 2 SCC 327.
2. *Dev Sharan* vs. *State of Uttar Pradesh,* (2011) 4 SCC 769.
3. *Devender Kumar Tyagi and ors.* vs. *State of Uttar Pradesh,* (2011) 9 SCC 164.
4. *Radhey Shyam* vs. *State of Uttar Pradesh,* (2011) 5 SCC 553.
5. *Anand Singh and Anr.* vs. *State of Uttar Pradesh and Ors.,* reported in (2010) 11 SCC 242.

RESULT: Allowed.

NAJMI WAZIRI, J.

1. The petitioner seeks the quashing of Notification dated 9th August, 2010 issued by the respondent, Government of National Capital Territory of Delhi ("GNCTD") under sections 4 and 17 (1) and (4) of the Land Acquisition Act, 1894 ("Act") dispensing with the hearing under section 5A of the Act, as well as Notification dated 4th August, 2011 under section 6 of the Act, declaring that the land was required for 'public purpose' i.e. modification and improvement of the T-junction of Anuvrat Marg and Aurobindo Marg. The petitioner also seeks quashing of the undated notice purported to have been issued under sections 9 and 10 of the Act.

2. The land in question is 4 biswas in Khasra No. 169/2 in Lado

Sarai, New Delhi ("property"), measuring about 200 square yards. The petitioner claims adverse possession of the property by virtue of being in continuous possession of it since 1948. To demonstrate his continuous possession, he relies upon an order of 22nd February 1979 passed by the Court of Sh. S.C. Poddar, SDM (Revenue Assistant) in a suit titled Kumari Keertika Vardhan v Bhola Ram, filed under section 84 of the Delhi Land Reforms Act, 1954, which order recorded under:-

> *"The evidence and documents on record therefor prove clearly that the defendant was in possession of the suit land for much longer than three years before the date of filing of the Application under section 84 of the Delhi Land Reforms Act and obviously the suit is barred by limitation and is decided in favour of the defendant."*

3. The revision preferred against the said order was rejected by the Financial Commissioner on 13th March, 1980. The property is adjacent to a petrol pump and a ground floor structure has been built upon it. The petitioner has also annexed municipal records showing that he had a cycle shop registered at the said address under the Delhi Shops and Establishments Act, 1954 vide a certificate dated 7th December, 1984 issued by the Chief Inspector, Shops and Establishments, Delhi. Documents of proceedings to assess property tax apropos 1A, Lado Sarai, New Delhi (being the property, identified by its postal address), are also annexed alongwith supporting receipts of payment of property tax for the years 2005 and 2010. The petitioner claims to be enjoying the property exclusively and in his individual right. Ms. Kanika Devi Verma, in whose name the land is recorded in the Revenue Records, was proceeded ex parte in these proceedings after service of notice.

4. The petitioner argues that his property alone is sought to be acquired, whereas the land immediately behind his property, which would necessarily be required for widening of the T-junction, has not been notified for acquisition. Therefore, the purported acquisition is evidently not for the professed public purpose. He contends that unless all requisite lands are acquired for widening of the road at the said T-junction, including the area under the petrol pump adjacent to the property and also the area behind it, the project could neither be initiated nor could it be viably completed. Therefore, he sought to contend, the section 4 notification would itself be without basis and a blatantly arbitrary exercise of power.

5. Evidently, the notification of 9th August, 2010 under sections 4 and 17 of the Act, was issued because the property was ostensibly required urgently for the stated public purpose. However, for almost 360 days of the year thereafter, the government did not take any action to demonstrate urgency in the acquisition of the property. Mr. Rakesh Tiku, learned Senior Advocate, submits on behalf of the petitioner that the notification under section 6 was issued on 4th August, 2011, i.e., merely four days before the expiry of the one year statutory period for the section 6 declaration. He contended that the lackadaisical approach of the government shows that there was no real urgency for acquisition of the property, and it was only for denying a fair hearing under section 5A, that the notification under section 17 (4) was issued. He contended that the same was an arbitrary and a colourable exercise of power; it also resulted in denial of the valuable right of hearing under section 5A. Therefore it ought to be quashed

6. In its counter affidavit, as well as in its submissions before the Court, the government contends that over the years, like its population, the volume of traffic has increased manifold in the National Capital Territory of Delhi. One consequence of the profusion of vehicular traffic is a daily traffic bottleneck due to the narrow approach leading to the T-junction in question. This required urgent attention and a lasting solution, all-the-more-so in view of the then ensuing Commonwealth Games ("CWG"). It was further submitted by Ms. Rachna Srivastava, Counsel for the Land & Building Department/Land Acquisition Commissioner, i.e., R2, that keeping the CWG in view, a requisition was sent by the Public Works Department ("PWD") of the GNCTD on 9th February, 2009 for acquisition of the 4 biswas of land (the property). This requisition was supported by a recommendation of the Delhi Traffic Police. It is stated that on either side of Anuvrat Marg (the road concerned), approximately 250 square metres each were required for widening of the road under the guidelines for the CWG. Accordingly, the location plan for requisition was sent to the Land Acquisition Commissioner (South) ("LAC") on 13th May, 2009 to ascertain the availability of land and to elicit the relevant records of the Revenue for acquisition proceedings. It is further submitted that the latter took almost a year to send his joint survey report on 4th April, 2010 to the PWD, after computing 80% of the acquisition-compensation amount. Thereafter, another four months were spent over drafting a notification, conducting survey, etc., with

respect to issuance of the notifications under sections 4 and 17 on 9th August, 2010 and as aforesaid, about 360 days thereafter the notification under section 6 was issued. Thus, Counsel for the Respondent No. 1 submitted, there was actually no delay in the matter and that the time taken in the processing of the file was on account of official movement of the same and issuance of notifications was in the ordinary course.

7. Learned Senior Advocate for the petitioner, placed reliance upon the judgement of the Supreme Court in **Anand Singh and Anr. v. State of Uttar Pradesh and Ors.,** reported in (2010) 11 SCC 242. In that case, referring to various precedents on the issue, the Supreme Court held inter alia as under:

> *"40. "Eminent domain" is the right or power of a sovereign State to appropriate the private property within the territorial sovereignty to public uses or purposes. It is exercise of strong arm of the Government to take property for public uses without the owner's consent. It requires no constitutional recognition; it is an attribute of sovereignty and essential to the sovereign government. [Words and Phrases, Permanent Edn., Vol. 14, 1952 (West Publishing Co.).*]
>
> *41. The power of eminent domain, being inherent in the Government, is exercisable in the public interest, general welfare and for public purpose. Acquisition of private property by the State in the public interest or for public purpose is nothing but an enforcement of the right of eminent domain. In India, the Act provides directly for acquisition of particular property for public purpose. Though the right to property is no longer a fundamental right but Article 300-A of the Constitution mandates that no person shall be deprived of his property save by authority of law. That Section 5-A of the Act confers a valuable right to an individual is beyond any doubt. As a matter of fact, this Court has time and again reiterated that Section 5-A confers an important right in favour of a person whose land is sought to be acquired.*
>
> *42. When the Government proceeds for compulsory acquisition of a particular property for public purpose, the only right that the owner or the person interested in the property has, is to submit his objections within the prescribed time under Section 5-*

A of the Act and persuade the State authorities to drop the acquisition of that particular land by setting forth the reasons such as the unsuitability of the land for the stated public purpose; the grave hardship that may be caused to him by such expropriation, availability of alternative land for achieving public purpose, etc. Moreover, the right conferred on the owner or person interested to file objections to the proposed acquisition is not only an important and valuable right but also makes the provision for compulsory acquisition just and in conformity with the fundamental principles of natural justice.

43. The exceptional and extraordinary power of doing away with an enquiry under Section 5-A in a case where possession of the land is required urgently or in an unforeseen emergency is provided in Section 17 of the Act. Such power is not a routine power and save circumstances warranting immediate possession it should not be lightly invoked. The guideline is inbuilt in Section 17 itself for exercise of the exceptional power in dispensing with enquiry under Section 5-A. Exceptional the power, the more circumspect the Government must be in its exercise. The Government obviously, therefore, has to apply its mind before it dispenses with enquiry under Section 5-A on the aspect whether the urgency is of such a nature that justifies elimination of summary enquiry under Section 5-A."

(Emphasis supplied)

Dwelling further upon the issue of how mere likelihood of delay (in the acquisition proceeding) ought to not be the only consideration for dispensing with hearing under section 5A, the Supreme Court observed:

"46. As to in what circumstances the power of emergency can be invoked are specified in Section 17(2) but circumstances necessitating invocation of urgency under Section 17(1) are not stated in the provision itself ..In many cases, on general assumption likely delay in completion of enquiry under Section 5-A is set up as a reason for invocation of extraordinary power in dispensing with the enquiry little realising that an important and valuable right of the person interested in the land is being taken away and with some effort enquiry could always be completed expeditiously."

8. Mr. Tiku further sought to rely upon the judgement of the Supreme Court in the case of **Devender Kumar Tyagi and ors. v. State of Uttar Pradesh,** (2011) 9 SCC 164, wherein the observations made in **Radhey Shyam v State of Uttar Pradesh,** (2011) 5 SCC 553 were reiterated:-

"77 à

(iv) The property of a citizen cannot be acquired by the State and/or its agencies/instrumentalities without complying with the mandate of Sections 4, 5-A and 6 of the LA Act. A public purpose, however, laudable it may be does not entitle the State to invoke the urgency provisions because the same have the effect of depriving the owner of his right to property without being heard. Only in a case of real urgency, the State can invoke the urgency provisions and dispense with the requirement of hearing the landowner or other interested persons.

....

(v) Section 17(1) read with Section 17(4) confers extraordinary power upon the State to acquire private property without complying with the mandate of Section 5-A. These provisions can be invoked only when the purpose of acquisition cannot brook the delay of even a few weeks or months. Therefore, before excluding the application of Section 5-A, the authority concerned must be fully satisfied that time of few weeks or months likely to be taken in conducting inquiry under Section 5-A will, in all probability, frustrate the public purpose for which land is proposed to be acquired....."

The Supreme Court further referred to its earlier dictum in **Dev Sharan v State of Uttar Pradesh,** (2011) 4 SCC 769, where it had held as under:

"37. Thus the time which elapsed between publication of Section 4(1) and Section 17 notifications, and Section 6 declaration in the local newspapers is 11 months and 23 days i.e. almost one year. This slow pace at which the government machinery had functioned in processing the acquisition, clearly evinces that there was no urgency for acquiring the land so as to warrant invoking Section 17(4) of the LA Act."

9. On the strength of the above judgements, Learned Senior Advocate sought to urge that the present case is clearly one where exercise of the power of judicial review of this Court is warranted, inasmuch as not only was there no urgency requiring the exercise of the powers under section 17 (4), but any urgency even if it did exist, would have long perished due to the delay – both pre and post-notification. This delay is exclusively by the government's own volition, inaction, indifference, lethargy, call it whatever one may.

10. This Court finds merit in the contentions of the petitioner. It is settled law that the right to hearing under section 5A is a valuable right and it cannot be taken away from the citizen by merely recording in the file that the land is required urgently. The corresponding facts and circumstances of each case would have to be examined to establish that the invocation of section 17 (4) is just and fair.

11. This court notices that more recently the Supreme Court, in **Darshan Lal Nagpal (Dead) by LRs. v Government of NCT of Delhi and ors.,** (2012) 2 SCC 327 had occasion to deal with a similar fact situation of emergency provisions under section 17 being invoked, interestingly again in the context of the upcoming CWG. Striking down the action of the government as being wholly unjustified in the facts of the case, given the undue delay both pre and post-notification, the Court, observed:

> *"38. A recapitulation of the facts would show that the idea of establishing 400/220 kV substation was mooted prior to August 2004. For next almost three years, the officers of DTL and DDA exchanged letters on the issue of allotment of land. On 28-7-2008 the Secretary (Power), Government of NCT of Delhi-cum-CMD, DTL made a suggestion for the acquisition of land by invoking Section 17 of the Act. This became a tool in the hands of the authorities concerned and the Lieutenant Governor mechanically approved the proposal contained in the file without trying to find out as to why the urgency provisions were being invoked after a time gap of five years. If the substation was to be established on emergency basis, the authorities of DTL would not have waited for five years for the invoking of urgency provisions enshrined in the Act. They would have immediately approached the Government of NCT of Delhi and made a request*

> *that land be acquired by invoking Section 17 of the Act. However, the fact of the matter is that the officers functionaries/concerned of DTL, DDA and the Government of NCT of Delhi leisurely dealt with the matter for over five years. Even after some sign of emergency was indicated in the letter dated 9-9-2008 of the Joint Secretary (Power), who made a mention of the Commonwealth Games scheduled to be organised in October 2010, it took more than one year and two months to the competent authority to issue the preliminary notification. Therefore, we are unable to approve the view taken by the High Court on the sustainability of the appellants' challenge to the acquisition of their land.*
>
> (Emphasis supplied)

12. It is clear from the precedents cited above, that power under section 17 (4) to dispense with the hearing under section 5A must not only be exercised sparingly and only in cases where the public purpose for which the acquisition is sought brooks no delay, but the government ought to exhibit such urgency in its actions as well – during the process of acquisition – both pre and post-notification. While it cannot be held that delays by the government, whether pre or post-notification would, by itself be good ground for the courts to interfere with the State's invocation of the power under section 17 (4), the court would rightly exercise its power of judicial review and restore to the land owner his/her right to be heard under section 5A where the delay is of such a nature as to negate the very urgency claimed for invoking section 17 (4).

13. We have had the benefit of perusing the file pertaining to the property, and note that subsequent to a draft letter being prepared on 13th May 2009 which admittedly was issued to the LAC on the same date, there is a perplexing silence of inactivity till 20th April 2010. This stares in the face of the professed urgency which was otherwise vigorously emphasised by the respondent for the sake of invocation of section 17 (4). The records also reflect that indeed the PWD had requested the Delhi Development Authority ("DDA") for acquisition of the aforesaid land way back on 14th January, 2009. Therefore, one could safely presume that the preparatory work for widening of the T-junction would have started some time towards the end of 2008 i.e. at least 2-3 months earlier.

14. From the aforesaid narration of facts, it is evident that although the acquisition was requisitioned in February 2009 to remove the perennial traffic bottleneck, coupled with the sense of urgency for a smooth flow of traffic especially in view of the then ensuing CWG in October, 2010 yet the respondent itself took about nineteen months to issue the section 4 notification. This, by no stretch of imagination, can be said to demonstrate any urgency.

15. Even thereafter, once the notifications under sections 4 and 17 were issued, the Government took almost a year (less four days) to issue the section 6 notification. Where both the requisitioning and the acquiring authority took almost twenty months to two years in issuing the section 4 notification and then another year in issuing the section 6 notification, it could hardly be said that there was any urgency. Allthemoreso when only one land owner was concerned for a small parcel of around 200 square yards.

16. There is no gainsaying the fact that when traffic causes bottleneck on a main traffic artery especially with the ever burgeoning traffic volume, the sense of urgency ought be of an immediate and an escalating degree with every passing day. Neither the records, nor the actions of the respondent reflect any such urgency or responsible exercise of authority as would be expected in such cases. Therefore, the ground for invocation of powers under sections 17 (1) and (4) is untenable.

17. Whatever urgency there may be with respect to the need for the property and consequently the compelling reason for issuance of notification under section 17 (4) for dispensing with the section 5A hearing, had been frittered away by the lethargic and indeed lackadaisical approach in the processing of the file by both – the requisitioning and acquiring authorities. The Lt. Governor, on 16th July 2010, recorded his satisfaction for the urgent acquisition of the land in question and accordingly dispensed with the application of section 5A. The notification under sections 4 and 17(4) was issued three weeks thereafter. However, the same records before the Lt. Governor would have also borne out that for almost 18 months, since the requisition for land was made by the PWD by their letter-way back on 9th February 2009, no action would be found evidencing urgency in the acquisition proceedings. In the circumstances, the Lt. Governor's satisfaction would be without basis and not borne out from the records. The mere statement of the urgent

requirement of the land would itself not be sufficient reason to enable invocation of that provision of statute. The claim of urgency is further defeated by the fact that the LAC himself took almost a year simply to survey the lands (along with officials of the PWD) to prepare the aks shajra.

18. In view of the above discussion, this court is of the opinion that there was clearly no justification for the invocation of the urgency provision of section 17 (4) and the consequent denial to the petitioner of the valuable right of hearing under section 5A. Consequently, we quash the notification dated 9th August 2010 under section 17 (4), as well as the notification of 4th August 2011 under section 6, along with the undated notice purported to be issued under sections 9 and 10 of the Act.. The respondent would accord the petitioner his rights under section 5A. The GNCTD is at liberty to complete the acquisition proceeding, if advised, after the hearing under section 5A and after considering the Collector's report.

19. Before disposing off this petition this court notices, not without some concern, that in the present case, evidently, the action of the government authorities both pre and post-notification was lackadaisical, even phlegmatic. The notification under section 6, issued on 4th August, 2011 appears to have been done so in a hurry possibly to meet the statutory limitation of one year. No explanation, however, appears either from the acquisition notifications file or from the submissions made before this court as to why the PWD had not taken any action since January 2009 or why the LAC failed to take any action between May 2009 and April 2010. Even assuming that urgency existed in early 2009 when the PWD had originally requisitioned the land because of the emergent situation as then recorded, such urgency has perhaps been frittered away by the authorities by their lethargic and lackadaisical approach. The file languished. It holds no evidence apropos the professed urgent need of the property in public interest. While it is incontrovertible that the right or power of eminent domain cannot be abused by the government, so also is it indisputable that authorities charged with exercising such power ought to act with as much efficiency and promptitude as warrants the urgency and exigency of the situation. It would be a worthwhile exercise for a diligent administration to identify officials who, because of their slothful or indifferent disposition or for other reasons, fail to accord the requisite attention to the provision of adequate remedies to acknowledged

urgent needs of a people. This need is all the more acute in the National Capital Territory bearing in mind its fast burgeoning population and traffic density and projected growth. Accountability ought to be fixed on such officers who let project files languish which in turn delays the creation of adequate civic infrastructure, thus compounding the problems of the city and subjecting the citizens to unwarranted sufferings.

20. The writ petition is allowed but in the above mentioned terms. There shall be no order as to costs.

ILR (2014) II DELHI 921
W.P. (C)

DHIRAJ BHATT **....PETITIONER**

VERSUS

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

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 6738/2012 & CM NO. : 17689/2012 **DATE OF DECISION: 27.09.2013**

Constitution of India, 1950—Article 226, General Conditions of the CCS (Leave Rules), Rule 7 of Chapter 2, 25: Petitioner has filed writ aggrieved by order rejecting Petitioner's candidature for appointment as SI in the Limited Departmental Competitive Examination (LDCE) and older. Further aggrieved by order whereby sanctioned casual leave was cancelled and the period was regularized as earned leave. Petitioner applied for 10 days of casual leave in April, 2010 and was supposed to report back on 15.04.2010—Ongoing Kumbh Mela caused disruption in transport—Causing Petitioner to report back to work one day late. The said explanation was acception as bonafide.

Respondents passed an order on 03.05.2010 converting the Petitioner's casual leave to half pay leave without salary and allowances, and that the same would be treated as a break in service rendering the Petitioner ineligible for the LDCE. Held: Respondents failed to communicate order dated 03.05.2010—Burden of disclosing the same lay on the respondents—In the present case by adjusting the absence of the petitioner against leave admissible, respondents have treated the petitioner's leave as bonafide—No order has been passed treating the period as a break in service, thus the same cannot be so treated—Further, scheme of the examination does not stipulate 4 continuous years of service preceding the LDCE—Order converting petitioner's casual leave to earned leave is quashed and the said period shall be treated as casual leave—Respondents directed to consider petitioner's candidature for appointment as Sub-Inspector—Petitioner entitled to notional seniority, but not backwages or arrears in salary.

So far as the manner in which the respondents have proceeded in the matter is concerned, we are compelled to note the fact that the respondents proceeded to pass the order dated 3rd May, 2010 so far as petitioner's half day absence was concerned. This order was passed behind the back of the petitioner. The respondents not only treated the half day absence of the petitioner as leave half pay without salary and allowances, but the respondents also cancelled the sanctioned casual leave of 10 days to the petitioner and treated the period from 1st April, 2010 to 15th April, 2010 as earned leave. **(Para 10)**

So far as the competency of the respondents to alter the leave of the petitioner from casual leave to earned leave is concerned, Rule 7 of Chapter II – General Conditions of the CCS (Leave Rules) is relevant and reads as follows:-

"7. **Right to leave**

(1) Leave cannot be claimed as of right.

(2) When the exigencies of public service so require, leave of any kind may be refused or revoked by the authority competent to grant it, but it shall not be open to that authority to alter the kind of leave due and applied for except at the written request of the Government servant." (Emphasis by us) **(Para 13)**

It is evident from the above that the respondents have no authority to cancel the leave which was sanctioned to the petitioner or to covert the same into earned leave. **(Para 14)**

In the instant case, the respondents have regularized the petitioner's absence as half pay leave without salary and allowances. The respondents have not directed that the same would be treated as an interruption or break in service of the petitioner. There is also no decision as that such absence rendered the petitioner ineligible for appearing in LDCE for which the minimum period of continuous service is required. The respondents having passed an order regularizing the period of absence, in the given circumstances, such absence could not have come in the way of the petitioner's entitlement to appear in the LDCE and for appointment if found successful. **(Para 16)**

It is an admitted position that the respondents have treated the absence of the petitioner as bonafide when they have adjusted it against the leave admissible to the petitioner. It is accepted that it was not wilful absence which would have invited the consequences set out in the rules. The same has not been treated as misconduct and therefore, no disciplinary action has been taken against the petitioner. No order has also been passed by the competent authority that this period is to be treated as break in service. The same cannot be so treated. **(Para 19)**

So far as participation and the result of the LDCE examination is concerned, we find that as per the scheme of the

examination, the respondents have mandated checking of service records as stage one; written examination as stage two; physical measurement as stage three; physical efficiency test as stage four and the medical examination as stage five. **(Para 20)**

The requirement as per the scheme of the examination is that the candidate should have completed four years of service including basic training. The stipulation is not that a candidate should have completed four years of continuous service immediately preceding the LDCE. This distinction has been completely overlooked in the matter inasmuch as the petitioner had joined the force as back as on 2nd February, 2006 and therefore, at the relevant time had more than six years of service. **(Para 23)**

We find that the respondents have taken a completely new stand in the counter affidavit which is to the effect that the petitioner had suppressed the order dated 3rd May, 2010. We have found above that the respondents had failed to communicate the order dated 3rd May, 2010 to the petitioner. He could not be expected to disclose what he had no knowledge of. In any case as per the scheme of the examination, the respondents were required to scrutinize the service record as checking the service record of the candidate is stage one of the examination process. The burden would therefore, lie strictly on them. Even otherwise, as per the application form prescribed for the purposes of the examination by the respondents, we are informed that it requires the candidate to give "details of punishment/rewards if any". No column for disclosing his leave account exists in the form. **(Para 24)**

The order whereby the petitioner leave was converted from casual leave to earned leave and half day absence treated as leave half pay was not treated as a punishment by the respondents. **(Para 25)**

In view of the above discussion, the order dated 3rd May, 2010 to the extent that it cancels the petitioner's casual

leave and directs that it be treated as earned leave is not sustainable and is completely set aside and quashed. The said period shall be treated as casual leave and appropriate corrections shall be effected in leave and service record of the petitioner within six weeks. **(Para 26)**

We also hold that the direction of the respondents to treat the 16th April, 2010 one day leave half pay without salary and allowances does not tantamount to punishment imposed upon the petitioner. The same was never so treated by the respondents and it cannot impede the petitioner appointment pursuant to the LDC Examination - 2012 in which the petitioner participated or may participate in future. **(Para 27)**

In view of the above, the respondents are directed to consider the case of the petitioner in the light of the above for appointment in accordance with his merit in the examination conducted for appointment to the post of Sub-Inspector/GD LDCE held in September, 2012. Appropriate orders shall be passed by the respondents within in a period of six weeks from today. **(Para 28)**

We make it clear that the petitioner shall be entitled to notional seniority as per the order of his merit and consequential benefits. It is further directed that the petitioner shall be placed immediately above the persons below him in the order of merit in the said examination. **(Para 29)**

The petitioner shall not be entitled to any backwages and arrears of salary. This writ petition is allowed in the above terms. **(Para 30)**

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Anuj Aggarwal and Mr. Gaurav Khanna, Advs.

FOR THE RESPONDENT : Mr. B.V. Niren.

RESULT: Writ petition allowed.

GITA MITTAL, J. (Oral)

1. The writ petitioner is aggrieved by an order dated 11th September, 2012 whereby the respondents have rejected his candidature for appointment as Sub-Inspector/GD in the Limited Departmental Competitive Examination – 2010 ('LDCE - 2010' hereafter). The petitioner is also aggrieved by the order dated 3rd May, 2010 whereby his sanctioned casual leave of 10 days with effect from 1st April, 2010 to 15th April, 2010 was cancelled and the period was regularized as earned leave. By the same order, the respondents have treated the petitioner having reported on 16th April, 2010 as leave half pay without salary and allowances.

2. The facts giving rise to the instant writ petition are in narrow compass.

3. The petitioner was recruited on the 2nd of February, 2006 as Constable/BUG with the Central Reserve Police Force ('CRPF' hereafter) and since July, 2007 he had been deployed with the CRPF Battalion at Doda, Jammu and Kashmir. On completion of four years diligent service with the CRPF, the petitioner had applied for taking the Limited Departmental Competition Examination – 2010 ('LDCE.) for the post of Sub-Inspector/GD. The petitioner undertook the examination in February, 2012 but could not qualify the same.

4. The petitioner again appeared in the examination held on 2nd September, 2012 wherein he was declared as qualified. The petitioner also qualified the physical efficiency test and the medical examination and therefore, had completed all requirements for appointment pursuant thereto. However, on 12th September, 2012, the petitioner received a communication dated 11th September, 2012 informing him that his candidature for appointment to the post of Sub-Inspector/GD through the said LDCE has been rejected as his service book revealed that there was one day "Leave Half Pay (LHP)/Non Qualifying Service (NQS)" on the 16th April, 2010.

5. The petitioner sought audience from the DIGP (Recruitment) requesting his intervention and kind consideration. However, he was unsuccessful in getting redressal. Finally on 16th September, 2012, the petitioner addressed a detailed e-mail to the Director General of the CRPF requesting his personal hearing and also seeking his intervention explaining

in detail the facts and circumstances which were responsible for his inability to report to duty on expiry of the casual leave on 15th April, 2010.

6. As the same did not receive any favourable consideration, the petitioner filed WP(C)No.6144/2012 before this court seeking a direction against the respondents and quashing of the order dated 11th September, 2012. However, this writ petition had to be withdrawn on 1st October, 2012 with liberty to file fresh writ petition for the reason that the petitioner had not enclosed the rules which applied to the facts of the instant case.

7. We find that so far as casual leave which was sanctioned to the petitioner is concerned, it is undisputed. The respondents also do not dispute that the petitioner was required to report to the CRPF Battalion on the evening of 15th April, 2010. However, he could not do so.

8. So far as the circumstances which were responsible for the late reporting of the petitioner are concerned, the petitioner has explained the same in his e-mail dated 16th September, 2012. The relevant portion may usefully be extracted and reads as follows:-

> "Here, I would like to explain the reason for one day LHP(NQS). Actually, I went on 10 days casual leave in April, 2010 and was to report on 15-04-2010 by evening roll call at BN HQ, Jammu. I left my hometown in the early evening of 14-04-2010 and I reached Rishikesh (Uttarakhand) around 3 at night of 15-04-2010 but due to ongoing Kumbh mela 2010 there was severe shortage of inter-state public transport buses and other road transport were stuck in huge taffic jam due to Kumbh Fair (mela) in Haridwar. I tried my best to get possible means of traposrt so that I can reach Jammu by the evening of 15-04-2010, but there was complete traffic chaos in Rishikesh and Haridwar because there were more than 10 million (1 crore) people gathered to take holy dip in river Ganga that day. After trying for several hours in vain, I was left with only one option that to travel by a train in an unreserved general compartment on 15-04-2010. On that day even train" schedule was badly affected by the Kumbh mela and all the trains originating from Haridwar and Rishikesh were running late by several hours. I boarded the train (Hemkunt Express) from Haridwar (on that day it started from hardiwar instead of Rishikesh – its actual originating station) and it was 3 hours late than its actually schedule when it left Hardiwar and by the time it reached Jammu, it was late by 9 hours. Its actual arrival time to reach Jammu is 04:30 AM but it reached Jammu at 01:30 PM on 16-04-2010. I also got this late arrival time mentioned at the back of my leave pass. After this I immediately reported to 76 BN HQ, Channi-Himmat, Jammu (J&K) at 2:30 PM same day.
>
> I am a very sincere and responsible serviceman of this Mahan Bal and I have never defaulted in my six years tenure, I never reported late from my leave, never misbehaved with my colleagues and seniors, and always efficiently met and fulfilled my responsibilities and expectations from this Mahan Bal and I.m committed to follow this throughout my career."

9. The petitioner has placed before us also the endorsement recorded at the railway station by the concerned authority at the station when he boarded the train (Hemkunt Express). The circumstances explained by the petitioner were certainly beyond his control. The respondents are unable to point out anything to doubt the truth and bonafide of the explanation given by the petitioner.

10. So far as the manner in which the respondents have proceeded in the matter is concerned, we are compelled to note the fact that the respondents proceeded to pass the order dated 3rd May, 2010 so far as petitioner's half day absence was concerned. This order was passed behind the back of the petitioner. The respondents not only treated the half day absence of the petitioner as leave half pay without salary and allowances, but the respondents also cancelled the sanctioned casual leave of 10 days to the petitioner and treated the period from 1st April, 2010 to 15th April, 2010 as earned leave.

11. The petitioner has contended that the order dated 3rd May, 2010 was never served upon the petitioner. The petitioner had also not made any request for conversion of his casual leave into the earned leave.

12. The fact that the order was not communicated is supported by the endorsement made on the impugned order dated 11th September, 2012 which had required the concerned authority to convey the order dated 3rd May, 2010 to the petitioner. Furthermore the averment of the petitioner in this behalf is not disputed by the respondents in the counter

affidavit. In any case, there has been no proof placed before us that this order was ever served upon the petitioner.

13. So far as the competency of the respondents to alter the leave of the petitioner from casual leave to earned leave is concerned, Rule 7 of Chapter II – General Conditions of the CCS (Leave Rules) is relevant and reads as follows:-

> "7. **Right to leave**
>
> (1) Leave cannot be claimed as of right.
>
> (2) When the exigencies of public service so require, leave of any kind may be refused or revoked by the authority competent to grant it, but it shall not be open to that authority to alter the kind of leave due and applied for except at the written request of the Government servant." (Emphasis by us)

14. It is evident from the above that the respondents have no authority to cancel the leave which was sanctioned to the petitioner or to covert the same into earned leave.

15. So far as the petitioner's inability to report on 15th April, 2010 is concerned, we find that the same was bonafide and for the reasons completely beyond his control. The petitioner had left his home town and was enroute to his place of posting when the circumstances midway intervened and he was unable to find any transportation to reach his destination.

16. In the instant case, the respondents have regularized the petitioner's absence as half pay leave without salary and allowances. The respondents have not directed that the same would be treated as an interruption or break in service of the petitioner. There is also no decision as that such absence rendered the petitioner ineligible for appearing in LDCE for which the minimum period of continuous service is required. The respondents having passed an order regularizing the period of absence, in the given circumstances, such absence could not have come in the way of the petitioner's entitlement to appear in the LDCE and for appointment if found successful.

17. Our attention has also been drawn to the comments in Swami Handbook 2010 made in Chapter V captioned as "Unauthorized absence – Break in service". The relevant portion whereof reads as follows:-

> "1. Wilful absence from duty not covered by grant of leave will be treated as dies non for all purpose, viz., increment, leave and pension. Such absence without leave standing singly and not in continuation of any authorozed leave of absence will constitute an interruption in service entailing forfeiture of past service for the purpose of pension and requires coordination by the Appointing Authority for counting past service for pension Condonation on such break for pension should be considered suo motu and cannot be refused as a matter of course, except in exceptional and grave circumstances.
>
> 2. Unauthorized absence after leave, will be debited against his half pay leave account excess, if any, being treated as extraordinary leave. However, he will not be entitled to any leave salary.
>
> 3. All cases of unauthorized absence from duty or in continuation of leave, will render a Government servant liable for disciplinary action, treating it as misconduct."

18. Mr. B.V. Niren, learned counsel for the respondents placed reliance on the Rule 25 of CCS (Leave Rules). We find that reliance on Rule 25 is of no assistance to the respondents. Even this rule permits the authority to grant leave or extend the leave to a government servant who remains absent or to direct that after the end of leave, the period of his absence shall be debited against his leave account as though it were half pay leave to the extent such leave is due. Sub-Rule 2 of Rule 25 specifically states that wilful absence from duty after the expiry of leave renders a government servant liable to disciplinary action. From the above narration of facts it is apparent that the respondents also did not consider the petitioner's absence as wilful and have not subjected him to any disciplinary action.

19. It is an admitted position that the respondents have treated the absence of the petitioner as bonafide when they have adjusted it against the leave admissible to the petitioner. It is accepted that it was not wilful absence which would have invited the consequences set out in the rules. The same has not been treated as misconduct and therefore, no disciplinary action has been taken against the petitioner. No order has also been passed by the competent authority that this period is to be treated as break in service. The same cannot be so treated.

20. So far as participation and the result of the LDCE examination is concerned, we find that as per the scheme of the examination, the respondents have mandated checking of service records as stage one; written examination as stage two; physical measurement as stage three; physical efficiency test as stage four and the medical examination as stage five.

21. It is undisputed that the petitioner has successfully cleared all stages of the selection process for the LDCE – 2012. It was only thereafter that the respondents have rejected his candidature as they have wrongly treated his absence of half day absence of 16th April, 2010 as a break in service while considering him eligible to appear in the said examination.

22. The stand of the respondents is inappropriate for yet another reason as para 3 of the scheme for the said LDC Examination is concerned, the respondents have prescribed the following eligibility condition.

"3. Eligibility conditions:

Xxx xxx xxx

a) Service eligibility : They should have completed four years of Service, including basic training."

23. The requirement as per the scheme of the examination is that the candidate should have completed four years of service including basic training. The stipulation is not that a candidate should have completed four years of continuous service immediately preceding the LDCE. This distinction has been completely overlooked in the matter inasmuch as the petitioner had joined the force as back as on 2nd February, 2006 and therefore, at the relevant time had more than six years of service.

24. We find that the respondents have taken a completely new stand in the counter affidavit which is to the effect that the petitioner had suppressed the order dated 3rd May, 2010. We have found above that the respondents had failed to communicate the order dated 3rd May, 2010 to the petitioner. He could not be expected to disclose what he had no knowledge of. In any case as per the scheme of the examination, the respondents were required to scrutinize the service record as checking the service record of the candidate is stage one of the examination process. The burden would therefore, lie strictly on them. Even otherwise, as per the application form prescribed for the purposes of the examination

by the respondents, we are informed that it requires the candidate to give "details of punishment/rewards if any". No column for disclosing his leave account exists in the form.

25. The order whereby the petitioner leave was converted from casual leave to earned leave and half day absence treated as leave half pay was not treated as a punishment by the respondents.

26. In view of the above discussion, the order dated 3rd May, 2010 to the extent that it cancels the petitioner's casual leave and directs that it be treated as earned leave is not sustainable and is completely set aside and quashed. The said period shall be treated as casual leave and appropriate corrections shall be effected in leave and service record of the petitioner within six weeks.

27. We also hold that the direction of the respondents to treat the 16th April, 2010 one day leave half pay without salary and allowances does not tantamount to punishment imposed upon the petitioner. The same was never so treated by the respondents and it cannot impede the petitioner appointment pursuant to the LDC Examination - 2012 in which the petitioner participated or may participate in future.

28. In view of the above, the respondents are directed to consider the case of the petitioner in the light of the above for appointment in accordance with his merit in the examination conducted for appointment to the post of Sub-Inspector/GD LDCE held in September, 2012. Appropriate orders shall be passed by the respondents within in a period of six weeks from today.

29. We make it clear that the petitioner shall be entitled to notional seniority as per the order of his merit and consequential benefits. It is further directed that the petitioner shall be placed immediately above the persons below him in the order of merit in the said examination.

30. The petitioner shall not be entitled to any backwages and arrears of salary. This writ petition is allowed in the above terms.

CM No.17689/2012

31. In view of the writ petition having being allowed, this application does not survive for adjudication and is disposed of.

ILR (2014) II DELHI 933
FAO (OS)

SUDARSHAN SAREEN **....APPELLANT**

VERSUS

NATIONAL SMALL INDUSTRIES CORPORATION LTD. AND ANR. **....RESPONDENTS**

(BADAR DURREZ AHMED & VIBHU BAKHRU, JJ.)

FAO (OS) NO. : 482/2011 & CM NO. : 18432/2011 **DATE OF DECISION: 01.11.2013**

Code of Civil Procedure, 1908—Order 9 Rule 13—Appeal against dismissal of application u/o 9 r 13 for setting aside ex parte decree. Held—An ex parte decree can be set aside when a Defendant satisfies the Court that the summons had not been duly served or he was prevented by sufficient cause from appearing when the suit was called for hearing. Appellant had admitted the service of summons. Appellant was aware of the pendency for the suit and had sufficient time to appear and answer the claim of respondent no. 1. Only reason given by Appellant for not appearing in Court is the alleged assurance given by Respondent no. 2 that the Appellant would be duly represented in the matter. This reason cannot constitute a sufficient cause for non-appearance of Appellant. Appellant has been willfully negligent, recourse to Or. 9 R. 13 not available. Appeal Dismissed.

A plain reading of the provisions of Order IX Rule 13 of the CPC indicates that an ex-parte decree can be set aside when a defendant satisfies the court that the summons had not been duly served or he was prevented by sufficient cause from appearing when the suit was called on for hearing. As per second proviso of Order 9 Rule 13 of CPC,

the court is proscribed from setting aside the ex-parte decree on mere irregularity in the service of summons or in a case where the defendant had notice of the date of hearing and sufficient time to appear in court. **(Para 11)**

Following the aforesaid decisions, we do not feel that the appellant has been able to show sufficient cause for not appearing in the proceeding. In the present case, the appellant has admitted the service of summons. Admittedly, the appellant was aware of the pendency of the suit and had sufficient time to appear and answer the claim of respondent no. 1. The only reason given by appellant for not appearing in court is the alleged assurance given by respondent no. 2 that the appellant would be duly represented in the matter. We find that this reason cannot by any stretch constitute a sufficient cause for non-appearance of the appellant. Admittedly, despite being aware of the proceedings, the appellant neither took any pains to ensure that he was represented before the court nor did he take any efforts to even apprise himself as to the outcome of the proceedings. The appellant has been wilfully negligent and thus, the recourse under Order IX Rule 13 of CPC is not available to the appellant. The learned Single judge has considered the question whether the application of the appellant fell within the scope of Order IX Rule 13 of the Code of Civil Procedure and held as under:-

> "10. It is, thus, clear that the second proviso to Order IX Rule 13 is mandatory in nature. A party approaching the court for setting aside ex-parte decree has to disclose "sufficient cause" by which he was prevented from appearing in the court. "Sufficient cause" would mean that (i) the party had not acted in a negligent manner (ii) he had acted bona fidely but could not appear in court due to the facts and circumstances beyond his control (iii) he had been acting diligently in pursuing the legal remedy available to him. Whether a party has succeeded in disclosing "sufficient cause" depends on facts and circumstances of each case

and no straightjacket formula of universal application can be adopted. In this case, applicant was well aware about the pendency of suit right from August/ September, 2000 and had ample opportunity to participate in the proceedings while the suit remained pending about for six years. Since applicant was aware of the pendency, even the application for setting aside the ex-parte order is barred by time by about three and a half years for which no plausible explanation is there. However, without going into the question of delay, application under Order IX Rule 13 CPC is being disposed of on merits. All throughout applicant did not bother to find out as to what was happening in the suit. His this conduct itself clearly shows lack of bona fide on his part and shows that he was grossly negligent in pursuing the matter. In my view, he has failed to disclose "sufficient cause" by which he was prevented from appearing in court from 2000 to 2006 when ultimately decree was passed."

(Para 14)

We are unable to accept that the appellant was prevented by any sufficient cause from appearing when the suit was called on for hearing. We concur with the decision of the learned single judge and find the present appeal devoid of any merit. We, accordingly, dismiss the present appeal and the application with no order as to costs. **(Para 15)**

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Mr Sangram Patnaik and Mr Deepak Kumar.

FOR THE RESPONDENTS : Mr Sanat Kumar for R-1.

CASES REFERRED TO:

1. *Parimal* vs. *Veena:* (2011) 3 SCC 545.
2. *Oriental Aroma Chemical Industries Ltd.* vs. *Gujarat Industrial Development Corpn.* [(2010) 5 SCC 459].

3. *Reena Sadh* vs. *Anjana Enterprises* [(2008) 12 SCC 589].
4. *Kaushalya Devi* vs. *Prem Chand* [(2005) 10 SCC 127].
5. *Srei International Finance Ltd.* vs. *Fairgrowth Financial Services Ltd.* [(2005) 13 SCC 95].
6. *Madanlal* vs. *Shyamlal* [(2002) 1 SCC 535].
7. *Davinder Pal Sehgal* vs. *Partap Steel Rolling Mills (P) Ltd.* [(2002) 3 SCC 156].
8. *Ram Nath Sao* vs. *Gobardhan Sao* [(2002) 3 SCC 195].
9. *G.P. Srivastava* vs. *R.K. Raizada:* (2000) 3 SCC 54.
10. *State of Bihar* vs. *Kameshwar Prasad Singh* [(2000) 9 SCC 94].
11. *Surinder Singh Sibia* vs. *Vijay Kumar Sood* [(1992) 1 SCC 70].
12. *Lonand Grampanchayat* vs. *Ramgiri Gosavi* [AIR 1968 SC 222].
13. *Ramlal* vs. *Rewa Coalfields Ltd.* [AIR 1962 SC 361].

RESULT: Appeal dismissed.

VIBHU BAKHRU, J.

1. The present appeal has been filed by the appellant (arrayed as defendant no. 2 in the suit) impugning the order dated 08.08.2011 passed by a learned single judge of this court in CS(OS) No.1982/1999 (hereinafter referred to as the 'impugned order'). By the impugned order, the learned single Judge has dismissed the application being I.A. No.14129/2009 filed by the appellant under Order IX Rule 13 of CPC for setting aside of an ex-parte decree dated 21.02.2006. The application being I.A. No.14130/ 2009 filed under section 5 of Limitation Act, 1963 for condoning the delay in preferring the said application has also been rejected by the impugned order.

2. The suit filed by Respondent no. 1 against the appellant (defendant no.2) and respondent no. 2 (defendant no.1) being CS(OS) No.1982/ 1999 was decreed on 21.02.2006. The controversy in the present appeal revolves around the question whether the ex-parte decree is liable to be set aside inasmuch as, it is contended that the plaintiff is a shareholder of defendant no. 1 and being in control of defendant no. 1 did not take

any steps to contest the suit and consequently defendant no.2 who was not in any manner personally liable for the debts of defendant no.1 has suffered the decree.

3. Briefly stated the facts are that respondent no. 2 is a company incorporated under the companies Act. Respondent no. 1 sanctioned a credit limit of Rs. 15,00,000/- for financing the bills drawn on respondent no. 2 by various suppliers for the supplies made to respondent no. 2. Respondent no. 1 had discounted various bills drawn on respondent no. 2 and made payments to various suppliers on behalf of respondent no. 2. Respondent no. 2 defaulted in repayment of the said loan. The appellant, who was a director of the respondent no. 2 at the material time is stated to have sent a letter dated 31.05.1996 whereby he undertook to pay to respondent no. 1 the outstanding dues of respondent no. 2 amounting to Rs. 17,09,779/- alongwith interest.

4. Admittedly, the appellant and respondent no. 2 failed to pay the outstanding dues. Consequently, respondent no. 1 filed a suit for recovery of dues amounting to Rs. 36,76,949.05/-. In the said suit, both appellant and respondent no. 2 were served with summons. Respondent no. 2 had initially appeared through counsel and filed a written statement, however, he failed to appear in the proceedings thereafter and was proceeded ex-parte on 10.08.2005. The appellant did not enter appearance in the suit despite service of the summon and was proceeded ex-parte on 06.09.2000. Respondent no. 1 led the ex-parte evidence and on 21.02.2006, the suit was decreed in favour of the respondent no. 1. A decree for an amount of '36,76,949.05/- alongwith pendente lite and future interest was passed against the appellant and respondent no.2.

5. The appellant has asserted that he became aware of the ex-parte decree for the first time on 25.09.2009 when the summons in the execution proceedings being EP No.371/2009 were served on him. The appellant thereafter, on 22.10.2009, filed an application (I.A. No.14129/2009) under order IX Rule 13 of CPC for setting aside the ex-parte decree dated 21.02.2006 alongwith an application (IA No.14130/2009) for condonation of delay in filing the said application.

6. It was contended by the appellant in the said application that the appellant cannot be made personally liable for the loan which was sanctioned, taken and utilized by respondent no. 2. It was also contended that the undertaking to pay the amounts due from respondent no.2 was

given by the appellant in his official capacity as a director of respondent no. 2 and thus, the same could not be construed as his personal guarantee. It was further asserted that the appellant was the Managing Director of the respondent no. 2 at the relevant time, however, he had since resigned and his resignation was duly accepted by respondent no. 2 vide its letter dated 04.02.1997. As per the records of the Registrar of Companies, the appellant ceased to be a director of respondent no. 2 with effect 06.09.1997.

7. It is contended on behalf of the appellant that respondent no. 2 is a public company and the appellant was associated with the said company as a director. It is further contended that respondent no.1 is a substantial shareholder of respondent no.2 company and if the corporate veil is lifted it would be found that respondent no. 2 is controlled by respondent no.1 and as such, the decree obtained by respondent no. 1 is a collusive decree. With regard to the service of summons in the suit, it was admitted that the appellant received the summons, however, it was contended that the same were handed over to respondent no. 2 on the alleged assurances that the appellant would be duly represented by respondent no. 1.

8. We have heard the learned counsel for the parties.

9. The contention that since the respondent no. 1 is a shareholder of respondent no. 2, the decree passed at the instance of respondent no.1 is a collusive decree does not appear to be sustainable. While, it is correct that the respondent no. 1 holds approximately 10% of the entire issued and paid up share capital of respondent no. 2 company, it is equally true that the appellant and his family members also own substantial shares of the respondent no. 2 company.

10. For considering the controversy whether the ex-parte decree is liable to be set aside, Rule 13 of Order IX of Code of Civil Procedure is relevant and is reproduced as under:

> **"13. Setting aside decree ex parte against defendants.–** In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for

hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim.

Explanation.– Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside the ex parte decree."

11. A plain reading of the provisions of Order IX Rule 13 of the CPC indicates that an ex-parte decree can be set aside when a defendant satisfies the court that the summons had not been duly served or he was prevented by sufficient cause from appearing when the suit was called on for hearing. As per second proviso of Order 9 Rule 13 of CPC, the court is proscribed from setting aside the ex-parte decree on mere irregularity in the service of summons or in a case where the defendant had notice of the date of hearing and sufficient time to appear in court.

12. The Supreme Court has in the case of **Parimal v. Veena:** (2011) 3 SCC 545 held that the second proviso of Order IX Rule 13 of CPC is mandatory and has interpreted the expression "sufficient cause" as under:

"13. "Sufficient cause" is an expression which has been used in a large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", inasmuch as may be necessary to answer the purpose intended. Therefore, word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly

examined from the viewpoint of a reasonable standard of a cautious man. In this context, "sufficient cause" means that the party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. (Vide **Ramlal v. Rewa Coalfields Ltd.** [AIR 1962 SC 361], **Lonand Grampanchayat v. Ramgiri Gosavi** [AIR 1968 SC 222], **Surinder Singh Sibia v. Vijay Kumar Sood** [(1992) 1 SCC 70] and **Oriental Aroma Chemical Industries Ltd. v. Gujarat Industrial Development Corpn.** [(2010) 5 SCC 459].)

xxxx xxxx xxxx xxxx xxxx

15. While deciding whether there is sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away the illegality perpetuated on the basis of the judgment impugned before it. (Vide **State of Bihar v. Kameshwar Prasad Singh** [(2000) 9 SCC 94], **Madanlal v. Shyamlal** [(2002) 1 SCC 535], **Davinder Pal Sehgal v. Partap Steel Rolling Mills (P) Ltd.** [(2002) 3 SCC 156], **Ram Nath Sao v. Gobardhan Sao** [(2002) 3 SCC 195], **Kaushalya Devi v. Prem Chand** [(2005) 10 SCC 127], **Srei International Finance Ltd. v. Fairgrowth Financial Services Ltd.** [(2005) 13 SCC 95] and **Reena Sadh v. Anjana Enterprises** [(2008) 12 SCC 589].)

16. In order to determine the application under Order 9 Rule 13 CPC, the test that has to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called on for hearing and did his best to do so. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Therefore, the applicant must approach the court with a reasonable defence. Sufficient cause is a question

of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straitjacket formula of universal application."

13. In the case of **G.P. Srivastava v. R.K. Raizada:** (2000) 3 SCC 54 the Supreme Court held as under:-

"7. Under Order 9 Rule 13 CPC an ex parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any "sufficient cause" from appearing when the suit was called on for hearing. Unless "sufficient cause" is shown for nonappearance of the defendant in the case on the date of hearing, the court has no power to set aside an ex parte decree. The words "was prevented by any sufficient cause from appearing" must be liberally construed to enable the court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed. The courts have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. The "sufficient cause" for non-appearance refers to the date on which the absence was made a ground for proceeding ex parte and cannot be stretched to rely upon other circumstances anterior in time. If "sufficient cause" is made out for non-appearance of the defendant on the date fixed for hearing when ex parte proceedings were initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the defendant approaches the court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis decided on merits."

14. Following the aforesaid decisions, we do not feel that the appellant has been able to show sufficient cause for not appearing in the proceeding. In the present case, the appellant has admitted the service of summons.

Admittedly, the appellant was aware of the pendency of the suit and had sufficient time to appear and answer the claim of respondent no. 1. The only reason given by appellant for not appearing in court is the alleged assurance given by respondent no. 2 that the appellant would be duly represented in the matter. We find that this reason cannot by any stretch constitute a sufficient cause for non-appearance of the appellant. Admittedly, despite being aware of the proceedings, the appellant neither took any pains to ensure that he was represented before the court nor did he take any efforts to even apprise himself as to the outcome of the proceedings. The appellant has been wilfully negligent and thus, the recourse under Order IX Rule 13 of CPC is not available to the appellant. The learned Single judge has considered the question whether the application of the appellant fell within the scope of Order IX Rule 13 of the Code of Civil Procedure and held as under:-

"10. It is, thus, clear that the second proviso to Order IX Rule 13 is mandatory in nature. A party approaching the court for setting aside ex-parte decree has to disclose "sufficient cause" by which he was prevented from appearing in the court. "Sufficient cause" would mean that (i) the party had not acted in a negligent manner (ii) he had acted bona fidely but could not appear in court due to the facts and circumstances beyond his control (iii) he had been acting diligently in pursuing the legal remedy available to him. Whether a party has succeeded in disclosing "sufficient cause" depends on facts and circumstances of each case and no straightjacket formula of universal application can be adopted. In this case, applicant was well aware about the pendency of suit right from August/September, 2000 and had ample opportunity to participate in the proceedings while the suit remained pending about for six years. Since applicant was aware of the pendency, even the application for setting aside the ex-parte order is barred by time by about three and a half years for which no plausible explanation is there. However, without going into the question of delay, application under Order IX Rule 13 CPC is being disposed of on merits. All throughout applicant did not bother to find out as to what was happening in the suit. His this conduct itself clearly shows lack of bona fide on his part and shows that he was grossly negligent in pursuing the matter. In my view, he has failed to disclose "sufficient cause" by

which he was prevented from appearing in court from 2000 to 2006 when ultimately decree was passed."

15. We are unable to accept that the appellant was prevented by any sufficient cause from appearing when the suit was called on for hearing. We concur with the decision of the learned single judge and find the present appeal devoid of any merit. We, accordingly, dismiss the present appeal and the application with no order as to costs.

ILR (2014) II DELHI 943
OMP

HERMAN PROPERTIES LTD. ....PETITIONER

VERSUS

RUPALI SINGLA & ORS. ....RESPONDENTS

(RAJIV SHAKDHER, J.)

OMP NO. : 64/2013 DATE OF DECISION: 07.11.2013

Arbitration & Conciliation Act, 1996—Sec. 9—Grant of Interim injunction—Petitioner sought an injunction against Respondents, so as to prevent them from creating third party interest and/or executing any agreement or to proceed with grant of license or permission for development qua land in issue—Whether petitioner was entitled to injunction as prayed for? Held, for grant of an interim injunction, Petitioner would have to show that, it had a prima facie case and balance of convenience was in its favour—Petitioner would also have to demonstrate that refusal of relief in form of an interim injunction would lead to irreparable harm and/or injury. Absence of signatures of other persons/entities referred in agreements apart from Respondents made both agreements prima facie inchoate—Third party rights had already interceded in matter as Respondents had executed a fresh collaboration agreement, with another entity—Hence, balance of convenience not in favour of Petitioner—Township required minimum contiguous land of 50-55 acres—Whether it was obligation of petitioner or respondent for that contiguous land, a matter of trial—Respondents refunded Rs. 1.76 Crores—Therefore, interim order not granted to Petitioner. Petition dismissed.

[Di Vi]

APPEARANCES:

FOR THE PETITIONER : Mr. Ajit Singh, Mr. Samdarshi and Mr. Shashi Ranjan, Advocates.

FOR THE RESPONDENTS : Mr. Akhilesh Jha and Mr. Animesh Kr. Sham, Advocates.

CASE REFERRED TO:

1. *Bharat Aluminium Company* vs. *Kaiser Aluminium Technical Services Inc.,* (2012) 9 SCC 552.

RESULT: Petition Dismissed.

RAJIV SHAKDHER, J.

1. This is a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 (in short the Act), to seek an injunction against the respondents, so as to prevent them from creating third party interest and / or executing any agreement or to proceed with grant of license or permission for development qua the land located in the revenue estate of Village Shahpur H.B. 125 and Village Buhava H.B. 162, Ambala Cantt. in the State of Haryana (hereinafter referred to as the land in issue).

2. The said relief is claimed in the background of a purported collaboration agreement dated 06.05.2011 (in short the parent agreement), entered into amongst the petitioner and the three (3) respondents and six (6) other persons. In all there are ten (10) entities, which are party to parent agreement. Curiously though, nine (9) persons referred to in the parent agreement, stand identified. The particulars of the tenth (10th)

entity are not recorded in the said agreement.

2.1 In addition to the above, a supplementary agreement of even date i.e., 06.05.2011, was also executed amongst the parties herein. The supplementary agreement also adverted to, apart from the petitioner and the respondents herein, six (6) other persons. In the supplementary, as in the case of the parent agreement, a reference is made to an entity, whose particulars were not referred to therein.

2.2 Importantly, apart from the three (3) respondents arrayed as parties, the other six (6) persons are not arrayed as parties to the present petition.

3. This petition was filed, apparently on, 22.01.2013. It was moved in court on 28.01.2013, when notice was issued to the respondents herein.

4. The petitioner has claimed the relief referred to hereinabove in the background of the following broad facts.

4.1 It appears that the petitioner entered into the aforementioned parent agreement with the three (3) respondents referred to herein apart from seven (7) other persons, including an entity, whose particulars are not adverted to in the said agreement. The said agreement apparently was executed for construction of an integrated township on the land in issue. The proposal, apparently, was to construct a township on contiguous land admeasuring 55 acres.

4.2 The petitioner avers, that it was given to believe that the respondents herein, amongst themselves, were owners of 35 acres of land, and that, they would, obtain rights to the balance 20 acres or there abouts from other persons and the unknown entity referred to in the said agreement.

4.3 For this purpose, evidently, the petitioner paid a sum of Rs.1.76 Crores by way of two cheques in the sum of Rs.1.11 Crores and Rs.65 Lakhs. The cheque in the sum of Rs.1.11 Crores was issued in favour of respondent no.2 i.e., Mrs. Rashmi Bansal w/o. one Mr. Satish Bansal, while the cheque in the sum of Rs.65 Lakhs was drawn in favour of respondent no.1 i.e., Mrs. Rupali Singla w/o. one Mr. Pawan Singla. The cheque favouring respondent no.2, in the sum of Rs.1.11 Crores, was apparently, dated 06.05.2011, while the cheque favouring respondent

no.1, in the sum of Rs.65 Lakhs, was dated 11.05.2011. To be noted, respondent no.3 is a company incorporated under the Companies Act, 1956 which is sued through its Director and authorised signatory i.e., Mr. Satish Bansal, who as indicated above, is the husband of respondent no.2.

4.4 The petitioner avers, that in terms of clause 17 (a) of the agreement, the respondents were required to deliver possession of vacant contiguous land alongwith title deeds to it, within 45 days of the execution of the said agreement. It is averred, that since, respondents failed to discharge their obligations, a legal notice dated 21.12.2012 was issued by the petitioner through its advocate, in which, the failure, on the part of the respondents to discharge their obligations, under the agreement, was brought to fore. The respondents were given ten days to hand over contiguous land admeasuring 55 acres, failing which, legal action was threatened. The said notice, concluded by triggering clause 20(a) of the parent agreement, which contains the arbitration agreement entered into, between the parties referred to in the said agreement.

4.5 The said notice was responded to, by each of the three (3) respondents through their advocate. On behalf of respondent no.3, a reply was sent on 06.01.2013, while on behalf of respondent nos.2 and 1, replies dated 07.01.2013 and 08.01.2013 respectively, were issued.

4.6 While, all three (3) respondents refuted the assertions made on behalf of the petitioner, each one of them took the stand that the parent agreement on which reliance was placed by the petitioner was not a concluded contract in view of the fact that other six (6) persons, from whom the petitioner was required to acquire land, so that a contiguous expanse of land admeasuring at least 50 to 55 acres was available, had not been brought on board. In other words, the stand taken was there were at least six (6) persons who had not signed the said parent agreement, though their names were mentioned therein, while the particulars of the tenth (10th) entity were not even adverted to, in the said agreement.

4.7 In particular, on behalf of respondent no.1, it was stated that the petitioner was aware of the fact that she was an owner of only 53 kanals and two marlas of land; which was available in three (3) parcels. Similarly, on behalf of respondent no.2, it was asserted that she was the owner of 77 kanals and 13 marlas, available in, four (4) parcels.

4.8 It was also asserted on behalf of respondent nos.1 and 2 that a sum of Rs.65 Lakhs and Rs.1.11 Crores paid to them respectively was sought to be remitted by the said respondents vide separate cheques dated 26.12.2012, by having the cheques deposited in the account of the petitioner from which the aforesaid amounts had been transferred to them in the first instance by the petitioner, and since, that account, of the petitioner, stood closed, as per the information given by the concerned bank, the aforementioned amounts were credited to the petitioner's account bearing no.00918630000388, maintained with the HDFC Bank, New Delhi.

4.9 In so far as respondent no.3 is concerned, a reply dated 06.01.2013, was issued wherein, apart from denying the assertions made by the petitioner in its legal notice, it was stated that the said respondent, was an owner of only 36 kanals and 3 marlas of land. It was further stated that in order to attain contiguity, respondent no.3 had to enter into agreement(s) with adjoining land owners, whereby it ended up purchasing land admeasuring 104 kanals and one marla; a transaction which resulted in financial detriment, as the petitioner, was unable to acquire/purchase land of other land owners to make the development project, viable. All three (3) respondents stated that the agreement to develop the land was unviable as under the then subsisting development rules, the developers, had to acquire a minim of 50 to 55 acres of contiguous land. The respondents, took the stand that since other parties to the agreement did not execute the agreement, the project was a non-starter both on facts and in law.

5. It appears that, the petitioner, being aggrieved by the stand taken by the respondents in response to its legal notice, decided to institute the present petition.

5.1 In the interregnum, it appears, that the respondents, had executed a fresh collaboration agreement dated 17.08.2012, with another entity, by the name of, Pan Infratech Pvt. Ltd.

6. Notice in the present petition was issued, as indicated above, on 28.01.2013, whereupon, the respondents, filed a common reply. In the reply, the respondents, have taken a stand, broadly in line with what was stated, in their response, to the legal notice issued by the petitioner.

6.1 The petitioner, has refuted the contentions of the respondents in its rejoinder and, amongst other things, has stated that vide e-mail

dated 30.05.2011, the respondents had given the land details of other persons, who are referred to in the parent agreement.

6.2 The parties had been directed vide order dated 27.05.2013 by my predecessor, to file their respective written submissions. While the respondents, filed their written submissions, the petitioner chose not to file its written submissions.

7. On behalf of the petitioner, the arguments were advanced by Mr.Ajit Singh, Advocate. The respondents were represented by Mr. Akhilesh Jha.

8. Mr. Singh, has submitted that respondents had been sued in view of the fact that they had represented to the petitioner that they were owners of 35 acres of land, for which purpose, they were paid a sum of Rs.1.76 Crores in the manner averred to in the petition. He submitted that the receipt of the money was not in dispute. Therefore, the failure on the part of the respondents to discharge their obligation to hand over a contiguous stretch of land admeasuring 55 acres was, a breach of the provisions of clause 17(a) of the parent agreement.

8.1 He further submitted that, the return of the sum of Rs.1.76 Crores was made after the respondents had already executed a fresh collaboration agreement with Pan Infratech Pvt. Ltd., on 17.08.2012. For this purpose, he not only relied upon the collaboration agreement dated 17.08.2012, but also, the applications filed by respondent nos.1 and 2 with the Director General, Town and Country Planning, Haryana, Chandigarh.

8.2 He further relied upon various e-mails exchanged between the parties herein, in particular, e-mail dated 30.05.2011, apparently issued on behalf of the respondents, to demonstrate that the respondents were aware of the particulars of the land held by other persons referred to in the parent agreement.

8.3 Mr. Singh, thus submitted that the return of money could not cure the breach, and that, having regard to the fact that the petitioner had fulfilled its obligation, it was entitled to an interim injunction pending disposal of the arbitration action which, it proposed to initiate against the respondents. It was Mr. Singh's contention that, as a matter of fact, as per the terms of the supplementary agreement, the amount paid as an advance could not have been refunded, and that, the sale deeds had to

be executed in favour of the petitioner, by calculating the consideration, at the rate of Rs.50 Lakhs per acre.

9. On the other hand, Mr. Jha reiterated his line of defence, which was that, the parent agreement was executed with the petitioner on the premise that, it would be able to obtain a contiguous stretch of land admeasuring 50 to 55 acres of land, which was the minimum requirement under the then subsisting rules and regulations, for development of an integrated township. Mr. Jha submitted that the petitioner gave them to believe that the needful will be done, and since, the said eventuality did not occur, the receipt of the legal notice dated 21.12.2012, propelled them, to refund the amounts paid to them by the petitioner.

9.1 Mr. Jha, submitted that a bare perusal of the agreements would show that there are, apart from the petitioner, ten (10) parties to the said agreements. Out of the ten (10) parties, the three (3) persons i.e., the respondents have signed the agreements whereas others have not signed the agreements. Out of the remaining seven parties, the particulars of one party have not even been adverted to in the parent agreement. The agreement therefore, was not concluded.

9.2 Mr. Jha also contended that this court had no jurisdiction to deal with the matter in view of the fact that : the respondents were residents of Ambala; the integrated township had to be developed at Ambala in the State of Haryana; the respondents had appended their signatures on the agreement at Ambala; and that, the refundable security amount, was deposited by the petitioner with respondent no.1 and 2 in their bank accounts, maintained at Ambala.

9.3 Therefore, it was Mr. Jha's contention that notwithstanding the fact that the parent agreement provided in clause 21, that the jurisdiction would be of the courts at Delhi only, this court, would have no jurisdiction, in view of the fact that no part of the cause of action arose in Delhi.

9.4 He further contended that, merely because, clause 20 of the parent agreement, which contained the arbitration agreement provided that the venue of arbitration will be at New Delhi, the said clause would not further the case of the petitioner. It was submitted that in this behalf, petitioner's reliance on the judgment of the Supreme Court in the case of **Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Inc.,** (2012) 9 SCC 552 would not help its cause, as the

judgment itself says that the law declared, would apply prospectively. Since, the judgment was delivered on 06.09.2012, it could not apply to the agreements in issue, which are dated 06.05.2011.

9.5 The petitioner, according to Mr. Jha, was not entitled to the injunction as prayed for as it would be contrary to the provisions of Section 41 sub-clause (e), (h) and (i) of the Specific Relief Act, 1963.

10. I have heard the learned counsels for the parties and perused the record. For grant of an interim injunction, the petitioner would have to show not only that it has a prima facie case in its favour but also that the balance of convenience is in its favour. The petitioner would also have to demonstrate that refusal of relief in the form of an interim injunction would lead to irreparable harm and / or injury.

11. After hearing counsels for the parties and perusing the record, what does emerge is, as follows :-

11.1 The parties herein entered into an agreement for development of an integrated township, at Ambala. The development of an integrated township, required acquisition of contiguous land admeasuring 50 to 55 acres, as per the then, subsisting rules. This aspect emerges from the pleadings, as the petitioner, has not refuted this aspect of the matter in its pleadings.

11.2 The respondents have taken the stand that, amongst themselves, they had approximately 20 acres of land, and that, to attain contiguity in respect of their land, respondent no.3 bought 104 kanals and one marla from adjoining owners. As a matter of fact, this stand of the respondents is reflected in paragraphs 4 and 7 of their reply at pages 31 and 38 of the paper book respectively. The respondents, in paragraph 4 of their reply, have given the exact area of land owned by each one of them. It is indicated therein that respondent no.1 was owner of 6.63 acres, respondent no.2 was owner of 9.7 acres and respondent no.3 was owner of 4.52 acres.

11.3 Undoubtedly, both the parent agreement as well as the supplementary agreement in all, apart from the petitioner, refers to ten (10) parties. Out of the ten (10) parties, three (3) signed the parent agreement as also the supplementary agreement. As is noticed from the perusal of the agreements that, the land owners comprise principally of three (3) families : the Singla family, the Bansal family and the Choudhary

family. Respondent no.3, which is a company, is represented by the Bansal Family i.e., its Director – Mr. Satish Bansal, who is the husband of respondent no.2 i.e., Mrs. Rashmi Bansal. The representatives of the Choudhary family, which comprises of four brothers, namely, Mr. Satish Choudhary, Mr. Rohtash Choudhary, Mr. Bhupinder Choudhary and Mr. Baljinder Choudhary alongwith Mr. Aditya Choudhary, son of Mr. Satish Choudhary and the wife of Mr. Rohtash Choudhary (whose name is not set out in the two agreements, referred to above) - did not sign either the parent agreement or the supplementary agreement. As a matter of fact, as indicated above, the particulars of one entity / person have been left out completely.

11.4 Given the fact that both the parent agreement and the supplementary agreement defines owners to include all ten (10) persons / entities, the absence of the signatures of other persons / entities apart from the respondents herein does make the two agreements prima facie inchoate.

11.5 The principal purpose of executing the parent and the supplementary agreement was to develop an integrated township, which required a minimum contiguous land of 50 to 55 acres. Such a contiguous land was, undoubtedly, not available with the petitioner, therefore, a township could not have been developed. To determine as to whether it was the obligation of the respondents herein or that of the petitioner, the matter would have to go to trial, which would require the parties herein to lead evidence. The reliance of the petitioner on the clause in the supplementary agreement that the advance paid would have to be adjusted against sale would require examination in the light of the undisputed fact that the fundamental premise on the basis of which the parent and the supplementary agreement were executed between the parties was that an integrated township would be developed. Whether, the petitioner, could call upon the respondents herein, to sell the land owned by them at the stated price, is a matter, which would again require trial. However, most certainly, at the interim stage, in my opinion, no interim order can be passed in favour of the petitioner, as the respondents, admittedly have executed a fresh collaboration agreement, with another entity, as far back as on 17.08.2012. The respondents' stand that, since they got to know in July 2012 that the petitioner was unable to bring other persons on board; a factor which propelled them to enter into the collaboration agreement dated 17.08.2012, would require evidence to be led in the

matter. It is not disputed that the respondent nos.1 and 2, in line with their stand, have refunded a sum of Rs.1.76 Crores to the petitioner. Therefore, having regard to the totality of facts, in my view, an interim order cannot be granted to the petitioner, as prayed for, at this stage.

11.6 The present action seems inchoate in view of the fact that the petitioner has failed to even implead the Choudhary family to the present petition. The petitioner's explanation that a group entity of respondent no.3 i.e., Partap Fabrics vide e-mail dated 30.05.2011 gave details of the land owned by the Choudhary family, would not help, as the supply of details would not by itself establish that the respondents had undertaken the obligation to obtain ownership rights of the land owned by the Choudhary family. Even if, this is assumed to be correct, for the sake of argument, on the petitioner's own showing one more person / entity was required to join the fray, in order to obtain ownership to contiguous land admeasuring 50-55 acres, which was the required minimum area for developing a township. In my opinion, the petitioner's attempt at showing respondents' lack of faith by relying upon a sale deed dated 29.12.2011, to demonstrate that the respondents had acquired land after executing the parent and / or supplementary agreement, would not further its cause, at this stage, as these aspects would not make a dent in the main assertion of the respondents that the petitioner had failed to bring on board all persons so that a minimum contiguous land was available for the development project, to see the light of the day. It appears on the other hand, on a perusal of the documents placed on record by the petitioner, that Pan Infratech Pvt. Ltd., the new developer, has acquired lands, apart from respondent nos.1 and 2, also from, an entity by the name of Bondi Builders and Developers Pvt. Ltd. The said entity is also not a party to the present proceedings. Therefore, in view of the fact that third party rights have already interceded in the matter, at this stage, balance of convenience is not in favour of the petitioner. The petitioner's remedy, if at all, may lie in an action for damages.

11.7 In view of the above, for the present, I need not decide the issue of jurisdiction, which is left open to be decided at the appropriate stage, if the need arises for the same.

12. For the foregoing reasons, I find no merit in the petition. It is, therefore, accordingly, dismissed. Parties shall, however, bear their own costs.

ILR (2014) II DELHI 953
CRL. A.

MOHD. IRFAN **....APPELLANT**

VERSUS

DIRECTORATE OF REVENUE INTELLIGENCE **....RESPONDENT**

(S.P. GARG, J.)

CRL.A NO. : 783/2012 & **DATE OF DECISION: 08.11.2013**
CRL. M.A. NO. : 17117/2012

Narcotics Drugs and Psychotropic Substances Act—Section 21 (c) of Appellant convicted—Conviction primarily based no statement of complainant PW1 and confessional statement u/S 67 of the Act—Held, the panchnama merely reflects name of the two public witnesses without further details about their addresses and parentage—No sincere attempts made to serve summons upon them at specific addresses and prosecution dropped them without valid reasons.—Complainant version remained uncorroborated from independent sources. Joining of independent public witnesses is not a mere formality and sincere attempts were required to be made before apprehension of accused.—Complainant was evasive as to who were other members in the raiding team.—Other members of raiding team not examined.—Secret informer was not a member in the raiding team.—The driver of vehicle in which the raiding team went to New Delhi Railway Station not joined.—Steps of log book of vehicle not filed.—No information given to security guards/RPF personnel present at the station and no railway official/vendors/stall owners joined in the proceedings.—No proceeding conducted at the spot and no material came out on record to infer that the place of apprehension was not conducive to conduct the proceedings.

Also held, that the contents of disclosure statement of accused was found incorrect during investigation and remained unproved—It is now well Settled that the court must seek corroboration of the purported confession from independent sources—Accused acquitted.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. C. Mohan Rao, Advocate with Mr. Trivender Chauhan, Advocate.

FOR THE RESPONDENT : Mr. Satish Aggarwala, Spl. P.P.

RESULT: Appeal accepted.

S.P. GARG, J.

1. Mohd. Irfan questions the legality and correctness of a judgment dated 26.03.2012 of learned Addl. Sessions Judge / Spl. Judge, NDPS in Sessions Case No. 126/04 by which he was held guilty for committing offence punishable under Section 21 (c) of the NDPS Act. By an order dated 27.03.2012, he was awarded RI for ten years with fine Rs. 1 lac. In nutshell, the prosecution case is as under :

2. On 07.04.2004, Sh.Raman Mishra, Intelligence Officer received intelligence report at 03.00 P.M. to the effect that Mohd. Irfan aged around 27 years and of wheatish complexion would be carrying around 20 kg narcotics / drugs in a red and black colour 'Polo World' zipper bag on platform No. 8/9, New Delhi railway station at about 07.15 P.M. The intelligence was reduced into writing as Ex.PW-2/A and put up before PW-24 (Sh.Samanjasa Das, Addl. Director). It is alleged that a raiding party was organised and two public witnesses – Raju and Vijay were associated. At about 07.15 P.M., Mohd. Irfan was found standing near the stairs of platform No. 8/9 carrying a bag. On interception, he revealed his identity as Mohd. Irfan R/o Distt. Mandsur, M.P. Since the place was not conducive to conduct search and other proceedings, Mohd. Irfan was taken to the office of DRI at Lodhi Road. On search of the

bag, 13 packets containing heroin weighing 16.760 kg was recovered. Necessary legal proceedings were conducted. On 08.04.2004, Mohd. Irfan tendered his voluntary statement (Ex.PW-1/G) under Section 67 of the Act. During investigation, it revealed that the appellant used to stay in Bombay Orient Hotel, 926 Jama Masjid and Hotel Sun Rise, Paharganj under the assumed name of Mohd. Almas. On 08.04.2004, room No. 410 in Hotel Bombay Orient, 926 Jama Masjid, where the accused had stayed under the fictitious name of Mohd. Almas was searched and cash ' 30,000/-and receipt No. 5646 dated 07.04.2004 regarding the booking of the room was recovered from a trolley bag lying therein and seized vide panchnama (Ex.PW-4/A). During the course of investigation, statements of the witnesses conversant with the facts were recorded and after completion of investigation, a complaint case was filed by Directorate of Revenue Intelligence (hereinafter referred as 'DRI') through Sh.Ashwani Kumar Sharma, Intelligence Officer. The prosecution examined twenty seven witnesses to establish the guilt. In 313 statement, the appellant pleaded false implication. He examined Mohd. Irshad, his brother, in defence. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment, convicted the appellant under Section 21 (c) of the Act. Being aggrieved, the appellant has preferred the appeal.

3. I have heard the learned counsel for the parties and have examined the record. Appellant's conviction is based primarily on the statement of complainant – PW-1 (Sh.Ashwani Kumar Sharma, Intelligence Officer) and confessional statement under Section 67 of the Act allegedly tendered voluntarily by the appellant. The prosecution was bound to establish beyond reasonable doubt about the apprehension and arrest of the appellant at platform No. 8/9 of New Delhi Railway Station on 07.04.2004 at about 07.15 P.M. PW-1 (Sh.Ashwani Kumar Sharma, Intelligence Officer) deposed that he was briefed about the intelligence report by Addl. Director, DRI, DZU at 1530 hours. He joined two witnesses at about 1600 hours to witness the interception of the suspect. A team was formed and at 1730 hours, they left for platform No. 8/9 and reached there at about 1900 hours. A surveillance was mounted and at about 1915 hours a person of wheatish complexion aged about 27 years carrying red and black colour 'Polo World' brand bag near the stairs at platform No. 8/9, New Delhi Railway Station was spotted and intercepted. Since the place of interception was not safe and proper for search and other

proceedings, Mohd. Irfan along with the bag was brought to DRI office, CGO Complex, New Delhi. The proceedings regarding search and preparation of 'panchnama' were conducted there on 08.04.2004 till 05.00 A.M. Intelligence report (Ex.PW-2/A) contained the name of the suspect as Mohd. Irfan, aged about 27 years, wheatish complexion, who would be carrying narcotics of about 20 kg in red and black colour 'Polo World' zipper bag. PW-1 (Sh.Ashwani Kumar Sharma, Intelligence Officer) did not state as to how much quantity of the narcotics would be in possession of the suspect. He also did not state that name of the suspect was disclosed to him at the time of briefing. No other description / features of the suspect were known to him. Immediately after getting briefing from PW-2 (Raman Mishra), two public witnesses were associated from Paryavaran Bhawan, CGO Complex, New Delhi. The complainant did not elaborate the full and complete names of the two public witnesses associated in the raid, with their parentage, designation, place of work and place of residence. In the cross-examination, he admitted that he had not verified the identity of the public witnesses and was not aware if they were working in a department or office. He was unable to disclose as to in what connection both the public witnesses were present on the 6th floor of CGO Complex and how and under what circumstances, they were called to join the investigation. He did not verify the qualification of public witnesses to ascertain whether they were conversant with Hindi and English. In his deposition before the Court, he did not give reason as to why both these witnesses were dropped and were not examined. Counsel for the prosecution emphasized that the witnesses had given incorrect addresses and were not traceable. The prosecution was under no obligation to verify the addresses given by them before associating in the raiding team. In the instant case, however, in my view, the prosecution had ample time to ascertain the addresses of the public witnesses. The secret information was received at about 03.30 P.M. and the suspect was apprehended at 07.15 P.M. The public witnesses allegedly remained with the complainant till 05.00 A.M. the next day. The panchnama (Ex.PW-1/C) merely reflects name of the public witnesses as Raju and Vijay without any further details about their addresses and parentage. No sincere attempts were made to get the summons served at specific addresses on these witnesses and conveniently on 02.06.2010, the prosecution opted to drop them without giving any valid reasons. Apparently, the complainant's version remained uncorroborated from independent sources

/ witnesses. Joining of independent public witnesses is not a formality to be performed and sincere attempts were required to be made by the prosecution before apprehension of the accused to procure the public witnesses whose identity / particulars were not doubtful.

4. The complainant was evasive to inform as to who were the other members in the raiding team. No such member of the raiding team was examined by the prosecution to corroborate the complainant's version. The secret informer was not a member in the raiding team. The driver of the vehicle in which the raiding team had gone to New Delhi Railway Station was also not joined. The extracts of the log book of the vehicle were not placed on record to find out the movement of the vehicle used in the raid. PW-1 admitted in the cross-examination that after raid at the New Delhi Railway Station, no information was given to the security guards / RPF personnel present there. No railway official available there was requested to join the investigation or the proceedings. The vendors / stall owners on the platform No. 8/9 were also not associated in any proceedings. The complainant during investigation did not investigate as to how and when the complainant had reached at platform No. 8/9. He was not found in possession of any railway ticket or platform ticket. After apprehension of the suspect, no intimation was given to the Station Master, GRP / RPF staff or the security incharge. Admittedly, no proceedings whatsoever were conducted at the spot of apprehension and the appellant was brought directly to the office of DRI, CGO Complex. He was not served with notice under Section 50 of the Act at the place of apprehension. Nothing material has come out on record to infer that the place of apprehension was not conducive to conduct the proceedings. Except the bald statement of the complainant, there is no evidence worth the name to infer that the appellant – Mohd. Irfan was apprehended in the manner and at the place described by him. Adverse inference is to be drawn against the prosecution for not examining the independent public witnesses whose existence itself was in doubt.

5. The prosecution examined PW-3 (N.D.Azad), PW-4 (Arvind Kumar Sharma), PW-10 (Asifuddin), PW-11 (Syed Abid Hussain), PW13 (Mohd.Sarvar) and PW-17 (Tarun Tuli) in an endeavour to establish that Mohd. Irfan stayed at Bombay Orient Hotel, 926 Jama Masjid and Hotel Sun Rise, Paharganj under the assumed name of Mohd. Almas. The photocopies of the guest register of relevant dates were procured and proved. However, the prosecution was unable to establish that Mohd.

Irfan was the person who stayed under the assumed name of Mohd. Almas in the said hotels. Neither of these witnesses identified him in the Court to be the visitor to the hotels. When room No. 410 in Hotel Bombay Orient, 926 Jama Masjid was searched, the official witness was unable to find out any material to connect that the bag containing ' 30,000/-belonging to the appellant. The handwriting on the visitors' register where he made entries in his own handwriting were not sent for comparison with admitted handwriting of the accused for comparison to handwriting experts. The recovery was not affected pursuant to the disclosure by the appellant and he was not taken to the said hotel at the time of its search. No call details were proved to show as to with whom the appellant had remained in contact prior to his apprehension. It is unclear as to whom the appellant was to deliver the consignment and if so, at what place and for what consideration. The appellant categorically denied to have made statement under Section 67 of the NDPS Act voluntarily. The contents of the statement (Ex.PW-1/G) were found incorrect during investigation. It was alleged that Man Mohan Sharma was kin pin for whom the appellant was working. Accordingly, during investigation, as a follow up, residential premises of the appellant and Man Mohan Sharma were searched. However, no incriminating / objectionable material was recovered from there. The prosecution rather examined Man Mohan Sharma as PW-16 and he disclosed that he was working as a teacher in a government school and was President of Teachers' Association for the last ten years. Nothing emerged that he had any association with Mohd. Irfan.

6. It was alleged that in the confessional statement, the appellant had disclosed that he had come to Delhi by Intercity Express and had reached Nizamuddin Railway Station at about 06.30 A.M. on 07.04.2004; had checked in room No. 410 in Hotel Bombay Orient, 926 Jama Masjid and went to Keberia Sarai after leaving his bag containing his personal belongings; contacted one African on his mobile No. 9811463504 and collected ' 30,000/-from him and came back to the hotel. He was informed by Man Mohan Sharma that 16.5 kg of heroin was being sent by him through a person wearing a yellow shirt by Golden Temple Express and the said person would travel by AC Ist class and would be waiting for him in front of the above coach. Accordingly, he reached platform No.9 at 07.00 P.M. and collected the bag from that person and when he was going back to his hotel he was apprehended by DRI Officers. The contents of disclosure statement remained unproved. The Investigating

Officer did not collect any document to show if any such person had travelled in Golden Temple Express or the said train had reached that day at New Delhi Railway Station at 07.00 P.M. After collecting the bag from the said person, there was no occasion for the appellant to wait for about fifteen minutes for his apprehension there. The secret information / intelligence with the DRI Officers was not that the bag with contraband would be delivered to him by a person travelling in Golden Temple Express. The alleged secret information was that a person by the name of Mohd. Irfan would be carrying a bag at platform No. 8/9 with contraband. There was no certainty that the bag in question in every eventuality was to be delivered to him at 07.00 P.M. Moreover, Man Mohan Sharma who appeared as a witness in the Court did not substantiate the alleged version narrated in the confessional statement. The prosecution was unable to unearth the source from where the alleged heroin originated. Apparently, the confessional statement purported to have been made can't be relied. It is now well settled that the Court must seek corroboration of the purported confession from independent sources which is lacking in the instant case.

7. The appellant was apprehended on 07.04.2004 at about 07.15 P.M. However, his arrest was shown the next date at 1900 hours and he was not produced soon after his arrest before the Magistrate. He was kept in a lock up though-out the night and was produced before the Court on 09.04.2004. The complainant did not explain the inordinate delay in effecting the appellant's arrest after his apprehension on 07.04.2004 at 07.15 P.M. The MLC (Ex.PW-1/J) does not record the time when Mohd. Irfan was produced for medical examination.

8. PW-2 (Raman Mishra) received the intelligence and conveyed the information (Ex.PW-2/A) to Sh. S.Das. He admitted in the cross-examination that in the present case secret information was not submitted before the immediate Superior Officer. He explained that it was not done so due to non-availability of the Superior Officer in the department. This fact did not find mention in any document on the judicial file. PWs have given inconsistent version as to when the complainant was briefed about the intelligence / secret information. The complainant admitted that intelligence report was not shown to him when he was briefed about secret information and was not given any written authorization to take over the further investigation.

9. Taking into consideration the discrepancies, contradictions, omissions and inconsistencies in the prosecution case and other surrounding circumstances, in my view, the prosecution was unable to establish its case beyond reasonable doubt. It must be borne in mind that severer the punishment, greater has to be the case taken to base conviction. The impugned judgment cannot be sustained and is set aside. The appeal is allowed and conviction and sentence are set aside. The appellant be set at liberty forthwith, if not required in any other case. Trial Court record be sent back forthwith. Copy of the order be sent to the appellant – Mohd. Irfan through Superintendent Jail.

CRL.M.A.17117/2012

The application has been moved by the respondent for destruction of the case property i.e. 16.760 kg heroin. Since the appeal has been allowed, the respondent is granted permission to destroy the case property i.e. 16.760 kg heroin including the representatives samples as per rules.

The application stands disposed of.

ILR (2014) II DELHI 960
CRL. A.

ZARAR KHAN @ MULLA ....APPELLANT

VERSUS

STATE (GOVT. OF NCT OF DELHI) ....RESPONDENT

(S.P. GARG, J.)

CRL. A. NO. : 706/2000 & 652/2000 **DATE OF DECISION 08.11.2013**

Indian Penal Code, 1860—Section 394/396/307/120B/34—Section 25-27—Arms Act, 1959—A1 and A2 convicted for offence u/S 392/34 IPC—In addition A1 convicted u/S 397 IPC.

Held, It is well settled that substantive evidence of the witness is his evidence identification in the court—Complainant who had direct confrontation with the assailants for sufficient duration had ample opportunity to observe and grasp the broad features of the culprits—No ulterior motive assigned to the complainant for falsely identifying the accused—No conflict between ocular and medical evidence—recovery of robbed articles from the possession of assailants is a vital incriminating circumstance to connect them with the crime—Police will plant substantial amount of Rs. 12,000/- to implicate falsely is unbelievable—Minor contradiction and discrepancies not material when presence of complainant at the spot was natural and probable and he was also injured.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Ajay Malviya, Advocate.

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

RESULT: Appeal dismissed.

S.P. GARG, J.

1. Shankar, Sahid Khan, Atiq Ahmed, Zarar Khan @ Mulla (A1) and Mohd. Nazir (A-2) were arrested in case FIR No. 246/94 by the police of PS Roop Nagar and sent for trial for committing offences punishable under Sections 394/397/307/34 IPC / 120B IPC and 25/27 Arms Act. Allegations against them were that on 15.11.1994 at about 05.30 P.M. at shop No. 12/21, Shakti Nagar, they committed dacoity using revolvers and daggers and injured complainant – Chander Kant while depriving him of cash Rs. 17,000/-, cheques and other documents contained in a leather bag. After the occurrence, the complainant – Chander Kant gave a chase to the assailants. Shankar fired with the revolver in his hand and the police officials present at Nagia Park were able to overpower and apprehend him. During the course of investigation, statements of the witnesses conversant with the facts were recorded. Pursuant to Shankar's disclosure

statement, the other assailants were apprehended on different dates and weapons were recovered from their possession. The robbed articles were also recovered. After completion of investigation, a charge-sheet was submitted against all of them in the Court. They were duly charged and brought to trial. The prosecution examined seventeen witnesses to establish their guilt. In their 313 statements, the assailants denied their complicity in the offence and pleaded false implication. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment dated 26.09.2000 in Sessions Case No. 144/96 convicted Shankar, A-1 and A-2 for committing offence punishable under Section 392/34 IPC. Shankar and A-1 were further held guilty for committing offence under Section 397 IPC. Shankar was also held guilty under Section 307 IPC. By an order dated 27.09.2000 various imprisonment terms detailed therein with fine were imposed. Sahid Khan and Atiq Ahmed were acquitted of all the charges. The State did not challenge their acquittal. Being aggrieved, A-1 and A-2 have preferred the appeals.

2. I have heard the learned counsel for the parties and have examined the record. Appellants' counsel strenuously urged that the Trial Court did not appreciate the evidence in its true and proper perspective. The appellants were shown to the witnesses in the police station after their arrest and were compelled to decline to participate in the Test Identification Proceedings. The cash and cheques recovered from the appellants were not in their exclusive possession and these articles were not sealed. The prosecution did not collect any evidence to ascertain as to when and how the cheques in question came in the custody of the complainant. PW-6 Raj Pal Singh was a stock witness of the police and no reliance can be placed on his testimony. Learned Addl. Public Prosecutor urged that the Trial Court findings are based upon the fair appraisal of the evidence of the complainant who identified the appellants in the Court. Recovery of the robbed articles from their possession is an additional circumstance to connect them with the crime.

3. The main assailant Shankar who fired with the revolver in his hand and injured the complainant did not prefer to challenge the conviction and purportedly, has already served the sentence awarded to him. Shankar was apprehended soon after chase by the complainant with the assistance of police officials present nearby. A-1 was arrested on 16.11.1994 and pursuant to his disclosure statement cash Rs. 12,000/- was recovered

from his house on 19.11.1994. A-2 was arrested on 29.11.1994 and two cheques with cash were recovered from his possession. Crucial testimony is that of the complainant – Chander Kant who had no extraneous consideration to fake the incident of robbery / dacoity. He was not acquainted with the assailants and did not nurture any grievance against them. The assailants were not named in the FIR. On the day of incident i.e. 15.11.1994, Chander Kant, Sales Assistant with Vinod Enterprises, 12/21, Shakti Nagar, since 1986 as usual was present at his office. At 05.30 P.M., Shankar and A-1 came in the office pretending to be customers and conversed with him to purchase 'joining sheets'. Soon thereafter, their companions also entered inside the shop. Shankar armed with a revolver and A-1 who had a knife pointed their arms towards Chander Kant and demanded whatsoever he had. When he expressed his ignorance about cash in his custody, he was hit by Shankar on his head with the butt of the revolver. Chander Kant assigned specific role to A-2 who after entering inside the shop cut the telephone wires. A-1 snatched the hand bag containing Rs. 17,000/-, ration card, some cheques and papers. In the cross-examination, his testimony could not be shattered and no infirmity emerged to disbelieve him. After the apprehension of the assailants, the Investigating Officer moved applications for Test Identification Proceedings. However, the assailants declined to participate in the TIP proceedings alleging that they were shown to the witnesses in the police station. They however, did not elaborate as to when and to whom the police had shown them in the police station. Nevertheless, complainant – Chander Kant who had given description of the assailants in his statement (Ex.PW-1/A) to the police at the first instance identified A-1 and A-2 in the Court without any hesitation. The complainant who had direct confrontation with the assailants for sufficient duration had ample opportunity to observe and grasp the broad features of the culprits. No ulterior motive was assigned to the complainant for falsely identifying A-1 and A-2 in the Court. It is well settled that substantive evidence of the witness is his evidence of identification in the Court. Complainant who was injured in the incident and was taken to Hindu Rao Hospital was medically examined by PW-3 (Arun Jain) on 15.11.1994 at 09.00 P.M. Clear Lacerated Wound (CLW) 1 cm over left parietal region, abrasion over left thumb, abrasion over right thumb were found on the body vide MLC (Ex.PW-3/A). There is no conflict between the ocular and medical evidence and testimony of PW-1 stands corroborated. The recovery of the robbed articles from the possession of the assailants is a vital

incriminating circumstance to connect them with the crime. The police was not expected to plant substantial amount Rs. 12,000/-upon the appellants to falsely implicate them. The cheques which had distinct features were also recovered from their possession.

4. Minor contradictions and discrepancies highlighted by the appellants' counsel are not material to discredit the cogent and reliable version of the complainant who was the victim / injured in the incident. His presence at the spot was natural and probable. Shankar's apprehension soon after the incident after chase lends credence to the version narrated by him. The Trial Court has dealt with all the relevant contentions of the appellants minutely and has discarded them with valid reasons. The findings are based upon proper and fair appreciation of the evidence and require no interference. Acquittal of co-accused -Sahid Khan and Atiq Ahmed has no bearing on the conviction of the appellants for which the prosecution was able to produce clinching evidence. Sentence awarded under Section 397 IPC to A-1 is the minimum sentence prescribed and cannot be modified. A-2's Nominal Roll dated 27.10.2010 reveals that he was awarded RI for four years with fine Rs. 5,000/-. He remained in custody for six months and fifteen days besides earning remission for two months as on 11.04.2001. The under-trial period in custody was not traceable. It further reveals that A-2 had no previous criminal background / antecedents and was not involved in any other criminal case. His overall jail conduct was satisfactory. His age has been recorded as twenty years in the Nominal Roll. Considering the fact that he was a first offender and did not use any arm in the incident, his sentence requires modification. Taking into consideration the mitigating circumstances, the substantive sentence is reduced to two years. Other terms and conditions of the sentence order are left undisturbed.

5. Appeal preferred by A-1 is unmerited and is dismissed. A-2's appeal is disposed of in the above terms whereby maintaining conviction under Section 392 IPC the substantive sentence is reduced from RI four years to RI two years.

6. Appellants (A-1 & A-2) are directed to surrender and serve the remainder of their sentence. For this purpose, they shall appear before the Trial Court on 15.11.2013. The Registry shall transmit the Trial Court records forthwith to ensure compliance with the judgment.

ILR (2014) II DELHI 965
O.M.P.

INX NEWS PVT. LTD. ....PETITIONER

VERSUS

PIER ONE CONSTRUCTION PVT. LTD. ....RESPONDENT

(RAJIV SHAKDHER, J.)

O.M.P. NO. : 673/2013 DATE OF DECISION: 11.11.2013

Arbitration & Conciliation Act, 1996—Sec. 34—Delay in re-filing of the petition U/s 34 of the Act after objections were raised by the Registry—Delay of 149 days—Two reasons given seeking condonation—First that the lawyer of petitioner had to be changed and second that the lawyer was ill. Held, both the events occurred in March 2013—There is no explanation for the period which occurred prior to March and for the delay which occurred in the month of April and May—Objections were finally removed in July 2013. Held, that Courts does have the power to condone the delay in re-filing if the initial filing is within the period prescribed U/s 34 (3) of the Act, but the result would depend on facts & circumstances of each case—The reasons advanced by the petitioner does not supply sufficient cause—Application rejected.

[Di Vi]

APPEARANCES:

FOR THE PETITIONER : Mr. Robin David, Mr. F. Mathew and Mr. Chitranshul Sinha, Advocates.

FOR THE RESPONDENT : Mr. Lokesh Bhola and Ms. Pankhuri Jain, Advocates.

CASES REFERRED TO:

1. *Delhi Transco Ltd. & Anr.* vs. *Hythro Engineers Pvt. Ltd.,* 2012 (3) Arb. LR 349 (Delhi).
2. *The Executive Engineer (Irrigation and Flood Control)* vs. *Shree Ram Construction Co.,* 2010 (10) AD Delhi 180.
3. *M/s. DSA Engineers (Bombay) and Ors.* vs. *M/s. Housing & Urban Development Corporation (HUDCO),* 2003 1 AD (Delhi) 411.
4. *Indian Statistical Institute* vs. *M/s. Associated Builders and Others,* (1978) 1 SCC 483.
5. *S.R. Kulkarni* vs. *Birla VXL Limited,* 1998 V AD (Delhi) 634.

RESULT: Petition Dismissed.

RAJIV SHAKDHER, J.

IA No.10631/2013 (condonation of delay in re-filing)

1. This is an application filed for condonation of delay in re-filing. In the application, it is averred that there is a delay of 105 days in re-filing the main petition. However, as per the report of the Registry, there is a delay of 157 days.

2. The relevant dates which are set out in the petition and which have been conveyed by the learned counsel for the applicant/ petitioner are as follows :-

2.1 The award dated 01.10.2012 was received by the applicant / petitioner on the same date. The petition under Section 34 of the Arbitration and Conciliation Act, 1996 (in short the 1996 Act) was filed by the applicant / petitioner on 02.01.2013. 01.01.2013 being a holiday, the petition was filed immediately thereafter, as indicated above, on 02.01.2013. Since the Registry raised objections, the petition was re-filed on 14.01.2013. The Registry, however, took a view that objections had not been removed and therefore, the petition was returned on 14.01.2013. The applicant/ petitioner re-filed the petition, once again, on 28.01.2013.

2.2 The Registry pointed to the applicant/ petitioner on 29.01.2013, that it should remove the objections *"properly"*. The applicant / petitioner

appears to have re-filed the petition, on 21.05.2013.

2.3 According to the Registry, objections which had been pointed on 14.01.2013, continued to remain on record, and therefore, once again, the petition was returned on 31.05.2013.

2.4 It appears, that finally, the applicant / petitioner removed all objections on 04.07.2013. The petition, came up for hearing, before this court, for the first time, on 10.07.2013.

2.5 On that date, since the respondent entered appearance, and had, sought time to file reply to the captioned application, the petition was re-listed today i.e., 11.11.2013.

3. The non-applicant/respondent has filed a reply.

3.1 Broadly, the objections taken by the non-applicant/respondent are as follows :-

(i). That the delay between 02.01.2013 to 31.05.2013 is 149 days, and not, 105 days;

(ii). The re-filed petition has been completely changed . This is sought to be demonstrated, by placing before the court a copy of the earlier petition filed with the Registry (a copy of which was obviously served on the non-applicant/respondent), and comparing the same with, the copy placed presently, on record.

(iii). The reasons for condonation of delay are untenable. The non-applicant/respondent contests the averments made in the application that seek to explain the delay between 02.01.2013 and 31.05.2013, on two grounds. The first, that there was a change in counsel. For this purpose, reliance is placed on an e-mail dated 13.03.2013 issued by the erstwhile counsel for the applicant/petitioner. Second, that the legal head of the petitioner i.e., one Mr. Dinesh Banth, had taken ill. It is averred that Mr. Dinesh Banth had a stone lodged in his kidney, for which, he was admitted to the hospital, in March, 2013, and operated upon on, 02.04.2013.

(iii)(a). As indicated above, the non-applicant/respondent contests this position by referring to the documents placed on record which, according to the non-applicant/respondent, only demonstrates that Mr. Dinesh Banth had admitted himself, in the hospital only for day care. It is, therefore, the contention of the non-applicant/ respondent that there

was nothing on record to suggest that the said gentleman was, operated upon, as averred in the application.

(iv) The delay is malafide and no sufficient cause has been shown for condonation of delay.

4. To be noted, the applicant/petitioner has filed a rejoinder; with which, most of the documents relied upon, concerning the illness of Mr. Dinesh Banth, have been filed. The applicant / petitioner has also placed on record the objections raised by the Registry from time to time.

5. The learned counsel for the parties have argued in line with the averments raised in their respective pleadings filed before me.

5.1 It is the submission of Mr. David, the learned counsel for the petitioner that the delay is neither malafide nor deliberate. It is his contention that a large part of the delay occurred on account of the change in counsel and due to the illness of the legal head of the petitioner. Mr. David contended that the court while examining the delay in re-filing need not adhere to the strict rigour, which it may be required to adopt, while examining the delay in the initial filing. In support of his submissions, Mr. David has relied upon the following three judgments :-

Indian Statistical Institute Vs. M/s. Associated Builders and Others, (1978) 1 SCC 483; **S.R. Kulkarni vs. Birla VXL Limited,** 1998 V AD (Delhi) 634; and **M/s. DSA Engineers (Bombay) and Ors. Vs. M/s. Housing & Urban Development Corporation (HUDCO),** 2003 1 AD (Delhi) 411.

6. On the other hand, Mr.Bhola, who appears for the non-applicant/ respondent submitted that this court would have to rigorously examine the delay in re-filing in view of the provisions of the Section 34(3) of the 1996 Act. He submits that examination of the delay in re-filing should be governed by the provisions of the New Act i.e., 1996 Act and not by keeping in mind the provisions of the Arbitration Act, 1940 (in short the 1940 Act).

6.1. The learned counsel for the non-applicant/respondent submits that while the frame of the petition on record is different from that which was filed in the first instance, the affidavit on record remains the same, that is, the one which was filed with the earlier petition.

6.2 To be noted, the affidavit is dated 02.01.2013, and is sworn by, one, Mr. Aman Thukral; an authorised representative of the petitioner.

6.3 The learned counsel for the petitioner further submits that at no stage did Mr. Dinesh Banth represent the applicant/petitioner, and that, Mr. Aman Thukral, represented the applicant/ petitioner before the arbitrator. Therefore, it is the learned counsel's contention that, the reason advanced to explain the delay; which is that the legal head, Mr. Dinesh Banth, had to be operated upon, and thus, the delay in re-filing ought to be condoned; is to say the least, nebulous and unworthy of acceptance.

6.4 In support of his submission, the learned counsel for the non-applicant/respondent has relied upon the judgment of the Division Bench of this court in the case of **The Executive Engineer (Irrigation and Flood Control) vs. Shree Ram Construction Co.,** 2010 (10) AD Delhi 180; and **Delhi Transco Ltd. & Anr. Vs. Hythro Engineers Pvt. Ltd.,** 2012 (3) Arb. LR 349 (Delhi).

6.5 The learned counsel has also relied upon a judgment dated 23.09.2013 delivered by me, in: IA No.7795/2013 and 7796/2013 filed in OMP 477/2013, in the case of **Union of India Vs. M/s. Ravinder Kapoor.** In the said judgment, I have followed the view taken by the two separate Division Benches in the aforementioned cases i.e., **Shree Ram Construction Co. and Delhi Transco Ltd. and Anr.**

6.6 Having regard to the above, I am of the view that the court does have the power to condone the delay in re-filing if the initial filing is within the period prescribed under Section 34(3) of the Act. The result, however, would depend on the facts and circumstances of each case. It is my reading of the Division Bench judgments of this court in Shree Ram Construction Co. and Delhi Transco Ltd. and Anr. that the court is not emasculated of its power to condone the delay, [and therefore, in a given case it may condone the delay] if sufficient cause is shown. The reasons, advanced, to explain the delay should reflect the bonafides of the applicant. I may only point out that if there was any lurking doubt with respect to this approach, it has been set at rest by yet another Division Bench of this Court in a recent judgment dated 07.11.2013, passed in FAO (OS) 485-86/2011, titled: **Delhi Development Authority Vs. M/s. Durga Construction Co.**

6.7 Thus, what has to be examined in this case is: whether sufficient

cause is shown to explain the delay.

7. A perusal of the record would show that the following facts obtain in the case :-

(i). The petitioner received a signed copy of the award dated 01.10.2012, on the same date.

(ii). There is nothing on record to show that Mr. Dinesh Banth was operated on 02.04.2013. There is no discharge summary filed; which is ordinarily issued, after an operation conducted by a hospital.

(iii). A perusal of the e-mail dated 13.03.2013, (put on record by the applicant/petitioner), would show that the lawyer then representing it, declined to appear for the applicant/petitioner because he had issues vis-a-vis the inability of the applicant/petitioner to take a decision qua his professional fee.

(iv). Most of the objections, which were raised on 14.01.2013 when, the applicant/petitioner was returned the petition, continued to appear on record even uptil 04.07.2013.

(v). The petition, which is placed on record, is accompanied by an affidavit of Mr. Aman Thukral; the authorised representative of the petitioner, and not that of, Mr. Dinesh Banth.

7.1 The learned counsel for the applicant/petitioner has confirmed that Mr. Dinesh Banth continues in the employment of the applicant / petitioner.

7.2 According to the applicant / petitioner, there is delay of 105 days. This obviously is an incorrect calculation. If only the period between 02.01.2013 and 31.05.2013 is taken note of, that itself accounts for 149 days.

7.3 Be that as it may, the moot question is : whether the delay has been properly explained. It is noted that there are two reasons given for seeking condonation of delay. The first reason, advanced is that: the lawyer for the petitioner had to be changed. The second reason articulated is, the illness of Mr. Dinesh Banth. Both events occurred in the month of March, 2013. The first event occurred somewhere in the middle of March, 2013, while the second event occurred at the end of March, 2013 and beginning of April, 2013. There is no explanation for delay

which occurred prior to March and that which occurred in the months of April and May, 2013. As indicated above, the objections were finally removed on 04.07.2013.

8. In my view, the reasons advanced by the petitioner do not supply sufficient cause, and therefore, the captioned application will have to be rejected. The time lines fixed, for filing objections to the award, are strict as indicated in three separate judgments of the Division Benches of this court in the following cases : Shree Ram Construction Co.; Delhi Transco Ltd. and Anr.; and M/s. Durga Construction Co.. It may be worthwhile to note that a Special Leave Petition as also a review petition was preferred against the judgment rendered in the case of Delhi Transco Ltd. & Anr. which were dismissed on 24.01.2013 and 21.03.2013 respectively. Similarly, a Special Leave Petition preferred in the case of Shree Ram Construction Co, was also dismissed.

8.1 Since the judgments relied upon by the learned counsel for the petitioner pertain to the 1940 Act, therefore, in my view, they would not have any applicability to the instant case. The regime under the 1996 Act, is perceptibly different to that of the 1940 Act. In any event, the condonation of delay is an aspect which turns on facts and circumstances of each case. Even if the test enunciated in the judgments relied upon by the petitioner is applied to the present facts, in my view, the applicant / petitioner has been negligent in not removing the objections in time.

8.2 As indicated above, there are vast periods qua which there are no explanations rendered by the applicant /petitioner.

9. I am also deeply concerned with the fact that the applicant / petitioner while removing objections changed the entire framework of the petition. When petitions are returned, the counsels involved are not entitled to change the framework of the petitions. The petitions are returned only for removing objections pointed by the Registry. If the amendments are required to be made, the correct course would be to move the concerned court after the petition is listed in court, so that steps are taken in accordance with the law, to incorporate the necessary amendments.

10. In foregoing circumstances, the application being without merit, is dismissed.

OMP 673/2013 and IA No.10629/2013 (stay)

11. In view of the dismissal of IA No.10631/2013, the necessary consequences will have to follow, which are, that the petition and the remaining application would also have to be dismissed. It is ordered accordingly.

ILR (2014) II DELHI 972
OMP

GAIL (INDIA) LTD. ....PETITIONER

VERSUS

GANGOTRI ENTERPRISES LTD. ....RESPONDENT

(RAJIV SHAKDHER, J.)

OMP NO. : 1110/2013 DATE OF DECISION: 12.11.2013

Arbitration & Conciliation Act, 1996—Sec. 34—Challenge to rejection of Counter Claim of the petitioner by the Arbitrator—No infirmity in conclusions of Ld. Arbitrator, which were based on record. Held Sec. 31(7)(b) of the Act permits recovery of interest, post award, @ 18% per annum, provided the arbitrator has not stated anything to the contrary. The petitioner failed to take advantage of time granted by the arbitrator—No interference. So far as costs are concerned, Ld. Arbitrator allowed one fourth of the total costs incurred by the respondents—Conclusion of arbitrator fair and equitable—Challenge rejected.

[Di Vi]

APPEARANCES:

FOR THE PETITIONER : Mr. Ajit Pudussery & Mr. M. Chandra Sekhar, Advs.

FOR THE RESPONDENT : None.

CASE REFERRED TO:

1. *State of Haryana & Ors.* vs. *S. L. Arora and Company* (2010) 3 SCC 690].

RESULT: Petition Dismissed.

RAJIV SHAKDHER, J.

OMP 1110/2013 & IA No. 18053/2013 (condonation of delay)

1. This is a petition filed under Section 34 of the Arbitration & Conciliation Act, 1996 (in short the Act) to assail the award dated 03.07.2013, passed by the sole arbitrator Hon'ble Mr Justice R.C. Lahoti, former Chief Justice of India.

1.1 Both in the petition filed before me as well as in the course of arguments advanced by Mr Ajit Pudussery, the challenge is laid solely to the rejection of the counter claim preferred by the petitioner. The counter claim relates to the imposition of liquidated damages by the petitioner, as compensation for delay in the execution of the contract by the respondent. The petitioner had pegged the counter claim at Rs. 64,47,978/-.

1.2 The petitioner, in the counter claim had sought recovery of a sum of Rs. 54,76,730/-, after adjustment of the accepted value of the final bill, in the sum of Rs.15,11,651/-. As noted by the learned arbitrator, the balance amount, which ought to have been claimed by the petitioner should have been a sum of Rs. 49,36,327/- and not Rs.54,76,730/-. The petitioner, apparently, was not able to explain the discrepancy based on the record placed before the learned arbitrator. The counsel for the petitioner, apparently, gave a rather vague explanation that the figure of Rs.54,76,730/- may have been arrived at after allowing for certain other claims. However, this need not detain me, as the learned arbitrator for the reasons given in the impugned award has rejected the counter claim of the petitioner, in its entirety.

2. Mr Ajit Pudussery has assailed this decision of the learned arbitrator on various grounds, which I would be adverting to shortly. Before I do that, let me refer to certain broad facts which are relevant for arriving at a decision in the present petition.

2.1 The petitioner, had invited tenders for construction of 175 housing units at UPPC Nagar, Diviyapur, Distt. Auraya, Uttar Pradesh. The respondent being a successful bidder, was awarded the contract. A letter of intent (LOI) dated 14.12.1995, was issued in favour of the respondent. A formal contract was executed between the parties on 03.01.1996.

2.2 The work entrusted under the contract to the respondent was required to be executed in three phases. For each phase, a scheduled date of completion was fixed. Undisputedly, the work, in respect of the each of the three phases was completed, though after the due date of completion. The delay in respect of phase I was 346 days, while the delay in respect of phases II and III was 746 days and 730 days respectively.

2.3 On 15.12.2000, the respondent submitted its final bill. After completion of joint measurements and scrutiny, the bill was certified for a total value of Rs. 16,11,654/-. Against the certified amount, a sum of Rs. 1 lac was directed to be deducted towards "retention against water proofing and ATT guarantee". Thus the net amount payable to the respondent was a sum of Rs. 15,11,654/-.

2.4 Admittedly, the net amount towards final bill, as indicated above, was not released to the respondent. Instead, the petitioner sought to recover the liquidated damages from the respondent towards compensation for delay in the execution of the works in issue.

2.5 It may be relevant to note that the respondent had submitted bank guarantees amounting to 10% of the contract value so that a sum equivalent would be released in its favour. The petitioner, having discovered that the amount which was recoverable towards liquidated damages was far in excess of the amount payable under the final bill, it refused to release the payment. This eventuality, perhaps, also occurred on account of the fact that the bank guarantees furnished by the respondent were not available for encashment. The record shows that BG No. 57/99 dated 24.02.1999 and BG No. 59/99 dated 06.03.1999 stood released, while BG No. 8/96 dated 03.02.1996, on which an injunction was obtained by the respondent from a civil court, had become invalid as it had not been renewed. Pertinently, the learned arbitrator discharged this bank guarantee, in view of the decision taken by him, in favour of the respondent.

3. Continuing with the narrative, the respondent vide notice dated 24.07.2001 sought reference of disputes to a sole arbitrator under clause 107.1 of the General Conditions of the Contract (in short GCC). The respondent, agreed to appointment of late Hon'ble Mr Justice R.S. Pathak, former Chief Justice of India, as the arbitrator, out of a panel of three arbitrators furnished by the petitioner. Some part of the proceedings were conducted by late Mr Justice R.S. Pathak. Upon his demise, parties by mutual consent agreed to the appointment of Mr Justice R.C. Lahoti, as the sole arbitrator. The proceedings before him, continued from the point they were positioned before Mr Justice R.S. Pathak.

4. The record shows that the respondent had preferred 19 claims, while the petitioner had preferred a counter claim towards recovery of liquidated damages, as indicated above. The respondent succeeded only in respect of: claim nos. 1, 7 and 18, whereby it was awarded sums of Rs. 15,11,654/-, Rs. 6.50 lacs and Rs. 1 lac respectively in its favour. Thus, the total amount awarded in favour of the respondent is a sum of Rs. 22,61,654/-. In addition, interest at the rate of 9% per annum is awarded in favour of the respondent from the date of filing of the statement of claims, i.e., 12.11.2001 till the date of the award; with a caveat that in case the awarded amount was not paid by 31.08.2013, it shall bear interest at the rate of 18% per annum from the date of the award till its realization. Costs in the sum of Rs.3 lacs, in addition to the amount expended towards stamp duty in the sum of Rs. 2,270/- by the respondent, was also awarded in its favour. 5. In the background of the aforesaid facts, Mr Pudussery challenged rejection of the counter claim on the following grounds:

(i) The learned arbitrator had failed to notice that a final decision had been taken by the Engineer-in-charge (EIC) under clause 27 of the GCC to levy liquidated damages.

(ii) The contract clearly provided that the authority to levy liquidated damages was vested in the EIC, while the decision as to whether or not time for execution of the contract had to be extended was vested in the competent authority; a distinction which the learned arbitrator failed to appreciate.

(iii) The learned arbitrator had failed to appreciate that the respondent had not objected to the imposition of liquidated damages, which was levied by the petitioner after expiry of the period stipulated under the

contract. The petitioner had consistently deducted a proportionate amount of liquidated damages from the Running Account bills (in short RA bills) submitted by the respondent from time to time. The respondent had accepted payments after deduction of liquidated damages without any *"serious protest"*.

(iv) The learned arbitrator failed to notice that under clause 107.1 of the GCC the decision taken by the EIC was not arbitrable, since it was an excepted matter. The impugned award, in so far as it rejected the counter claim of the petitioner, was contrary to public policy. The provisions of section 28 and 34 in this regard are adverted to in the petition.

6. Before I proceed further, I must also say that though no arguments were raised before me with regard to the award of the rate of amount of interest post 31.08.2013, or the award of costs, these are grounds of challenge raised in the petition. Notwithstanding the failure of Mr Pudussery to argue the same, I shall be dealing with the same.

REASONS

7. Having perused the record and heard the submissions of the learned counsel for the petitioner, I am of the view that there is no case made out for interference qua the impugned award vis-a-vis the aspects raised by the petitioner. Before I proceed further, it may be relevant to note that the entire case of the petitioner revolves around three clauses of the GCC; these being clauses 26, 27 and 107.1 of the GCC.

8. Clause 26, in particular clause 26.5.1, allows the owner, i.e., the petitioner, to "determine the period by which time is to be extended based on the recommendations of the EIC". The extension of time, however, would not absolve the contractor (in this case the respondent) qua other obligations imposed upon it, under the contract.

8.1 The provision of compensation for delay in the execution of the contract is provided in clause 27. The material sub-clauses are 27.1 and 27.2. Clause 27.1 clearly stipulates that time is the essence of the contract, and if, the contractor (i.e., the respondent) fails to execute the work in all respects, within the stipulated period then, unless such failure is due to force majeure conditions, as defined in clause 26 of the GCC, or due to the owner's (i.e., the petitioner's) default, it would have to pay compensation for delay at the rate of 0.5% of the value of the contract

for every week of delay or a proportionate sum thereof, subject to a maximum of 10% of the value of the contract. Crucially, this clause provides that the *"decision"* of the EIC in regard to applicability of compensation for delay would be final and binding on the contractor, i.e., the respondent".

8.2 Clause 107.1 of the GCC, which provides for arbitration, excludes matters, in respect of which, the decision of the EIC, is final and binding, from the remit of the arbitrator.

9. The learned arbitrator, in the impugned award, has clearly accepted the contention of the petitioner in this behalf, based on the plain reading of the aforementioned clauses of the GCC, that the authority to levy liquidated damages and the decision in that regard vests in the EIC. The learned arbitrator, has also accepted the contention of the petitioner that the decision as to whether or not extension of time is to be granted to the contractor, i.e., the respondent, vests with the petitioner/ competent authority, as provided in clause 26.5 of the contract, albeit based on the recommendation of the EIC.

9.1 Where the learned arbitrator has found fault with the petitioner's case, is that, he has been unable to discover any written decision placed on record, with regard to recovery of compensation for delay by way of liquidated damages.

9.2 It is in this background, that on 27.05.2010, the learned arbitrator had, as a matter of fact, directed the petitioner to place on record the relevant decision, if any, taken by the petitioner. The record reveals that at the fag end of the arbitration proceedings, i.e., on 06.09.2010, a photocopy of a note-sheet was produced before him for the period spanning 30.11.2000 till 06.12.2000. Despite the direction issued by the learned arbitrator the original was kept back; it appears the same was not made available to him. As a matter of fact, the learned arbitrator notes in paragraph 8.6 of the award that, the original record, of which, the note-sheet formed a part was not, produced before him.

9.3 On the examination of the note-sheet produced before the learned arbitrator, he came to the conclusion that the EIC had only made recommendations qua the following aspects, for which, approval was sought of the competent authority:

"....(i) Time extension with 5.5% LD of the contract value of Phase-I.

(ii) Time extension with 10% LD of the contract value of Phase-II.

(iii) Time extension with 10% LD of the contract value of Phase-III.

Sd/- (illegible)
06.12.2000
Camp UPPC, Pata"

9.4 The aforesaid extract would show that the signatures at the end of the note were illegible. This aspect has been recorded by the learned arbitrator in the impugned award.

9.5 Since, the petitioner had led evidence of one Mr.A.N. Choudhury (RW-1), who claimed in his deposition that he had taken a decision to levy liquidated damages, the learned arbitrator gave him the benefit of doubt that the signature on the note-sheet dated 06.12.2000, may be that of Mr A.N. Choudhury. The learned arbitrator, however, notices the fact that in the affidavit filed by Mr A.N. Choudhury, by way of examination-in-chief, he had not referred to the decision taken by him in levying liquidated damages. The learned arbitrator notices that this aspect was alluded to by Mr A.N. Choudhury (RW-1), only in the cross-examination. As indicated above, the learned arbitrator could not find anything in the note-sheet produced before him, which would have him come to the conclusion that a decision had been taken by the EIC with respect to imposition of liquidated damages on the respondent.

9.6 It is in this background that the learned arbitrator came to the conclusion that Mr A.N. Choudhury had only made a recommendation to the competent authority, and that, neither from the pleadings nor from the evidence on record, could he decipher as to who was the competent authority and, what decision had been taken by such an authority. The learned arbitrator's conclusion was that the official who wrote the note dated 06.12.2000 had not taken any decision but had only submitted a proposal for approval by the competent authority. These are findings of facts, which the learned arbitrator has carefully recorded in the impugned award, in particular, in paragraphs 8.14, 8.19 and 8.20 of the award.

9.7 The learned arbitrator, in the background of the above, concluded that in the absence of the decision of the competent authority several questions remained unanswered, which were raised by the respondent. These being: Firstly, with regard to the plea of the respondent that another contractor, who was identically placed, was allowed extension of time without imposition of liquidated damages. Secondly, the competent authority did not take a conscious decision with respect to imposition of liquidated damages, and hence, it could not be sustained. Lastly, the absence of proof of loss caused to the petitioner on account of the delay in the execution of the contract.

9.8 I find no infirmity in the conclusions arrived at by the learned arbitrator. The conclusions of the learned arbitrator are based on the record made available to him.

9.9 Mr Pudussery, at some stage, had sought to rely upon documents filed in this court, to contend that a decision was taken by the competent authority. I squarely put to him if any of these documents were placed before the learned arbitrator. Mr Pudussery fairly conceded that he was not sure as to whether the lawyer who represented the petitioner in the arbitration proceedings had placed these documents on record.

10. The lack of uncertainty even at the stage of the institution of a petition under Section 34 of the Act speaks volumes for the manner in which the petitioner has dealt with the matter.

10.1 The other argument, that the respondent, had not objected to, adjustments made in RA bills, is untenable for two reasons. First, there is no reference to this aspect in the impugned award. It is quite possible, this argument was never made. Assuming that this argument was made, the fact of the matter is that the contract between the parties requires a decision with respect to liquidated damages by the EIC; which is clearly absent. Lack of protest, as alleged, would not help the petitioner's cause.

10.2 As regards the submission of Mr Pudussery that decision of EIC was an *"excepted"* matter and hence not arbitrable is pivoted on whether or not there was a decision taken, in the first instance, by the EIC. The submission in this behalf, in my view, is completely untenable.

11. This brings me to two other aspects. The first aspect is with regard to the enhancement of the rate of interest in the impugned award to 18%, if the petitioner was to fail in paying the awarded amount by

31.08.2013. It is to be noted that admittedly, as averred in the petition, a signed copy of the impugned award dated 03.07.2013, was made available to the petitioner on 05.07.2013. It had more than one and a half month available to it, to challenge the award. The petitioner, however, waited for the expiry of the three months period granted for impugning an award under Section 34(3) of the Act. The present petition was filed only on 11.10.2013. As a matter of fact, the petitioner has filed an application seeking condonation of delay of eight (8) days beyond the period of three months. In my view, the learned arbitrator has only incentivised alacrity. Pertinently, Section 31(7)(b) of the Act permits recovery of interest, post the date of the award at the rate of 18% per annum, provided the arbitrator has not stated anything to the contrary. [See **State of Haryana & Ors. vs. S. L. Arora and Company** (2010) 3 SCC 690]. The petitioner failed to take advantage of the time frame granted by the arbitrator, and therefore, there is no reason as to why I should interfere with the award on this score.

12. The second aspect relates to costs. The petitioner claims that since the majority of the claims of the respondent were rejected, the learned arbitrator should not have granted costs in the sum of Rs. 3 lacs to the respondent. The learned arbitrator has carefully weighed this aspect, as against the following: the fact that after the re-constitution of the arbitral tribunal, nearly 26 hearings (effective and non-effective) were held before him; the respondent was represented by a senior counsel assisted by a junior counsel; and while, the respondent had succeeded partially, the petitioner's counter claim had been rejected. Having regard to this overall scenario the arbitrator allowed one-fourth of the total costs incurred by the respondent; which were quantified at Rs. 3 lacs. I find that the learned arbitrator in coming to a conclusion, which he did, has been both fair and equitable. The ground of challenge raised in this behalf is also rejected.

13. For the foregoing reasons, I find no merit in the petition. The same is, accordingly, dismissed.

ILR (2014) II DELHI 981
CRL. A.

RAM PARSHAD **....APPELLANT**

VERSUS

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

(S.P. GARG, J.)

CRL.A. NO. : 230/2000 **DATE OF DECISION: 12.11.2013**

Indian Penal Code, 1860—Sec. 302, 304(II)—FIR is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at trial. The object to insist prompt lodging of FIR is to obtain the earliest information regarding the circumstances in which the crime committed.

There is no such universal rule as warrant rejection of the evidence of a witness merely because he/she was related to or interested in the parties to either side. If the presence of such a witness at the time of occurrence is proved or considered to be natural and the evidence tendered by such witness is found in the light of surrounding circumstance and probabilities of the case to be true, it can provide a good and sound basis for conviction.

Prior to the occurrence, there was no animosity of these with the appellant to falsely implicate him in the incident.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. M.M. Singh, Advocated with Mr. Sunil Singh, Advocate.

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

RESULT: Appeal dismissed

S.P. GARG, J.

1. Ram Parshad (the appellant) challenges the correctness and legality of a judgment dated 08.03.2000 in Sessions Case No. 398/94 arising out of FIR No. 233/91 under Section 302 IPC registered at PS Gokal Puri by which he was convicted for committing offence punishable under Section 304 part-II IPC and awarded RI for seven years with fine Rs. 3,000/-. The factual matrix of the case are as under :

2. Meera, (Ram Roop's sister) married to Radhey Shyam, appellant's son, had come to stay at her parents' house on the occasion of delivery of a son to her sister-in-law (Devrani), Rustam's wife. On the day of incident i.e. 25.07.1991, Radhey Shyam had come to her in-laws' house to bring her back and after some time, the appellant also came there. Meera's brother – Raj Kumar promised to send her back after some days as certain formalities regarding the birth of the child were yet to be performed. Ram Parshad confronted Raj Kumar for not sending Meera with his son – Radhey Shyam and hit him (Raj Kumar) with a danda in a scuffle. When Ram Roop intervened, Ram Parshad took out a scissor from the pocket and inflicted blow on Ram Roop's neck, as a result of which, he fell down and became unconscious. Ram Roop breathed his last on the way to GTB Hospital and was declared 'dead' on arrival. The police machinery was set in motion after Daily Diary (DD) No.4A (Ex.PW15/ A) was recorded at PS Gokal Puri on receiving intimation from PW-15 (Cont. Chaman Singh) about Ram Roop's admission in the hospital by his wife. The investigation was marked to SI Baldev Singh who with Const.Rajpal proceeded for the spot. Subsequently, the investigation was taken over by SHO – Ram Singh Chauhan and he lodged First Information Report after recording Raj Kumar's statement (Ex.PW-4/A). Post-mortem examination on the body was conducted. Statements of the witnesses conversant with the facts were recorded. The accused was arrested and on completion of investigation, he was charge-sheeted for committing offence under Section 302 IPC. To establish its case, the prosecution examined eighteen witnesses in all. In his 313 statement, the appellant pleaded false implication and came up with the plea that Raj Kumar had attempted to injured him with a scissor but it hit Ram Roop on his intervention and caused his death. He was falsely

implicated in an attempt to save the actual perpetrator of crime Raj Kumar. DW-1 (Radhey Shyam) and DW-2 (Narain Giri) appeared in his defence. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment held Ram Parshad, guilty of the crime under Section 304 part-II IPC and sentenced him accordingly. It is relevant to note that State did not challenge the judgment whereby the appellant was acquitted of the charge under Section 302 IPC.

3. I have heard the learned counsel for the parties and have examined the record. It is admitted case of the parties that Meera married to Radhey Shyam – appellant's son had come to stay at her parents' house about eight days prior to the incident due to birth of a male child in the family of her brother – Rustam. It is also not in dispute that on the day of occurrence, Radhey Shyam and his father – Ram Parshad had come at Meera's parents' house to take her back to the matrimonial home. Her brothers had not agreed to send her back at that moment of time and a scuffle ensued between Ram Parshad and Raj Kumar, in which Raj Kumar suffered a danda blow at the hands of the appellant. Counsel for the appellant urged that danda blow enraged Raj Kumar and he brought a scissor from the house to inflict injuries to the appellant. Ram Roop intervened to save Ram Parshad and the churi blow hit him and caused his death. The prosecution witnesses have denied the allegations and have held Ram Parshad responsible for Ram Roop's death. Counsel urged that Raj Kumar did not take the injured to the hospital and fled the spot after the occurrence. The injured was taken and admitted in the hospital by the appellant and his son. Vital discrepancies in the testimonies of interested witnesses whose concern was to save their close relative and to put the blame upon the appellant were ignored without sound reasons. Adverse inference is to be drawn against the prosecution for withholding crucial witness – Meera from appearance in Court. The appellant had no motive to bring scissor in his pocket from his residence as his only purpose was to bring back his daughter-in-law to the matrimonial home. The ocular testimony is inconsistent with the medical evidence. Learned Addl. Public Prosecutor urged that statements of the relevant and material witnesses who had witnessed the incident are consistent and there are no valid reasons to deviate from the finding recorded by the Trial Court.

4. The crucial question to be ascertained is whether the scissor blow was given by the appellant to Ram Roop or he sustained injuries

accidentally when allegedly, Raj Kumar attempted to injure Ram Parshad. The occurrence took place at about 07.30 A.M. Daily Diary (DD) No. 4A (Ex.PW-15/A) was recorded at 09.18 A.M. on information given by Duty Const. Chaman Singh regarding Ram Roop's admission in the hospital. MLC mark 'Y' records arrival time of the patient at GTB Hospital at 09.00 A.M. It further records that Sohan Devi brought Ram Roop and admitted him in the hospital. Statement of the complainant – Raj Kumar was recorded and the Investigating Officer lodged First Information Report promptly without any delay at 10.40 A.M. by making endorsement (Ex.PW-18/A) thereon. In the statement, Raj Kumar gave vivid description of the occurrence and specifically named Ram Parshad to have inflicted injuries with a scissor to his brother Ram Roop. He also attributed specific motive prompting Ram Parshad to cause injuries when he declined to send Meera with his son Radhey Shyam that time. Since the FIR was lodged without any delay, there was least possibility of a false story to have been created in a short interval. FIR in a criminal case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object to insist prompt lodging of obtain the earliest information regarding the circumstances in which the crime was committed. While appearing in the Court, Complainant – Raj Kumar proved the version given to the police at the first instance without any major variations or improvements. He deposed that when he told Ram Parshad that Meera would be sent after performing necessary ceremonies, Ram Parshad reacted by uttering *'Ki Tu Bahut Dada Banta Hai'*. Thereafter, Ram Parshad hit him with a danda lying nearby. Ram Roop, Sohan Devi, Santosh and Jyoti reached there and tried to intervene in the dispute. When his brother – Ram Roop tried to make Ram Parshad understand that he should not pick up the dispute, he (Ram Parshad) took out a scissor from the pocket and hit him on the left side of his neck. He was taken in a three-wheeler scooter by his wife -Sohan Devi and Brij Mohan to the hospital. The neighbours apprehended Ram Parshad and gave beating to him. In the cross-examination, he disclosed that the incident took place in the gallery near the door. He denied the suggestion that beatings were given by them to Radhey Shyam. He fairly admitted that he had not accompanied Ram Roop to the hospital and explained that on the way he had gone to the police station to lodge report. He categorically denied that he had attempted to inflict injury to Ram Parshad with a scissor or by an accident it hit Ram Roop. On scrutinising the complainant's deposition, it transpires that the appellant could not elicit

any vital discrepancy to disbelieve and discard his version. PW-1 (Sohan Devi), deceased's wife also held Ram Parshad responsible for the death of her husband – Ram Roop when he inflicted injuries with a scissor on his neck. She denied the role assigned to Raj Kumar in attempting to inflict injury with a scissor to Ram Parshad. She rather explained that she pacified the quarrel that took place with Ram Parshad over sending of Meera to her matrimonial home. She corroborated the testimony of PW-4 on all material aspects and nothing material could be extracted in the cross-examination to disbelieve her. She had lost her husband and was not expected to falsely implicate an innocent and to let the real culprit go scot free. PW-5 (Santosh), Raj Kumar's wife, also deposed on similar lines. PW-12 (Brij Mohan), a neighbour, who went to the spot after hearing the commotion also supported the prosecution and implicated Ram Parshad for causing injury with a scissor on Ram Parshad's neck. He had taken the injured in a three-wheeler scooter with deceased's wife Sohan Devi to the hospital. Being a neighbour, his presence at the spot was quite natural and probable. All the witnesses referred above are consistent in their version whereby specific role was attributed to the appellant for causing injuries to the deceased with a scissor. All of them were living in a joint family and had no history of animosity among them over any issue. It is not believable that Raj Kumar would attempt to cause fatal injuries by a scissor to the father-in-law of his sister Meera in the presence of his brother-in-law Radhey Shyam.

5. Medical evidence is not in conflict or variance with ocular evidence. PW-14 (Dr.L.T.Ramani), autopsy surgeon, proved the postmortem examination report (Ex.PW-14/A). Ram Roop had sustained two incised wounds on the body which were ante mortem in nature caused by sharp edged weapon. Injury No.1 was sufficient in the ordinary course of nature to cause death. The injuries were not accidental in nature. These were caused with great force and the victim had no time to react and succumbed to the injuries while being taken to the hospital. Ram Parshad was medically examined after arrest on 25.07.1991 vide MLC (Ex.PW18/ A) by Dr.R.A.Gautam at GTB Hospital. Since, he was beaten by the public at large after the occurrence, he suffered simple injuries by blunt object on his body. The appellant or his son Radhey Shyam appearing as DW-1 did not explain as to how and in what manner injuries were caused to Ram Parshad. Ram Parshad did not lodge report with the police to accuse Raj Kumar for causing fatal injuries to Ram

Roop. MLC mark 'Y' does not record that he had taken the victim to GTB Hospital. PW-1 (Sohan Devi) whose name finds mentioned in the MLC denied Ram Parshad to have accompanied them to the hospital. Suggestions were put to the PWs to create an impression that relations between the brothers were strained on some issues but there was no cogent material to infer any animosity among them and they all lived in a joint family without any confrontation. Ram Parshad did not give plausible explanation as to what forced him to go to the spot to fetch his daughter-in-law when Radhey Shyam had already gone there for that purpose. He had no occasion to hit Raj Kumar with a danda despite his refusal to send Meera to her matrimonial home. Discrepancies and improvements highlighted by the appellant's counsel are inconsequential as they do not go to the root of the case. Non-examination of Meera is not fatal. It is unclear if Meera lived with Radhey Shyam in the matrimonial home after the occurrence. In that eventuality, the appellant was at liberty to examine her in defence. It is true that the witnesses examined by the prosecution are all related to the deceased. However, that itself is no ground to reject their testimonies in its entirety. The occurrence had taken place during morning time at the Meera's parents' house. Outsiders / neighbourers were not expected to be present to witness the incident. There is no such universal rule as to warrant rejection of the evidence of a witness merely because he / she was related to or interested in the parties to either side. In such cases, if the presence of such a witness at the time of occurrence is proved or considered to be natural and the evidence tendered by such witness is found in the light of surrounding circumstance and probabilities of the case to be true, it can provide a good and sound basis for conviction. Prior to the occurrence, there was no animosity of these witnesses with the appellant to falsely implicate him in the incident.

6. In the light of above discussion, the findings under Section 304 part-II IPC cannot be held unreasonable to interfere with and are affirmed. The appellant was sentenced to undergo RI for seven years. Nominal roll dated 18.07.2000 reveals that he had already undergone one year, one month and one day incarceration as on 18.07.2000 before enlargement on bail. He is not a previous convict and has no criminal antecedents. There was no ulterior motive for the appellant to cause death of his close relative. The incident occurred suddenly in a heat of passion over a trivial issue on refusal of Meera's brothers to send her to the matrimonial home

with her husband that day. Considering all the facts and circumstances of the case, sentence order is modified and the substantive sentence of the appellant is reduced from seven years to five years. Other terms and conditions of the sentence order are left undisturbed.

7. The appellant is directed to surrender to serve the remaining period of sentence before the Trial court on 20th November, 2013. The Registry shall transmit the Trial Court records forthwith.

ILR (2014) II DELHI 987
OMP

INDU PROJECTS LTD. ....PETITIONER

VERSUS

UNION OF INDIA ....RESPONDENT

(RAJIV SHAKDHER, J.)

OMP NO. : 1112/2013 DATE OF DECISION: 18.11.2013

Arbitration & Conciliation Act, 1996—Petition U/s. 9 seeking injunction qua encashment of the performance bank guarantee—Bank guarantee was unconditional—Bank was required to pay, merely on a demand, to the beneficiary. The terms of the bank guarantee envisages two scenarios; first, where the beneficiary by virtue of breach suffered injury and also quantified the loss; secondly, the breach has resulted in an injury but the loss was not yet quantified. Held, it is trite to say that bank guarantee is an independent contract. The bank is not to look to the terms of the underlying or the main contract entered into between the contractor and the beneficiary. The examination by the Court has to be from the point of view of the concerned bank furnishing bank guarantee and not independent to it. The only exceptions are the exceptions of fraud or whether the invocation of bank guarantee is in terms of the bank guarantee. The tests adopted by the Courts are: Is the fraud "egregious"? Is it an established fraud of the beneficiary known to the bank? Or whether independent of the bank, the aggrieved party sets up a case of special equity. A broad test would be that, would an aggrieved party find it difficult to realize or recover the amounts reflected in bank guarantee from the opposite party, if the aggrieved party were to ultimately succeed in the principal action. Held, in the present case, the case of petitioner does not come within the ambit of any exception—Petition dismissed.

[Di Vi]

APPEARANCES:

FOR THE PETITIONER : Mr. C.A. Sundaram & Mr. Ashok Bhan, Sr. Advocates with Mr. Ashish Bhan & Ms. Ginny Rautray, Advs.

FOR THE RESPONDENT : Mr. Rajeeve Mehra, ASG with Mr. Sumeet Pushkarna, CGSC & Mr. Jaswinder Singh & Ms. Sara Sundaram, Advs.

CASES REFERRED TO:

1. *State Trading Corporation of India Ltd.* vs. *State Bank of India & Ors.* 200 (2013) DLT 283 (DB).
2. *DSC Ltd.* vs. *Rail Vikas Nigam Limited & Ors.,* OMP No. 742/2013.
3. *Vinitec Electronics Pvt. Ltd.* vs. *HCL Infosystems Ltd.* (2008) 1 SCC 544.
4. *Hindustan Construction Co. Ltd. & Anr.* vs. *Satluj Jal Vidyut Nigam Ltd.* 2006 (I) AD (Delhi) 466.

RESULT: Petition Dismissed.

RAJIV SHAKDHER, J.

IA No. 18122/2013 (Exemption)

Allowed subject to just exceptions.

OMP No. 1112/2013

1. This is a petition filed under Section 9 of the Arbitration & Conciliation Act, 1996 (in short the Act) to seek an injunction qua the encashment of the performance bank guarantee bearing No.2010133IBGP0326 dated 25.10.2010, in the sum of Rs. 6,76,69,100/-, issued by the concerned branch of the IDBI Bank, situate at Hyderabad.

1.1. I must note, at the very outset, that a petition, raising similar pleas, though pertaining to a different contract, was filed by the petitioner, once again, under Section 9 of the Act. By this petition, as well, injunction on invocation of the bank guarantee in issue, in that case, was sought. The said petition was numbered as: OMP 1097/2013. By a judgment dated 01.11.2013, the petition, was dismissed. I am informed that an appeal was preferred with the Division Bench, which was rendered infructuous, as the respondent during the pendency of the appeal, had encashed the bank guarantee.

1.2. This petition, in broad terms, is a repetition of the pleas taken and dealt with by me, while delivering judgment in OMP No. 1097/2013. This petition is thus, like a second string to the bow. Having said that, one cannot help but observe, that the time consumed and the expense involved, in adjudicating upon such like disputes repeatedly, is enormous.

1.3 As indicated by me in my judgment dated 14.08.2013, passed in OMP No. 742/2013, titled **DSC Ltd. vs Rail Vikas Nigam Limited & Ors.,** it appears that advocates are unable to guide petitioners as to the state of the law on the subject. One of the reasons why such petitions are filed repeatedly, without fail, is perhaps the diffidence shown by courts in not imposing heavy costs in respect of issues on which the law is settled far too well, by the highest court in the country. What makes the matter worse is that the present petition is accompanied by three other petitions, and perhaps, several others waiting in the pipeline.

2. Therefore, without much ado, let me advert to the facts which obtain in the present petition, and the arguments, advanced in support of those contentions. I must, however, state at the outset that Mr Sundaram,

who appeared for the petitioner, categorically conveyed to me that the submissions made in the lead matter, would cover the other three petitions filed along with the lead petition.

2.1 However, for the sake of good order, I have passed separate orders, so that the dates and events, obtaining in each matter are distinctly set out; the discussion qua submissions made though, is common.

3. On 15.06.2010, the respondent floated a Notice Inviting Tender (NIT), for execution of the work described as "construction of residential accommodation at Udhampur (Army) and Udhampur (Air Force) Package – I B." (the work in issue).

3.1 Since, the petitioner was declared a successful bidder, a Letter of Intent (LOI) dated 30.09.2010, was issued in its favour. The total value of the work in issue was pegged at Rs. 135.17 crores. The total tenure of the contract was 27 months commencing from the date on which the site was handed over; as averred in the petition. The work was required to be executed in five phases. The date of commencement of the work was 09.10.2010. Therefore, the contract was required to be completed on or before 08.01.2013.

3.2 The petitioner, as per the terms of the contract, was required to furnish a performance bank guarantee, equivalent to 5% of the contract value. Accordingly, the petitioner furnished a performance bank guarantee dated 25.10.2010 of a value of Rs. 6,76,69,100/-. The bank guarantee, according to the petitioner is valid till 31.12.2014.

3.3 It is the case of the petitioner that the mobilization advance was paid to it only on 08.12.2010; after a delay of nearly two and a half months. The petitioner avers that recovery against mobilization advance was commenced, by the respondent, along with interest, at the rate of 8% per annum w.e.f. 08.02.2011. It is also the case of the petitioner that, in order to commence execution of the work, it had mobilized resources at the site in issue. It is averred that the petitioner had erected scaffolding worth several lakhs, to enable the execution of the work in issue.

3.4 The petitioner claims that, contrary to the terms of the contract, the site in issue, was handed over to it on a piecemeal basis, which, inter alia, resulted in delay, in the execution of the work.

3.5 There are several other reasons set out in the petition, which according to the petitioner, impeded the execution of the work in issue. These being: the onset of heavy and unexpected rains; the delay in decision taken by the respondent for removal of existing water pipelines in five blocks at Chhetri enclave; the onset of public bandhs; and the non-availability of steel, which had to be sourced from approved vendors, i.e., SAIL.

3.6 It is also averred that, the petitioner, has applied for extension of time vide letter dated 20.11.2012 till December, 2013 which, is pending consideration of the respondent.

4. It is in this background when, the petitioner came to know on 08.08.2013, that the respondent, had sought to invoke the bank guarantee in issue vide letter dated 07.08.2013, that it approached this court, by way of a petition, under Section 9 of the Act; which was numbered as OMP No. 783/2013. Vide order dated 12.08.2013 an interim injunction was granted in favour of the petitioner, for the reason that prima facie, the invocation, at that stage, did not appear to be in consonance with the terms of the bank guarantee. The respondent, apparently, to meet this defect in its letter of invocation overrode the earlier letter of invocation with a fresh letter of invocation dated 23.10.2013.

4.1. The petitioner, has assailed, in substance, the fresh invocation made vide letter dated 23.10.2013.

4.2 Vide order dated 31.10.2013, OMP No. 783/2013, was disposed of giving liberty to the petitioner to impugn the letter dated 23.10.2013; albeit in accordance with law.

5. It is in this background, Mr Sundaram, learned senior counsel for the petitioner has made the following submissions:

(i) The invocation was not in terms of the bank guarantee as it did not state that a loss had occasioned on account of the alleged breach committed by the petitioner. In other words, the factum of loss, was not articulated in the letter of invocation. In this regard, he referred to provisions of clauses 47 and 48, and first proviso to clause 60 of the General Conditions of the Contract (GCC).

(ii) While, it was not for the concerned bank, which had furnished the bank guarantee, to make an inquiry as to whether or not loss had

occasioned; the respondent was duty bound to place before the court material to establish that loss had in fact occasioned; which propelled it to invoke the performance bank guarantee. The invocation of the bank guarantee was thus, pivoted on this jurisdictional fact.

(iii) The parties herein, have entered into eight (8) contracts; albeit for different locations, in respect of which eight (8) bank guarantees had been furnished. The total value of the bank guarantees was a sum of Rs. 43 crores. If, the respondent, was permitted to encash all bank guarantees, the petitioner, would practically, become insolvent; thus causing grave injustice to it.

(iv) Since the factum of loss was not established, the invocation was fraudulent.

(v) The impediments in the execution of the contract, (adverted to in the petition), being solely attributable to the respondent, give rise to special equities, in favour of the petitioner; which was, yet another reason for injuncting the encashment of the bank guarantee.

5.1 In support of his submissions, Mr Sundaram relied upon the following judgments: **Hindustan Construction Co. Ltd. & Anr. vs Satluj Jal Vidyut Nigam Ltd.** 2006 (I) AD (Delhi) 466 and **State Trading Corporation of India Ltd. vs State Bank of India & Ors**. 200 (2013) DLT 283 (DB).

6. On the other hand, Mr Mehra, learned ASG who appeared for the respondent, contended that no ground was made out for grant of injunction. It was submitted that the petitioner's case did not fall within any of the three exceptions articulated by the courts for grant of injunction of an unconditional bank guarantee.

6.1 Mr Mehra in this behalf relied upon the terms of the bank guarantee and the letter of invocation dated 23.10.2013. It was his submission that the letter of invocation adverted to the fact that the petitioner had breached the terms and conditions of the agreement obtaining between the parties, and that, by virtue of such a breach, the loss/ damage, which would be caused to the respondent, would exceed the value of the bank guarantee in issue.

6.2 It was Mr Mehra's contention that against the total value of the contract, which was in the range of Rs. 135 crores (approximately), the

petitioner had completed work amounting to only 12.65%. As a matter of fact, he brought to the notice of the court that a fresh NIT had been issued, wherein the contract value was indicated at Rs. 141 crores (approximately), which was higher than the value of the contract executed between the parties herein, by at least Rs. 13 crores (approximately). In other words, Mr Mehra sought to convey that, as a matter of fact (as was obvious), loss had already occasioned and, there was every possibility of it being much higher, than the, difference in values indicated hereinabove.

6.3 In any event, according to Mr Mehra, the terms of the guarantee required the respondent only to say that a breach had occurred, which had or was likely to, result in a loss. Furthermore, it was Mr Mehra's contention that, reliance on clauses 47 and 48, and the first proviso of clause 60 of the GCC, was misconceived, as none of these clauses, had been referred to in the bank guarantee in issue.

6.4 In support of his submission, Mr Mehra, relied upon the judgment delivered between the same parties dated 04.10.2013 in OMP No. 1005/ 2013. Based on this judgment, Mr Mehra submitted that this court, had ruled, (in respect of a bank guarantee which had identical terms), that, where the beneficiary was in the realm of a likely loss, that could be caused to it, quantification of the loss was not required since, that was in any event, not a term of the bank guarantee.

REASONS

7. Having heard the learned counsels for the parties and perused the record, the contentions raised before me by Mr Sundaram, to use an aphorism, are really, in the nature of old wine in a new bottle. Though, I must state that, Mr Sundaram tried to draw a distinction qua the judgment delivered by me, between the same parties, in OMP No. 1097/ 2013, dated 01.11.2013, by emphasising the fact that the argument with regard to factum of loss, had not been dealt with in that judgment.

8. Let me, therefore, deal with this argument of Mr Sundaram based on which he seems to convey that the bank guarantee, which is otherwise unconditional, has metamorphosed into a conditional bank guarantee. For this purpose, for the sake of convenience, the relevant portion of the bank guarantee, on which, reliance is placed by Mr Sundaram, has been extracted hereinbelow:

> ''....We IDBI Bank Limited, do hereby undertake to pay the amounts due and payable under this guarantee any demur, merely on a demand from the Government stating that the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by the Government by reason of any breach by the said contractor of any of the terms or conditions contained in the said Agreement or by reason of the contractor's failure to perform the said Agreement. Any such demand made on the Bank shall be conclusive as regards the amount due and payable by the Bank under this guarantee. However, our liability under this guarantee shall be restricted to an amount not exceeding Rs. 6,76,69,100 (Rupees Six Crores Seventy Six Lacs Sixty Nine Thousand One Hundred only)..."
>
> (emphasis is mine)

8.1 A reading of the aforesaid extract of the bank guarantee would show that the concerned bank, which has furnished the bank guarantee, is required to pay, merely on demand, to the beneficiary, i.e., the respondent herein, the amounts due and payable under the guarantee.

8.2 Therefore, one is required to examine, as to the manner, in which, the demand ought to be made. As per the terms of the bank guarantee, the demand of the beneficiary, requires to state that, by reason of breach of any of the terms and conditions contained in the agreement by the contractor or, by reason of failure on the part of the contractor to perform its obligations under the said agreement, the amount claimed, has become due by way of loss or damage caused to it or that which would be caused or suffered by it.

9. In the light of the aforesaid, the next step would logically involve the examination of the relevant contents of the letter of invocation. Therefore, relevant parts, that is, paragraphs 5 and 6 of the letter dated 23.10.2013, are extracted hereinbelow.

> ".....5. And whereas there has been a breach by the contractor of the terms and condition of the Agreement and by virtue of such breach there would be loss/ damage caused to the Government by reason of such breach by the contractor which in the estimate of HQ DG MAP will exceed the value of said Bank Guarantee Bond.

6. I, on behalf of the President of India, hereby serve you with this notice of demand against the aforesaid Bank Guarantee Bond for the sum of Rs. 6,76,69,100/- (Rupees Six Crores Seventy Six Lacs Sixty Nine Thousand One Hundred only) on account of loss/ damage which would be caused to or suffered by the Government....."

9.1 A reading of the aforesaid extract would show that the respondent has firstly, stated that there has been a breach of the terms and conditions of the agreement, by the petitioner. Second, that the breach would result in loss or damage. Lastly, it is the estimate of the respondent, that the loss/damage would exceed the value of the bank guarantee in issue.

9.2 As I read the terms of the bank guarantee, it envisages two scenarios. First, where the beneficiary by virtue of the breach committed by the opposite party, would not only have suffered an injury but would also have, quantified the loss, say for example, where it had already entered into a risk-purchase contract on the date of injury or immediately thereafter but prior to the invocation of the bank guarantee. Second, which is a situation arising in the present case, where breach has occurred which has resulted in an injury, the quantification of loss though was not made possible, as the next step, which is the execution of a fresh contract, had not reached the stage of fruition. In the facts of the present case, there is no dispute that there has been a delay in the execution of the contract. The dispute which really obtains between the parties, is that, on whose door-step, the delay, in the execution of the contract, has to be laid. The question is: to whom is the delay attributable. The record shows that, as per the respondent, there is a breach, which has resulted in an injury, which the respondent has not been able to quantify, as yet. Therefore, keeping in mind this situation, the letter of invocation in terms of the bank guarantee speaks of the loss/damage, which would be caused to it by reason of breach, which is, estimated to exceed the value of the bank guarantee. The bank guarantee thus, draws a distinction between legal injury and the quantification of compensation for that injury, when it speaks of losses that would be caused or suffered by the beneficiary, as against a situation, where amounts are claimed by way of loss or damage already caused. It is quite possible; (though one must confess in the present times it is a remote possibility, with the cost of material and labour increasing with each day), that a fresh contract may be of a value less than the value of the original contract which was breached by the

contractor. In such an eventuality, at the end of the day, even though there is a legal injury suffered by a beneficiary, it may not be entitled to any damages in monetary terms, as damages under Sections 73 and 74 of the Indian Contract Act, 1872 are ultimately compensatory in nature, designed to put the aggrieved party in the same position as it would have been had the contract been performed by the opposite party, according to the terms and conditions agreed to between them. It is because, this exercise, cannot be conducted at the stage of the invocation of the bank guarantee, that is, where a fresh contract has not been executed by the aggrieved party, or where corrective measures have not been taken; that the bank, is called upon to pay, without demur and merely on a demand by the beneficiary.

9.3 It is trite to say that a bank guarantee is an independent contract. The bank, which has furnished the bank guarantee, at the behest of the contractor, i.e., the petitioner in this case, is not to look to the terms of the underlying or the main contract entered into between the contractor and the beneficiary, i.e., the petitioner and the respondent herein.

9.4 Therefore, the submission of Mr Sundaram that one would have to look at the provisions of clauses 47 and 48, and first proviso of clause 60 of the GCC, is completely untenable for more than one reason. First, there is no reference to the said clauses in the bank guarantee. Second, the examination by the court has to be from the point of view of the concerned bank which has furnished the bank guarantee and not independent of it. It is because of this reason that while examining the exception of fraud, or the other exception, which is, whether or not the invocation is in terms of the bank guarantee, that the tests adopted by the court are: Is the fraud "egregious"? Is it an established fraud of the beneficiary known to the bank? Is the encashment in consonance with the terms of the bank guarantee? In respect of the two exceptions, referred to above, the court has to examine the material from the point of view of the bank. Any other approach, if adopted, would put an unacceptable burden on the bank, and therefore, in one sense, paralyse the commercial world, which is the prime purpose why courts ordinarily do not injunct the encashment of bank guarantees, save and except where circumstances fall within the exceptions articulated hereinabove. The only area perhaps, where the court could examine the material placed before it, and in that sense independent of the bank, is where, the aggrieved party sets up a case of special equities. Therefore, the argument

of Mr Sundaram that in this particular case the court needs to examine the factum of loss, at this stage, in my view, is an argument which cannot be accepted.

10. In so far as special equities are concerned, the only argument that has been advanced before me, in sum and substance, is that, there were several impediments in the execution of the contract, which were solely attributable to the respondent. An overall view of the judgments pertaining to the bank guarantees would show that courts have interchangeably used the expression *"special equities"*, with expressions, such as, *"irretrievable injury"* or *"irretrievable injustice"*. In my opinion, the expression *"irretrievable injury"* or *"irretrievable injustice"*, is difficult to define with precision, as it would depend on facts and circumstances obtaining in each case. A broad test though, to my mind, would be that, would an aggrieved party find it difficult to realize or recover the amounts, which are reflected in the bank guarantee from the opposite party, if the aggrieved party were to ultimately succeed in the principal action, that it may launch against the opposite party. [See **Vinitec Electronics Pvt. Ltd. vs. HCL Infosystems Ltd.** (2008) 1 SCC 544 in paragraph 29 at page 553]. If I were to apply the aforesaid test to the present case, in my view, the petitioner's case does not come within the ambit of special equities.

10.1 I had in fact taken the very same view in **DSC Ltd.** case, wherein in somewhat similar situation a case for grant of injunction on the ground of special equities was sought to be raised. I had rejected that plea. The matter was carried in appeal to the Division Bench. The appeal was numbered as: FAO(OS) 374/2013. The Division Bench vide judgment dated 19.08.2013, dismissed the appeal. As a matter of fact, a Special Leave Petition was preferred against that judgment, which was numbered as: Civil Appeal No. 26796/2013. The Special Leave Petition was dismissed in limine vide order dated 27.08.2013.

10.2 In this context, the argument of Mr Sundaram that the petitioner had overall entered into eight contracts with the respondent and furnished, accordingly, eight bank guarantees worth Rs. 43 crores and that encashment of all eight bank guarantees would ruin the petitioner, is a submission which overlooks the following. First, that at the rate of 5% of the contract value (which is the rate Mr Sundaram provided me), the bank guarantees worth Rs. 43 crores, against contracts worth Rs. 860

crores (approximately), no employer likes to put contracts of such values unnecessarily into jeopardy. I am stating this only to put the matter in perspective, with the usual caveat that the trial would determine as who is it to blame for the delay. Second, there is no material put on record to show the petitioner's financial position; assuming one can look at the petitioner's financial worth. Third, this argument, in one sense is self-defeating, because it is precisely for this reason that bank guarantees are provided.

11. In the DSC Ltd. case, I had distinguished the judgment of a Single Judge of this court, in the case of: **Hindustan Construction Co. Ltd.** the same distinction would hold good in the present case. The facts as set out in Hindustan Construction Co. Ltd. would show that, the bank guarantee in issue in that case, was sought to be invoked even though the beneficiary of the bank guarantee had issued, a certificate of substantial completion of work; there was a decision of the Dispute Review Board awarding a substantial amount in favour of the contractor, with regard to its claim for extension of time; and that, the internal committee deliberations, which included the CMD of the beneficiary company, had returned findings in support of the contractor . As a matter of fact, the bank guarantee was sought to be invoked, just a day prior to the expiry of the performance period. As would be seen, the facts obtaining in the present case, are completely distinguishable.

12. In so far as the judgment in the case of State Trading Corporation of India Ltd. is concerned, the facts, as articulated in the judgment would show that the Division Bench was considering a challenge to an order passed by the Debts Recovery Tribunal (DRT) under Article 226 of the Constitution. The challenge to the order of the DRT arose in the background of the following circumstances: The petitioner before the court, i.e., State Trading Corporation Of India Ltd. (in short STC) had entered into a contract for purchase of wheat with respondent no. 3, in that case. To ensure due performance of contract by respondent no. 3, STC insisted on issuance of a performance guarantee, which was provided by respondent no.3, by requesting the State Bank of India (SBI)/ respondent no. 1, to do the needful. SBI/respondent no. 1 to protect its interest, had sought a counter guarantee, which was provided by a Swiss Bank, i.e., UBS AG/ respondent no.2. Since, disputes arose between STC and respondent no.3, STC invoked the bank guarantee furnished by SBI, which paid the said sum, despite, intimation by UBS AG/ respondent

no.2, that it had been injuncted by the Swiss Court, to make a payment in terms of the counter guarantee. The order of the Swiss court was upheld right till the Swiss Federal Supreme Court. The STC, had contested those proceedings. Parallely, arbitration was also taken recourse to by the parties to the main contract, i.e., the STC and respondent no. 3. Under the arbitration award a certain sum was awarded in favour of STC. On appeal, the Queen's Bench Division at London, awarded a larger sum in favour of respondent no. 3. Since, SBI was out of pocket, as it had paid STC against the bank guarantee furnished by it, it initiated proceedings before the DRT, for recovery of the sum due. In those proceedings, not only STC was impleaded as a party, but UBS AG/ respondent no. 2, as well as, respondent no. 3 were arrayed as defendants. The DRT, issued a recovery certificate in favour of SBI and against STC, while UBS AG/ respondent no.2 and respondent no.3, "were exonerated". It is in this background, that STC assailed the judgment of the DRT by way of a petition under Article 226 of the Constitution. The court, while rejecting the petition, noted that the invocation and consequent encashment of the bank guarantee was fraudulent, in view of the fact that, not only were the findings in the award against STC, but also there were findings returned against STC, by the Swiss Courts. The Division Bench, also noted that the DRT had recorded that there was performance of the contract by UBS AG/ respondent no.2, and the small variations, if any, could have been negotiated by the STC. The issues, raised in the petition by the STC, inter alia, pertained to the fact that DRT did not have jurisdiction in the matter as the STC did not owe a "debt" to the SBI, and that, the decree of the foreign court, ought not to be recognized. The court noted that, not only was STC in possession of the goods, but had also retained the money recovered by it upon encashment of the bank guarantee and had, thus, unjustly enriched itself. In my view, there is nothing in the Division Bench judgment which, even remotely, comes close to the facts obtaining in the present case. Mr Sundaram's reliance on the judgment of the Division Bench, is completely misplaced.

13. In my view, there is no merit in the petition. Needless to say though, any observations made by me hereinabove, are prima facie in nature and that they would have no impact on the merits of the disputes articulated in the petition if, and when, the petitioner, was to take recourse to arbitral proceedings.

14. In these circumstances, the petition is dismissed with costs of Rs. 25,000/-. The costs imposed will be deposited in the Prime Minister's Relief Fund, within one week. The concerned bank shall forthwith transmit the funds, as reflected in the bank guarantee in issue, to the respondent.

15. List before the learned Joint Registrar for compliance on 29.11.2013.

ILR (2014) II DELHI 1000
CRL. A.

ANIL TANEJA & ANR. ....APPELLANTS

VERSUS

STATE OF DELHI ....RESPONDENT

(S.P. GARG, J.)

CRL.A NO. : 473/2000 DATE OF DECISION: 19.11.2013

Indian Penal Code, 1860—Section 301-embodies doctrine of transfer of malice and is attracted when accused causes death of a person whose death he neither intends nor knows will be the result of his act.

Evidence Act—There is no legal hurdle in convicting a person on the sole testimony of a single evidence if his version is clear and reliable, for the principle that the evidence has to be weighed and not counted.

[Di Vi]

APPEARANCES:

FOR THE APPELLANTS : Mr. K.B. Andley, Sr. Advocate with Mr. M.L. Yadav, Mr. Lokesh Chandra & Mr. M. Shamikh,

Advocates.

FOR THE RESPONDENT : Mr. Lovkesh Sawhney, APP.

RESULT: Appeal dismissed.

S.P. GARG, J.

1. Anil Taneja (A-1) and Madan Lal (A-2) challenge their conviction in case FIR No.256/1998 registered at PS Moti Nagar in Sessions Case No.112/1998. By a judgment dated 17th July, 2000 passed by learned Additional Sessions Judgment, they were held guilty under Sections 304 and 323 IPC respectively. A-1, in addition, was convicted under Section 27 Arms Act. By an order dated 19.07.2000, A-1 was awarded various prison terms with fine while A-2 was released on probation. The prosecution case emerged out of the record is as under:-

2. On 26.06.1998 at about 12.30 a.m. at shop No.26-27, Subzi Market, Moti Nagar, an altercation ensued among the appellants and Munna for allowing Shyam Sunder to gamble at their shop. In the said quarrel, A-2 injured Munna by inflicting a danda blow on his head and on his exhortation, A-1 fired shots from the licenced revolver at Munna with an intention to murder him but the target missed and it hit Guruswamy standing nearby and caused his death. During the course of investigation, A-1 and A-2 were arrested. Post-mortem examination of the body was conducted. The crime weapons i.e. revolver and danda were recovered. Statements of witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was submitted against both the appellants for committing offences under Section 302/307/34 IPC. By an order dated 18.02.1999 they were charged for committing offences under Section 304/323 IPC. A-1 was also charged under Section 27 Arms. Act. The prosecution relied on the evidence of 20 witnesses. In their 313 statements, the appellants denied their complicity in the crime and claimed that they were victims at the hands of PW-3 (Jagdish Lal), who was running a gambling den in the area and encouraged Shyam Sunder to gamble there. When they objected to him (PW-3 Jagdish Lal) for spoiling their close relation, he got annoyed and on 26.06.1998, they were way laid and assaulted by him and his companions when they were returning after closing their shop. They also attempted to rob their revolver and in the scuffle, firing took place. They were taken to the hospital in injured condition but the police did not lodge their complaint. After

considering all these, as well as the submissions of the parties, the Trial Court by the impugned judgment held A-1 perpetrator of the crime under Section 304 Part I IPC and 27 Arms Act whereas A-2 was held guilty only under Section 323 IPC. There is no challenge by the State against A-2's acquittal under Section 304 IPC.

3. I have heard the learned counsel for the parties and have examined the record. Shri K.B.Andley, learned senior counsel for the appellants urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell in grave error in convicting the appellants for the offence which was never intended to be committed by them. The appellants had no animosity with Guruswami to cause his death by firing at him. The occurrence was accidental in nature. The injuries sustained by the appellants on their bodies were not explained. It is relevant to note that PW-4 (Munna) did not opt to support the prosecution and completely turned hostile. PW-3 (Jagdish Lal) and PW-5 (Subhash) are unreliable witnesses as they were running the gambling den and had prior animosity with the appellants. He adopted alternative argument to take lenient view and release A-1 for the period already spent by him in custody. The submissions made on behalf of the appellants were strongly resisted on behalf of the State by learned Additional Public Prosecutor who urged that the Trial Court had held that nothing had been elucidated by the defence from the evidence of PW-3 (Jagdish) and PW-5 (Subhash) which could cause the evidence of the said witnesses to be disbelieved. The impugned judgment is based on proper and fair appraisal of the evidence and needs no interference.

4. Homicidal death of Guruswami who succumbed to the injuries caused to him at the spot and was declared brought dead on arrival at the hospital is not under challenge. PW-11 (Dr.K.K.Kumra) proved MLC (Ex.PW-11/B) prepared by Dr. Ravinder Kumar on 26.06.1998. PW-19 (Dr.Komal Singh), autopsy surgeon, proved the postmortem examination report (Ex.PW-19/A) where the cause of death was given as hemorrhagic shock due to penetration of bullet on both lungs. The injury was sufficient in the ordinary course of nature to cause death. On external examination following injuries were found on the body:-

(i) One wound of 1.5 cm X 05 cm present on the right side of the arm near axilla.

(ii) One wound of 0.7 c.m. x 0.7 c.m. circular in shape black

ring present around it. It was 10.1 c.m. from the left nipple above and lateral.

PW-4 (Munna) admitted in the cross-examination by learned Additional Public Prosecutor that Guruswami died as a result of fire shot. PW-3 (Jagdish Lal) and PW-5 (Subhash), eye witnesses, have proved his homicidal death.

5. It is true that the appellants had no grudge or grievance against Guruswami to cause injuries to him. The prosecution case is that A-1 fired at Munna by his revolver and when the target missed, it hit Guruswami who was working nearby and caused his instant death. Apparently, ingredients of Section 301 IPC are attracted in this case. In **Rajbir Singh Vs. State of U.P. and Anr.** AIR 2006 SC 1963 scope of Section 301 IPC as examined and explained in **Shankarlal Kachaabhai and Ors. Vs. The State of Gujrat** 1965 Cri LJ 266 was reiterated by Supreme Court :

> *".....It embodies what the English authors describe as the doctrine of transfer of malice or the transmigration of motive. Under the section if A intends to kill B, but kills C whose death he neither intends nor knows himself to be likely to cause, the intention to kill C is by law attributed to him. If A aims his shot at B, but it misses B either because B moves out of the range of the shot or because the shot misses the mark and hits some other person C, whether within sight or out of sight, under Section 301 is deemed to have hit C with the intention to kill him. What is to be noticed is that to invoke Section 301 of the Indian Penal Code A shall not have any intention to cause the death or the knowledge that he is likely to cause the death of C....."*

In the instant case, the fact that there was no intention to cause injury to Guruswami and he was accidently hit can make no difference as according to the prosecution version, A-1 intended to cause injuries by fire arm to PW-4 (Munna) in an attempt to kill him but as he (PW-4 Munna) ducked, it hit Guruswami. Though initially malice was focused on PW-4 (Munna), however, due to missing of the target, it caused Guruswami's death and thus was a case of transfer of malice. The appellants, thus, cannot escape liability for causing Guruswami's death simply because it was never intended.

6. Crucial testimony to infer the guilt of the appellants is that of PW-3 (Jagdish Lal) who in his deposition before the court, attributed and assigned specific role to them in the incident and implicated A-1 to have fired thrice by the fire-arm in his possession at Munna on the exhortation of his father (A-2). Munna escaped the fire shot by sheer chance and Guruswami who worked at a dosa shop was hit on the chest and died. A-2 had caused injuries to Munna on head by a danda. In the cross examination, the witness admitted his involvement in criminal cases but denied that he was responsible for allowing Shyam Sunder, A-2's younger brother to gamble at his shop. He explained that gambling was going on the pavement in front of Delar's shop. He denied the suggestion that they were running a gambling den or that family members of Shyam Sunder had complained to them. He further denied that when the accused were returning from the shop, they were assaulted and injured with blunt and sharp edged weapons. Perusal of the statement of this witness reveals that his presence at the spot has not been denied. The appellants did not offer any explanation as to how and under what circumstances, the licenced revolver in A-1's possession came into motion and three shots were fired through it. The appellants did not claim that they had fired shots in the exercise of their legal right of private defence. They did not lodge any complaint against any assailants for the alleged injuries caused to them. It is also unclear as to at whom the fire shots were aimed at or that the assailants were armed with any weapon. Negativing this plea, Trial Court observed in para 33

> *"Now coming to the plea of self defence, having gone through the MLCs of each of the two accused, this court finds their version of having been assaulted to be a figment of their wild imagination. There has been no attempt on the part of the police at glossing over injuries of either of the two accused. The injuries sustained by them are such, as were quite natural in the circumstances, created by the accused themselves and have to be regarded as trivial in the given circumstances. The accused do not say specifically which particular person assaulted either of them and by what mode. The plea of firing in self defence has to be negatived. Firstly, there does not appear to be any plausibility matchless proof in their contentions that they*

were the victim of assault. Instead both of them are proved to be the aggressors. The self professed misconceived right of private defence does not arise at all in the given circumstance. Such a right did not enure in the first place against Munna or PW-3 or any other unnamed and unidentified person and the question of such non-existing right extending to the deceased Guru-Swamy just does not arise. The contention of the learned counsel appears humorously pathetic, to say the least. The evidential parameters before the court do not admit of even a remote possibility much less a reasonable apprehension of the enormity of being hurt justifying an exercise of right of private defence. In the absence of proof of such an apprehension the question of looking into the question whether the right was exceeded to or not would not arise. Of course, in pure legalistic terms if a right would have enured against Munna or Pw-3 or Pw-5, the same would have been available even qua any innocent person like the poor Guruswamy, deceased.

7. PW-5 (Subhash) another eye-witness corroborated PW-3's version in its entirety without any major variation. He also named A-1 to have fired at Munna who escaped but Guruswami became target and died. In the cross-examination, no material contradictions could be elicited to disbelieve his presence at the spot. Both PWs 3 and 5 had no prior animosity to falsely implicate the appellants in the incident. Merely because PW-3 had criminal antecedents and was involved in some criminal cases, it does not discredit the version given by him before the court, in the absence of any material discrepancies or contradictions. In fact, in their 313 statements, the appellants have admitted the firing incident but were unable to offer reasonable justification for the use of licenced fire-arm thrice. No specific plea of right of private defence was taken during trial and they were even unable to prove if they were justified to fire with the licenced revolver on unarmed individual(s) or that the exercise of right for private defence was reasonable and permissible in law. Initial confrontation had taken place with PW-4 (Munna) over allowing Shyam Sunder to gamble at PW-3's shop. In the said quarrel, A1 fired at Munna. Apparently, A-1's intention was to eliminate Munna by repeatedly

firing at him by the fire-arm in his possession. Post-mortem examination report reveals that Guruswami sustained two fatal wounds on his vital organs. One shot was fired in the air. It was good luck of Munna that he escaped but Guruswami became the victim. It is true that PW-4 (Munna) turned hostile and did not for some reasons opted to support the prosecution. He took complete somersault; denied appellants' involvement in the incident and introduced a new story of sustaining injuries in an altercation with a rickshawala without naming him. He admitted his signatures on Ex.PW-4/A which became the basis of First Information Report. Apparently PW-4 resiled from the previous statement made to the police implicating the appellants for extraneous reasons. Exclusion of his evidence won't affect the cogent and reliable testimonies of PWs-3 and 5 coupled with CFSL report. There is no legal hurdle in convicting a person on the sole testimony of a single evidence if his version is clear and reliable, for the principle is that the evidence has to be weighed and not counted. PW-4 cannot be permitted to sabotage the prosecution case. All the relevant contentions of the appellants were considered and dealt with in the impugned judgment with valid reasons. The judgment is based upon fair and proper appraisal of evidence and requires no interference. The findings of the Trial Court on conviction are affirmed. Undisputedly, Rigorous Imprisonment for ten years awarded to A-1 is excessive and needs modification. A-1's nominal roll reveals that he remained in custody for three years, two months and two days besides earning remission for three months and 14 days as on 07.10.2002. He was not involved in any criminal case and had clean antecedents. His overall jail conduct was satisfactory. The incident pertains to the year 1998. After his enlargement on bail vide order dated 09.01.2002, his involvement in any such criminal case did not surface. He was granted interim bail to take BA (BDP) examination at Indira Gandhi National Open University vide order dated 27.11.2001. The firing incident occurred when he and his father had gone to challenge PW-3 (Jagdish Lal) and his employee (PW-4 Munna) for encouraging Shayam Sunder, their close relative to gamble at their place. The compensation amount of '3 lacs awarded by the Trial Court has since been deposited. Considering all these mitigating circumstances, the sentence order is modified and the substantive sentence of A-1 is reduced from ten years to six years under Section 304 Part I IPC. Other terms and conditions of the sentence order are left undisturbed.

8. The appeal stands disposed of in the above terms. A-1 is directed to surrender before the Trial Court on 26.11.2013 to serve the remaining period of sentence. The Registry shall transmit the Trial Court records forthwith.

ILR (2014) II DELHI 1007
CRL. A.

AMAR KUMAR GUPTA ....APPELLANT

VERSUS

STATE OF DELHI ....RESPONDENT

(S.P. GARG, J.)

CRL.A NO. : 606/2000 & 607/2000 **DATE OF DECISION: 20.11.2013**

Evidence Act, 1872—Appreciation of Evidence—Early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding truth of the version.

Evidence Act—Appreciation of Evidence—The testimony of the injured witness is accorded a special status in law.

Evidence Act—TIP Adverse inference is to be drawn against the appellants for declining to participate in the Test Indentification Proceedings. It is settled legal preposition that Identification Parade is a tool of investigation and is used primarily to strengthen the case of the prosecution on the one hand and to make doubly sure that accused in the case are actual culprits. It is trite to say that substantive evidence is the evidence of identification in Court.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. R.D. Rana, Advocate.

FOR THE RESPONDENT : Mr. Lovkesh Sawhney, APP.

CASES REFERRED TO:

1. *Jai Prakash Singh* vs. *State of Bihar & Anr.',* 2012 CRI.L.J.2101.
2. *Rabinder Kumar Pal @ Dara Singh* vs. *Republic of India',* (2011) SCC 490.
3. *State of Uttar Pradesh* vs. *Naresh and Ors.',* (2011) 4 SCC 324.
4. *Prem Singh* vs. *State of Haryana.,* 2011 (10) SCALE 102.
5. *Abdul Sayed* vs. *State of Madhya Pradesh',* (2010) 10 SCC 259.
6. *Shyam Babu* vs. *State of Haryana* : AIR 2009 SC 577.

RESULT: Appeal dismissed.

S.P. GARG, J.

1. Ram Raj @ Rajesh @ Sagar; Amar Kumar Gupta (A-1); Khem Chand @ Sonu; Sarfu @ Govinda; Dharamvir @ Dharma (A-2) and Raj Kumar @ Raju were arrested in case FIR No. 532/98 PS Okhla Industrial Area and sent for trial for committing offences under Sections 394/34, 120-B & 411 IPC, on the allegations that on 01.08.1998 at 07.40 P.M. at Service road, D-block, near Water Tank, Okhla Industrial Area, they hatched criminal conspiracy to commit dacoity and pursuant to that conspiracy, robbed Ravinder Chaudhary of cash Rs. 86,000/-after inflicting injuries to him. The prosecution examined twelve witnesses to substantiate the charges. In their 313 Cr.P.C. statements, the accused persons pleaded false implication. DW-1 (Jagdish) and DW-2 (HC Ramesh Chand) were examined in defence. On appreciating the evidence and considering the rival contentions of the parties, the Trial Court by the impugned judgment dated 04.08.2000 in Sessions Case No. 146/98 convicted A-1, A-2, Ram

Raj @ Rajesh @ Sagar and Sarfu @ Govinda under Sections 394/34 IPC. Khem Chand @ Sonu and Raj Kumar @ Raju were acquitted of the charges. It is apt to note that the State did not challenge their acquittal. It is further relevant to note that Sarfu @ Govinda and Ram Raj @ Rajesh @ Sagar had preferred Crl.A.Nos. 557/2000 & 558/2000 before this Court which were disposed of on 26th April, 2013.

2. I have heard the learned Addl. Public Prosecutor and Mr.R.D.Rana, Advocate, Counsel for the appellants and have examined the record. During the course of arguments, appellants, counsel emphasized to take lenient view and modify the sentence order as the A-1 and A-2 had already remained in custody for about three years and have clean antecedents. The crime weapon was not recovered and the recovery of the robbed cash is suspicious. Learned Addl. Public Prosecutor urged that there are no valid reasons to discard the victim's statement who had no prior animosity with the accused to falsely implicate them.

3. Crucial testimony to infer the appellants, guilt is that of PW1 (Ravinder Chaudhary) who was deprived of Rs. 86,000/- and other articles on 01.08.1998 at about 07.40 P.M. He went to the police post and lodged First Information Report (Ex.PW-12/G) without any delay and informed the police about the incident. He was taken to AIIMS and was medically examined. The injuries were described 'simple' in nature caused by blunt object. In the statement (Ex.PW-12/G), Ravinder Chaudhary gave vivid description of the incident and attributed specific role to the assailants who had come on a motorcycle and had snatched a bag containing Rs. 86,000/-, ration card, I-card and gate pass from him though, he could not note down the registration number of the motorcycle on which the assailants had arrived at the spot. He claimed to identify the assailants and described their broad features in the complaint. During the course of investigation, all the assailants declined to participate in Test Identification Proceedings alleging that they were shown to the witnesses in the police station. PW-1 (Ravinder Chaudhary) identified all of them in the Court without hesitation and implicated them for the incident of robbery in which he was beaten. The complainant who had no prior ill-will or grievance against any of the appellants proved the version given to the police at the first instance without any variation or improvements. Despite searching cross-examination, his testimony could not be shattered on the material aspects. No ulterior motive was assigned to the witness to depose falsely. It has come on record that none of the assailants was

known to him and was not named in the FIR. It shows he did not nurture any grievance against them. The victim had direct confrontation with the assailants for sufficient duration and had clear opportunity to observe their broad features to identify them in the Court. The occurrence took place at about 07.40 P.M. and the police machinery was set in motion promptly. The Investigating Officer after recording victim's statement lodged First Information Report by making endorsement (Ex.PW-12/A) over the same at 09.15 P.M. Early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding truth of the version. In the case of **'Jai Prakash Singh v. State of Bihar & Anr.',** 2012 CRI.L.J.2101, the Supreme Court held :

> *"The FIR in criminal case is vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it looses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question."*

4. No infirmity has emerged in the testimony of the complainant to disbelieve or discard the version narrated by him and the evidence has a ring of truth, is cogent, credible and trustworthy.

5. The testimony of the injured witness is accorded a special status in law. In the case of **'State of Uttar Pradesh vs. Naresh and Ors.',** (2011) 4 SCC 324, the Supreme Court held:

> *"The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to*

falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence. Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein."

6. In the case of **'Abdul Sayed Vs.State of Madhya Pradesh'**, (2010) 10 SCC 259, the Supreme Court held :

"The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness".

7. Adverse inference is to be drawn against the appellants for declining to participate in the Test Identification Proceedings. Soon after their arrest, they were produced in muffled faces in the Court for identification purposes. Nothing was revealed as to when they were shown to the witnesses and to whom.

8. It is settled legal preposition that Identification Parade is a tool of investigation and is used primarily to strengthen the case of the prosecution on the one hand and to make doubly sure that accused in the case are actual culprits. It is trite to say that substantive evidence is the evidence of identification in Court. In **'Prem Singh vs. State of Haryana.,** 2011 (10) SCALE 102, the Supreme Court held :

XXX XXX XXX

"13. The two eye-witnesses PW-11 and PW-12 have given a graphic description of the incident and have stood the test of

scrutiny of cross-examination and had also stated that they could identify the assailants, but the accused had declined to participate in the test identification parade on the ground that he had been shown to the eye-witnesses in advance. In my considered view, it was not open to the accused to refuse to participate in the T.I. parade nor it was a correct legal approach for the prosecution to accept refusal of the accused to participate in the test identification parade. If the accused-Appellant had reason to do so, specially on the plea that he had been shown to the eye-witnesses in advance, the value and admissibility of the evidence of T.I. Parade could have been assailed by the defence at the stage of trial in order to demolish the value of test identification parade. But merely on account of the objection of the accused, he could not have been permitted to decline from participating in the test identification parade from which adverse inference can surely be drawn against him at least in order to corroborate the prosecution case.

14. In the matter of **Shyam Babu v. State of Haryana** : AIR 2009 SC 577 where the accused persons had refused to participate in T.I. parade, it was held that it would speak volumes, about the participation in the Commission of the crime."

9. In **'Rabinder Kumar Pal @ Dara Singh Vs. Republic of India',** (2011) SCC 490 the Supreme Court held that "photo identification and TIP are only aides in the investigation and do not form substantive evidence. The substantive evidence is the evidence in the court on oath. The logic behind TIP, which will include photo identification lies in the fact that it is only an aid to investigation, where an accused is not known to the witnesses, the IO conducts a TIP to ensure that he has got the right person as an accused. The practice is not borne out of procedure, but out of prudence. At best it can be brought under Section 8 of the Evidence Act, as evidence of conduct of a witness in photo identifying the accused in the presence of an IO or the Magistrate, during the course of an investigation."

10. Ocular testimony of the complainant has been corroborated by medical evidence. PW-10 (Dr.S.K.Gupta) proved MLC (Ex.PW-10/A) of the victim Ravinder Chaudhary which was prepared by Dr.Hitesh Vajpayee. PW-2 (Akhilesh Mathur) was categorical about payment of Rs. 86,000/

- to Ravinder Chaudhary at the time of clearance of accounts. PW3 (Dalip Gosain) Chief Accountant in Goverdhan Enterprises proved payment of Rs. 86,008/- to the complainant. Omission of the prosecution to prove vouchers containing signatures of the complainant in token of receipt of money is of no consequence. A-1 in 313 Cr.P.C. statement admitted his presence at the spot. He alleged that an accident had taken place between a motorcyclist and the complainant and he intervened to tell that the motorcyclist was not at fault. On that complainant threatened him to take revenge and to falsely implicate him. The defence deserves outright rejection. Nothing has come on record to show if any accident had taken place with a motorcyclist. Rather motorcycle used in the incident was recovered by the police subsequently.

11. In the presence of overwhelming evidence against the appellants, I find no valid / good reasons to interfere in the findings of the Trial Court by which the appellants were held guilty under Section 394/34 IPC. The appellants were sentenced to undergo RI for five years with fine Rs. 2,000/- each. While dismissing the appeals of co-convicts Ram Raj @ Rajesh @ Sagar and Sarfu @ Govinda, sentence order was not modified and they were directed to surrender and serve the remaining period of sentence awarded to them. In the instant case, the appellants had not only robbed a poor worker of his hard earned money of ' 86,000/- which he had got in full and final satisfaction at the time of clearance of the accounts with the company but was also given beatings. The entire robbed amount could not be recovered and wrongful loss was caused to the victim. The offence committed was deliberate and pre-planned. Considering the gravity of the offence, the sentence awarded to the appellants cannot be considered excessive and no interference is called for.

12. The appeals are unmerited and are dismissed. The appellants are directed to surrender before the Trial Court on 27.11.2013 and serve the remaining period of their sentence. Trial Court record be sent back forthwith with the copy of the order.

ILR (2014) II DELHI 1014
OMP

SR DIVISIONAL COMMERCIAL MANAGER ....PETITIONER

VERSUS

SHRIRAM FOOD & FERTILIZER INDUSTRIES ....RESPONDENT

(RAJIV SHAKDHER, J.)

O.M.P. NO. : 377/2011 DATE OF DECISION: 28.11.2013

Arbitration & Conciliation Act, 1996—Sec. 34—Delay—Ld. Arbitrator dispatched signed copies of award through registered post to the General Manager, Head quarter and, Senior Divisional Commercial Manager of Railways on 4.11.2010. Copies received by GM and Head Quarter on 8.11.2010—Senior DCM denying having received copy on 8.11.2010. Held, once it is shown that document was sent properly addressing, prepaying and posting by registered post to addressee than the presumption provided U/s 27 of General Clauses Act read with Sec. 114 Illustration (f) of Indian Evidence Act gets triggered. A noting on the award reflected that it was received on 8.11.2010 in the office of Senior DCM—No cogent explanation why the copy received in the Office of GM & HQ not transmitted to Office of Sr. DCM. Held, from 8.11.2010 the petition was beyond period of 3 months and 30 days and the court has no power to condone the delay where the initial filing is beyond the prescribed period U/s 34 (3) of the Act.

[Di Vi]

APPEARANCES:

FOR THE PETITIONER : Ms. Geetanjali Mohan, Advocate.

FOR THE RESPONDENT : Mr. P.K. Bhalla, Advocate.

CASES REFERRED TO:

1. *Union of India* vs. *Tecco Trichy Engineers & Contractors* (2005) 4 SCC 239.

2. *Union of India* vs. *Popular Construction Co.* (2001) 8 SCC 470].

RESULT: Petition Dismissed.

RAJIV SHAKDHER, J.

IA No.7829/2011 (condonation of delay)

1. This is an application for condonation of delay in which in the recent past, two detailed orders have been passed by me. The first order was passed on 05.07.2013 and the second order was passed on 06.09.2013. On both occasions, opportunity was given to the petitioner (in short the Railways) to explain by way of affidavits, supported by necessary documentary evidence, as to when exactly a signed copy of the award in issue, was received by the Railways.

2. Pursuant to the last order dated 06.09.2013, an affidavit has been filed on behalf of the Railways by Mr. Vikram Singh, presently posted as Senior Divisional Commercial Manager (Sr. DCM), Northern Railway, DRM Office, New Delhi.

3. Prior to this, there is an affidavit on record of the same person i.e., Mr. Vikram Singh, Sr. DCM, which was sworn on 22.10.2012 (and not on 20.10.2012 as recorded in order dated 05.07.2013). Apart from this affidavit, there are two affidavits of Mr. R.C. Dhiman, who since then, has retired and was at the relevant time, the Chief Officer Superintendent Commercial, DRM Office, Delhi Division, Northern Railway, New Delhi. He has filed affidavits dated 22.11.2012 and 19.07.2013.

4. Having perused the record placed before me, what emerges is as follows:-

4.1 Admittedly, the award, which is dated 13.10.2010 / 03.11.2010 was despatched by the learned arbitrator to: the General Manager (GM), Head Quarter (HQ), Sr. DCM and the respondent vide registered post, in respect of which, receipts bearing nos.5777, 5779 and 5778, respectively, were generated.

4.2 The record would show that postal receipts bearing nos.5777 and 5779 relate to the GM, HQ and Sr. DCM, Railways, while, the last postal receipt bearing no.5778, relates to the respondent.

4.3 There is no dispute that the signed copies of the award (each of which are treated as originals) were despatched to the aforementioned three recipients, on 04.11.2010.

4.4 There is also no dispute, in respect of the fact, that the GM, HQ, Railways, received a signed copy of the award on 08.11.2010. Similarly, the respondent, concededly, received a copy of the award, also on, 08.11.2010.

5. The dispute, really is: whether, the Sr. DCM, Railways received the signed copy of the award, on 08.11.2010.

6. It is the stand of the Railways that it received a copy of the award on 25.11.2010 via the respondent, and that, the signed copy of the award, which was despatched by the learned arbitrator on 04.11.2010, was received in the office of the Sr. DCM, Railways, only on, 04.03.2011. For this purpose, the Railways seeks to place reliance on the internal notings, of its, office files and the affidavits of its officers given the time and space between the happening of the event and dates of the affidavits.

6.1 It is also the case of the Railways that the signed copy of the award which was sent by the arbitrator to the GM, HQ was despatched to the office of the Sr. DCM, under a cover of the letter dated 17/18.01.2011.

6.2 The aforementioned fact is pleaded by the Railways, so as to be able to contend that service on its Sr. DCM is appropriate service as the said officer was following the matter before the arbitrator and hence charged with the responsibility to assail the award. This submission is based on the ratio of the judgment of the Supreme Court in the case of **Union of India vs Tecco Trichy Engineers & Contractors** (2005) 4 SCC 239.

6.3 A bare perusal of the letter dated 17/18.01.2011 would show that, the letter has been signed by the Chief Commercial Manager (CCM), on 14.01.2011. It is quite possible that the said letter remained with the CCM till 17/18.01.2011, as that is the date appended on the right hand top corner of the letter.

7. As noted in my order dated 05.07.2013, the letter refers to "paper" pertaining to the arbitration case. I assume therein that the reference is to the award dated 13.10.2010 / 03.11.2010 as the letter bears a caption adverting to the said dates. This inference is not obviously rebutted by Railways.

8. The Railways, further state that, having received a signed copy of the award, in the office of Sr. DCM (from the office of the GM, HQ under a cover of letter dated 17/18.01.2011), on 24.02.2011, a decision was taken to assail the award.

8.1 Consequently, on 18.03.2011, a counsel was nominated. A petition under Section 34 of the Arbitration and Conciliation Act, 1996 (in short the Act) was drafted, and after being duly vetted, the instant petition was filed on, 18.04.2011.

9. Based on these events, Ms. Mohan, who appears for the Railways says that the petition filed under Section 34 of the Act, is within the time, prescribed under Section 34(3) of the Act.

10. Ms. Mohan says that though the signed copy of the award, dispatched by the learned arbitrator to the Sr. DCM's office, was received in that office, on 04.03.2011, even if, limitation is counted form 17/18.01.2011, that is, the date, when the signed copy of the award was despatched from the office of the GM, HQ to the Sr. DCM's office, the institution of the petition under Section 34 of the Act, would be within the time.

11. As against this, Mr. Bhalla, who appears for the respondent says that the record demonstrates to the contrary. It is his submission that having regard to the fact that two out of the three recipients admittedly received the signed copy of the award dispatched by the learned arbitrator, on 08.11.2010, then on a balance of probabilities, unless there is evidence to the contrary, it would have to be presumed that the Sr. DCM's office received the signed copy of the award vide postal receipt no.5779, on 08.11.2010.

11.1 In order to buttress his submission, he relies upon the certificate issued by the postal authorities, which reads as follows :-

> "...Regd. letter vide no.5779 was delivered to the addressee on dated 08.11.2010 as per this office record. The photocopy of relevant record is attached below..."

12. It is Mr. Bhalla's contention that, it is not the Railways' submission, as it cannot be, that the communication was not addressed to the Sr. DCM.

13. To drive home his point, Mr. Bhalla also brought to my notice a photocopy of the letter dated 02.11.2011, issued by the Railways, based on a RTI application, filed on, 30.09.2011; which seems to suggest that the Sr. DCM, received the signed copy of the award on 19.01.2011. It is also his contention that Mr. Vikram Singh, Sr. DCM, who has sworn the affidavit dated 22.10.2012, actually joined the office of the Sr. DCM on 09.05.2012.

13.1 Unfortunately, these letters have not been formally filed in court, backed by an affidavit, and therefore, the Railways has had no opportunity to examine the veracity of these communications.

14. Nevertheless, Mr. Bhalla says that if, only his contention vis-a-vis postal receipts is taken into consideration, even then, admittedly the institution of the petition under Section 34 of the Act is time barred, as it is beyond the period prescribed under Section 34(3) of the Act.

15. It is, therefore, Mr. Bhalla's contention that this court has no power to condone the limitation beyond the period of three months and 30 days stipulated in Section 34(3) of the Act. It is Mr Bhalla's say that even the leeway of 30 days can be made available only if the Railways, in a given case, is able to show "sufficient cause" to condone delay beyond the 3 months period, provided under Section 34(3) of the Act.

16. I have heard the learned counsel for the parties. As indicated before, the matter has been deliberated upon in detail on previous two dates. My observations, on each occasion, have been recorded in detail. As alluded to above, there are several gaps in the explanation advanced by the Railways. There is no cogent explanation given as to why the signed copy of the award, which was received in the office of the GM, HQ on 08.11.2010 was not transmitted to the office of the Sr. DCM till 17/18.01.2011. Apart from the fact that departmental proceedings having been initiated against certain officers, and that too after lacunae was pointed by this court, the reasons for delay are not explained.

16.1 The Railways has been unable to show documents wherein,

the inward receipt of the signed copy of award in the office of the GM, HQ, stood recorded. Had it not been for the postal receipt, this fact possibly, would not have been admitted.

16.2 Even so, the record shows that the signed copy of the award received in the office of GM, HQ was transmitted to office of CCM. He obviously had it with him on 14.01.2011, if not before. Here again nothing is placed on record by the Railways which would demonstrate movement from GM, HQ's office to CCM's office. The paper trail is completely missing. As indicated above, the letter dated 17/18.01.2011, was actually signed by the CCM on 14.01.2011.

16.3 The letter dated 17/18.01.2011 does not inspire much confidence for the reason it carries a subject reference, which reads, as follows:- "letter No..2006/Arbitration /2 dated 13.10.2010 / 03.11.2010". It is in response to the said letter, that the CCM has sent a "paper". While it cannot be said with certainty that the "paper", is the signed copy of the award which his office purportedly, received from GM, HQ's office and transmitted to Sr. DCM, I have decided to give Railways, the benefit of doubt, as indicated above.

16.4 This, perhaps, may have saved the Railways from being non-suited on the ground of limitation but for the fact that there is evidence on record which scuppers the theory advanced that the Sr. DCM received the signed copy of the award from two sources, on two different dates; each of which if taken into account will bring the petition filed under Section 34 of the Act within limitation.

16.5 The first source adverted to is the GM, HQ's office. The second source is the learned arbitrator.

16.6 The first source is dependent on the letter dated 17/18.01.2011 of the CCM. The second source is dependent on the dispatch made by the learned arbitrator, as far back as on 04.11.2010. For the reason adverted to above, the evidence adduced qua the first source does not inspire confidence, though I have given the Railways the benefit of doubt. If, however, I am able to come to the conclusion that in so far as the second source is concerned, the signed copy of the award was received much earlier, that is, on 08.11.2010 and not on 04.03.2011, as claimed, the benefit of doubt given qua the first source would not help the cause of the Railways.

16.7 Therefore, what has to be seen is the evidence on record qua the second source of dispatch, which is the arbitrator himself.

16.8 In so far as the second source is concerned, what clinches the case for the respondent, is the noting on the copy of the award filed by the Railways, with the Section 34 petition and the postal certificate issued in that behalf.

16.9 Both these documents were referred to, in my order dated 06.09.2013. Nothing has been brought on record since then, by the Railways which would cast a doubt on the evidentiary value of the said material available on record.

17. As noted in my order of 06.09.2013; the copy of the award filed alongwith the petition under Section 34 of the Act, bears notings to the following effect:-

"R-5779/Sr. DCM and Recd 8/11 (sic S-8/11)"

17.1 Ms. Mohan, has verified the position as to whether the original award received in the office of Sr. DCM, (which was dispatched by the learned arbitrator), bears the said annotation. Ms. Mohan has confirmed the said position.

17.2 Besides this, as noted above, the postal receipt supports this fact. An extract of the postal receipt is set out in paragraph 11.1 above.

17.3 With the aforesaid evidence on record, that is, the postal receipt and the postal certificate, none of which is in challenge before me, a presumption of service of a signed copy of award on Sr. DCM, on 08.11.2010, can safely be drawn under Section 27 of the General Clauses Act, 1897 (in short G.C. Act) read with Section 114 illustration (f) of the Indian Evidence Act, 1872 (in short I.E. Act).

17.4 Once it is shown that document sought to be served on the opposite party was sent by properly addressing, pre-paying and posting by registered post to the said party i.e., addressee, then the presumption provided of due service under Section 27 of the G.C. Act read with Section 114 illustration (f) of the I.E. Act gets triggered [see **Harcharan Singh vs. Smt. Shivrani and Ors.,** (1981) 2 SCC 535]. Exception to this perhaps would be if the Railways in this case would have brought on record credible material to demonstrate that presumption of service in law is not valid. In such a situation, the onus would have shifted back

on the respondent who claims that service of a signed copy of the award was made on the Sr. DCM on 08.11.2010. No such credible material has been brought on record in the facts of the present case.

18. In these circumstances, limitation, in my view, can only commence from 08.11.2010, even if it is assumed that the Sr. DCM was the person, who had to be served with a signed copy of the award as he was charged with the responsibility to take the decision, as to whether or not a petition under Section 34 of the Act, had to be filed. If that date is taken into account, then, it is an admitted position that the institution of the petition is beyond the period of three months and thirty days provided under Section 34(3) of the Act.

19. Before I conclude, I must note that, Ms Mohan attempted to touch upon the merits of the case, though quite fleetingly. This attempt was thwarted by me, on account of a singular reason, which is, when examining the issue of limitation any discussion on merits can only obfuscate the debate. Intervention of limitation bars the remedy. It bears no reflection on the rights of parties, which is why it is often referred to as the statute of repose. Decidedly, the court has no power to condone the delay where initial filing is beyond the period prescribed under Section 34(3) of the Act. [See **Union of India vs Popular Construction Co.** (2001) 8 SCC 470]. Accordingly, the application is dismissed.

O.M.P. 377/2011

20. In view of the order passed in IA No.7829/2011, the captioned petition would have to be dismissed. It is ordered accordingly.

ILR (2014) II DELHI 1022
EFA (OS)

BALDEV RAJ JAGGI **....APPELLANT**

VERSUS

NATIONAL AGRICULTURAL COOPERATIVE MARKETING FEDERATION OF INDIA LTD. & ORS. **....RESPONDENTS**

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

EFA (OS) NO. : 37/2011, C.M. NO. : 19815/2011 (FOR STAY) & 19816/2011 **DATE OF DECISION: 28.11.2013**

Transfer of Property Act, 1882—Sections 52 and 53 of Legality of attachment of Property—Section 9—Arbitration and Conciliation Act, 1996—National Agricultural Cooperative Marketing Federation of India Ltd. (NAFED) decree holder—Kripa Overseas—M/s. Rital Impex Ltd.—Collectively referred as judgments debtors—involved in arbitral proceedings—NAFED preferred petition under Section 9 of the Arbitration and Conciliation Act—Resulted in an order of injunction restraining the sale of several properties, including the property in question (A-13, Block B-1, Mohan Cooperative Industrial Estate, Mathura Road, New Delhi, 110044)—Subsequently, the three parties entered into a settlement dated 03.05.2007 Rs. 20 Cr. shall be paid within next 60 days upon raising loan by mortgaging the property in question - property in question was mortgaged with ICICI Bank against advance of Rs. 1.5 crores other properties subject matter of attachment, in Section 9 proceedings, were released from the attachment order of the Court on 14.12.2007—The Order dated 14.12.2007, did not refer to the property

in question; it described another property—Subsequently corrected and previous order modified through an order of 18.412.2007—Property in question was allowed to be sold by the owner/judgment debtor—Sale deed was executed by one of the judgment debtors in favour of the objector total consideration of Rs. 3.5 crores payment of Rs. 1.5 crores made to ICICI Bank to clear the mortgage and recover the title deeds remainder to the owner/judgment debtor arbitration proceedings between NAFED, and the two judgment debtors award dated 24.09.2009 was made in terms of the settlement dated 03.05.2007 modified by the subsequent order dated 04.04.2008 holding, inter alia, that NAFED is (sic) held entitled to the outstanding amount by sale of the properties, mentioned in the deed of settlement dated 3.5.2007, by public auction—NAFED instituted execution proceedings property in question was attached—NAFED instituted execution proceedings property in question was attached appellant, preferred objections contending that he had clear title to the property sold without any precondition learned Single Judge concluded—Court in its order dated 14.12.2007 did not permit an unconditional sale by the respondents/judgment debtors condition respondents shall deposit Rs. 18 crores by the sale of two properties including the one in question, within 75 days of the sale to satisfy a part of the petitioner/decree holders claim—To acquire a clear and unencumbered title to the property in question, the objector/applicant should have ensured that the said condition was complied with by the respondents/judgment debtors sale deed in question is clearly in contravention of the order dated 14.12.2007 and is subject to Section 52 of the Transfer of Property Act property in question was not released from the lot of properties under the cover of attachment sale consideration of Rs. 3.5 crores to the objector for the property gross undervaluation judicial notice of this

fact in holding that such a transfer would also violate Section 53 of the Transfer of Property Act—Hence the present appeal. Held: Conjoint reading of the two orders 16.05.2007 and 18.12.2007 clarify that whereas the first order lifted or vacated the attachment made earlier in respect of two properties did not include the property in question the second order specifically vacated the attachment in respect of the property in question—NAFED never chose to apply for its modification or recall—No conditions or restrictions of the kind—Applicable to the sale of the title documents in respect of the property in question.

Applicability of Section 52—A transferee from a judgment debtor is presumed to be aware of the proceedings before a Court of law recognizes the doctrine of lis pendens—Rule 102 of Order XXI of the Code take into account the ground reality and refuses to extend helping hand to purchasers of property in respect of which litigation is pending unfair, inequitable or undeserved protection is afforded to a transferee pendente lite, a decree holder will never be able to realize the fruits of his decree—In the present case, NAFES'S claim was one for money in arbitral proceedings—Pending adjudication it sought for attachment of the judgment debtor's properties—But in no manner enlarge the scope of its claim into one encompassing any right to immovable property "directly" or "specifically—Absence of any restriction as to the marketability of the title, or direction by the Court, amounting to an encumbrance or charge order of 18.12.2007 operated to lift the attachment—This was done to facilitate sale direction in the previous order of 14.12.2007 that NAFED could retain the title deeds till it was paid Rs. 18 crores was meaningless and inapplicable because the title deeds were with ICICI Bank, which were later redeemed by the purchaser objector who was made aware of the mortgage in

favour of that bank.

Applicability of Section 53—In the present case, far from discharging the onus of proving want of good faith—NAFED merely relied on a textual interpretation of the orders dated 14.12.2007 and 18.12.2008 argued that the property was sold for inadequate consideration impugned order is based on "judicial notice" having been taken about the prices of land law casts a burden on the decree holder (NAFED), who has gotten its rights crystallized subsequently in the award—Till then, it had no claim in respect of the suit property faced attachment for a brief period attachment was lifted, to enable its sale, in order to satisfy NAFED's claims sale ought to have proceeded in a particular manner, nothing prevented it from insisting upon imposition of conditions—Having failed to do so, its mere allegation of undervaluation of the property could not have resulted in the impugned finding.

Important Issue Involved: (A) Section 52 recognises the Doctrine of lis pendens. The doctrine of lis pendens was intended to strike at attempts by parties to litigation to circumvent the jurisdiction of a Court, in which a dispute on rights or interests in immovable property is pending.

(B) Rule 102 of Order XXI of the Code thus takes into account the ground reality and refuses to extend helping hand to purchasers of property in respect of which litigation is pending.

[Sa Gh]

APPEARANCES:

FOR THE APPELLATE : Mr. Amit Sibal, Mr. J.K. Sharma, Mr. Prateek Chaddha and Mr. Mahender Singh, Advocates.

FOR THE RESPONDENT : Mr. A.K. Thakur and Mr. R.K. Mishra, Advocates, for Resp. No.1.

CASES REFERRED TO:

1. *Usha Sinha* vs. *Dina Ram and Ors.,* (2008) 7 SCC 144.
2. *Vijayalakshmi Leather Industries (P) Ltd.* vs. *K. Narayanan, Lalitha,* AIR 2003 Mad 203.
3. *Basavegowda and etc.* vs. *S. Narayanaswamy (by LRs) and Ors.,* AIR 1986 Karn. 225.
4. *Rajender Singh & Ors* vs. *Santa Singh & Ors.,* AIR 1973 SC 2537.
5. *Bellamy* vs. *Sabine,* (1857) 1 DG & J 566 : 44 ER 847.

RESULT: Appeal allowed.

S. RAVINDRA BHAT, J.

1. The present appeal arises from an order of the learned Single Judge dismissing objections (under Order XXI, Rule 58 CPC) preferred by the appellant, (hereafter "the objector") concerning the sale of property bearing No. A-13, Block B-1, Mohan Cooperative Industrial Estate, Mathura Road, New Delhi, 110044 (hereinafter "the property in question").

2. The property in question was the subject matter of attachment in a dispute between the National Agricultural Cooperative Marketing Federation of India Ltd. (hereafter "NAFED, the decree-holder), Kripa Overseas (and its director Mr. Sandeep Khanna) and M/s Rital Impex Ltd (and its director Mr. Pradeep Khanna) – collectively referred to hereafter as "judgment debtors".

3. The material facts are narrated hereafter. NAFED and the judgement debtors were involved in arbitral proceedings, the subject-matter of which does not concern the Court today. During the course of those proceedings, NAFED preferred a petition under Section 9 of the Arbitration and Conciliation Act, 1996, in OMP No. 291/2006. That petition resulted in an order of injunction, dated 06.07.2006, restraining the sale of several properties, including the property in question, in order to secure NAFED's claims. Subsequently, the three parties entered into a settlement dated 03.05.2007, recording, inter alia, that (operative clause 3):

"3. Rs. 20 Cr. shall be paid within next 60 days upon raising loan by mortgaging the property bearing No. A-13/B-1 and E-16/B-1, Mohan Co-Operative Industrial Estate, Mathura Road, New Delhi-110044. For this purpose M/s Rital impex will provide copy of the sanctioned and release orders issued by the concerned bank along with an undertaking that aforesaid money will be paid to NAFED as per above admitted dates"

4. Accordingly, the property in question was mortgaged with ICICI Bank, Green Park Branch against an advance of Rs. 1.5 crores. Subsequently, other properties which had been the subject matter of attachment, in Section 9 proceedings, were released from the attachment by an order of the Court on 14.12.2007 (while considering I.A. No. 5743/2007, in OMP 291/2006) in the following terms:

".....In view of the compromise inter se the parties the attachment of the above said properties No. E-18, East of Kailash, New Delhi and E-16, Block B-1, Mohan Co operative Industrial Estate Limited, Extension, New Delhi is being released to be put on sale....."

5. This order, as is evident, did not refer to the property in question; it described another property, i.e. E-16, instead of A-13. Another application was moved by the judgment debtor, asking for correction of the order, to incorporate the description of the property in question, to facilitate its sale. The order was, therefore, corrected by the Court and the previous order modified accordingly through an order of 18.12.2007 (in considering I.A. No. 14641/2007); the property in question was allowed to be sold by the owner/judgment debtor.

6. Subsequently, a sale deed was executed by one of the judgment debtors, as the director of M/s. Rital Impex Ltd. in favour of the objector, for a total consideration of Rs. 3.5 crores. In this, a payment of Rs. 1.5 crores was made to the ICICI Bank to clear the mortgage and recover the title deeds, and the remainder to the owner/judgment debtor. Later, in the arbitration proceedings between the three parties (NAFED, and the two judgment debtors) an award dated 24.09.2009 was made, in terms of the settlement dated 03.05.2007, as modified by the subsequent order dated 04.04.2008, holding, inter alia, that

"NAFED is (sic) held entitled to the outstanding amount by sale

of the properties, mentioned in the deed of settlement dated 3.5.2007, by public auction, as agreed and ordered in the order of Mr. Justice S.L. Bhayana dated 4th April 2008....."

7. NAFED instituted execution proceedings (Ex.P. 223/2009), where the property in question was attached. The appellant, Shri Jaggi, preferred objections, contending that he had clear title to the property, it was sold without any precondition; that he had no notice of any previous attachment, (of the property in question) under Order XXI, Rule 58 CPC. The objector also contended that he was an innocent third party purchaser without any knowledge of any prior dispute, or encumbrance in respect of the said property. The appellant's objections were, however dismissed.

8. In considering this question, the learned Single Judge referred to the order of 14.12.2007, ultimately concluding that:

"[t]he Court, however, did not permit an unconditional sale by the respondents/judgment debtors of, inter alia, the property in question. The condition was that the respondents shall deposit Rs. 18 crores by the sale of two properties, including the one in question, within 75 days of the sale to satisfy a part of the petitioner/decree holders claim. This condition has, admittedly, not been complied with. The applicant/objector was, and ought to have been aware of the said condition. To acquire a clear and unencumbered title to the property in question, the objector/ applicant should have ensured that the said condition was complied with by the respondents/judgment debtors. The Court specifically directed that the title deeds of the property in question shall be retained by NAFED till the amount of Rs. 18 crore is paid of. Therefore, the applicant/objector should have known that its (sic) titled shall not be perfected by the mere execution and registration of the sale deed dated 28.12.2007. In fact, the said sale deed could not have been validly executed without complying with the conditions imposed by the Court in its order dated 14.12.2007. The sale deed in question is clearly in contravention of the order dated 14.12.2007 and is subject to Section 52 of the Transfer of Property Act which, inter alia, provides that an immovable property which is directly and specifically in question in a suit or proceedings before a Court, cannot be transferred,

so as to affect the rights of any other party except under the authority of the Court and on such terms as it may impose. The terms and conditions imposed by the Court not having been complied with, the property in question could not have been transferred by the respondents/judgment debtors so as to the affect the rights of the petitioner/decree holder. Therefore, the right of the decree holder to seek attachment and sale of the property in question cannot be taken away. "

9. The learned Single Judge also held that the property in question was not released from the lot of properties under the cover of attachment, as was argued in the alternative by the objector, based on the order of 04.04.2008. Finally, the learned Single Judge held that the sale consideration of Rs. 3.5 crores to the objector for the property seemed to be a gross undervaluation, and although not pleaded, the learned Single Judge took "judicial notice" of this fact in holding that such a transfer would also violate Section 53 of the Transfer of Property Act, 1882 and thus, be voidable at the instance of the decree holder, NAFED, for that reason.

10. Impugning this order, Mr. Sibal, learned counsel for the appellant, argued that he (the appellant/objector) was a bona fide third party purchaser, and thus, his rights were protected independent of any question of attachment. It was argued that the objector conducted the necessary due diligence as to the possession, documents, MCD/DDA records and title deeds of the property in question, and there was no occasion to speculate as to the same. It is claimed that no notice of this fact was provided at any point to the objector, until 21st November, 2009, after the sale deed had been executed, when the attachment notice was pasted at the property (under Order XXI, Rule 58, CPC) in the physical possession of the objector at the time. It was argued that on the other hand, the sale deed itself carries a representation from the judgment debtor that the property was free from any attachment. Secondly, it was argued that the release of the property in question was unconditional in the order dated 14.12.2007, and the obligation to pay Rs. 18 crores was independent of the sale. This, it is argued, is clear from the wording of the order itself. Further, it is argued that this sale is not hit by Section 53 of the Transfer of Property Act, given, first, that the sale was itself permitted by the Court in the above order, and secondly, that third party bona fide purchasers are protected in such cases. Finally, it was submitted that the impugned order is based on the wrong premise that the award passed on

24.09.2009 reposed in the property in question as well. This, it is argued, is because the award was passed in terms of the deed of settlement dated 03.05.2007, as modified by the order dated 04.04.2008, and the latter, crucially, has excluded the property in question from being put up from public auction.

11. Learned counsel for NAFED, on the other hand, argued that at no point was the property in question completely released from attachment. Rather, the permission to sell the property was contingent on the payment of Rs. 18 crores to NAFED. Further, it is argued that the objector ought to have been aware of the restrictions imposed by the Court in terms of the attachment order, and that the Court's acceptance of the present sale transaction would frustrate the rights of the decree-holder. It was also urged that the learned Single Judge had considered the entire gamut of facts in this case and correctly held that objector was not a third party whose rights could frustrate those of the decree-holder.

12. Before the addressing the question arising in this case, it is useful to extract Sections 52 and 53 of the Transfer of Property Act, 1882:

"52. Transfer of property pending suit relating thereto: During the pendency in any court having authority within the limits of India excluding the State of Jammu and Kashmir Government or established beyond such limits by the Central Government of any suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.

Explanation : For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution

thereof by any law for the time being in force.

53. Fraudulent transfer

(1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made."

13. Three questions arise for this Court's consideration: first, whether the property in question was still under the cover of attachment at the time of the execution of the sale deed; secondly, whether the transfer violates Section 52 of the Transfer of Property Act, and finally, whether it violates Section 53 of the Transfer of Property Act.

14. On the first question, it is important to consider the order of this Court on 14.12.2007 in its entirety:

"As per order dated 16.5.2007 one of the properties No.E-19, East of Kailash, New Delhi were released to be put on sale. Apart from this property two more properties viz. E-18, East of Kailash, New Delhi and E-16, Block B-1, Mohan Cooperative Industrial Estate Limited, Extension, New Delhi were also attached by order of the Court dated 6.7.2006. In view of the compromise inter se the parties the attachment of the above said properties No.E-18, East of Kailash, New Delhi and E-16, Block B-1, Mohan Cooperative Industrial Estate Limited, Extension, New Delhi is being released to be put on sale. The defendants shall pay a sum of Rs. 18 crores towards settlement of the claim of the plaintiff within 75 days. The title deeds shall remain with the plaintiff till the defendants pay the amount of Rs. 18 crores within the stipulated period. List on 12th February 2008, the date already fixed."

15. The second order, of 18.12.2007, reads as follows:

"It is pointed out that property No. E-16, Mohan Cooperative Industrial Estate Limited, Extension, New Delhi is not correct as given in the order dated 14.12.2007. The correct address is A-13, Block B-1, Mohan Cooperative Industrial Area, Mathura Road, New Delhi. Learned counsel for the plaintiff has no objection if the order is modified accordingly. Hence, the order dated 14.12.2007 is modified to the extent that the address of the property No. E-16, Mohan Cooperative Industrial Estate Limited, Extension, New Delhi is accordingly corrected and modified in the entire order and shall be read as A-13, Block B-1, Mohan Cooperative Industrial Area, Mathura Road, New Delhi. Application stands disposed of."

16. A conjoint reading of the two orders would clarify that whereas the first order lifted or vacated the attachment made earlier in respect of two properties, which concededly did not include the property in question, yet, the second order (of 18.12.2007) specifically vacated the attachment in respect of the property in question. Counsel for the NAFED had urged that though the attachment of the property in question was vacated by the later order, the intention of the Court was clear that title deeds were to be retained by the decree holder (NAFED) till the amount of '18 crores was deposited. This, argued counsel, placed a cloud on the title which the purchaser/objector was deemed to have been aware of. It was further submitted that though the judgment debtor deposited '3 cores, the fact remained that till the entire amount was paid, according to the agreement of the parties, the encumbrance over the property existed, signifying that in fact, it was subject to attachment.

17. This Court is of the opinion that the specific order describing the property in question on 18.12.2007 vacated the attachment with the intention that the proceeds collected from it were to be used to pay off the liabilities arising out of the compromise, and payable by the judgment debtors. Had the intention of the parties, particularly of the decree holder, been that the till the sum of '18 crores was received, it should have charge over the property, it could have provided for it. In this context, it is crucial that both parties were aware that the title deeds to the property in question were not with the NAFED, but with ICICI. If the NAFED, therefore, was of opinion that some measure of control was necessary, it could have got such safeguards as it wished, to be incorporated in the order of 18.12.2007, to ensure that its rights were protected. Having not done so, it cannot now contend that the attachment had not been vacated, contrary to the plain terms of the order of 18.12.2007 which stands till date. NAFED never chose to apply for its modification or recall. Therefore, on the first issue, this Court holds that the attachment of the property in question had been specifically vacated by the order of 18.12.2007. No conditions or restrictions of the kind, argued by NAFED were applicable to the sale or the title documents in respect of the property in question.

18. Section 52 of the Transfer of Property Act has been extracted above. It incorporates the doctrine of *lis pendens*. The NAFED's argument here is that the property in question became the subject matter of *inter se* disputes between it and the judgment debtor, because of the interim measures directed under Section 9 of the Arbitration Act. It further argues that *lis pendens* applies even in execution proceedings.

19. The NAFED's best argument in this context relies on the Supreme Court's ruling in **Usha Sinha v. Dina Ram and Ors.,** (2008) 7 SCC 144, where the Court dealt with the effect of Order XXI, Rule 102, CPC, (which excluded from application Rules 97 to 101). The said rules give third parties the right to obstruct execution proceedings, and claim rival title. Rule 102 states that:

> *"102. Rules not applicable to transferee pendente lite*
>
> *Nothing in rules 98 and 100 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person."*

20. Speaking of this rule, it was held that:

> *"9. Bare reading of the rule makes it clear that it is based on justice, equity and good conscience. A transferee from a judgment debtor is presumed to be aware of the proceedings before a Court of law. He should be careful before he purchases the property which is the subject matter of litigation. It recognizes the doctrine of lis pendens recognized by Section 52 of the Transfer of Property Act, 1882. Rule 102 of Order XXI of the Code thus takes into account the ground reality and refuses to extend helping hand to purchasers of property in respect of which litigation is pending. If unfair, inequitable or undeserved protection is afforded to a transferee pendente lite, a decree holder will never be able to realize the fruits of his decree. Every time the decree holder seeks a direction from a Court to execute the decree, the judgment debtor or his transferee will transfer the property and the new transferee will offer resistance or cause obstruction. To avoid such a situation, the rule has been enacted."*

21. The Court elaborated the origins of the rule, and the underlying purpose, as follows:

> *"10. Before one and half century, in **Bellamy v. Sabine,** (1857) 1 DG & J 566 : 44 ER 847, Lord Cranwoth, L.C. proclaimed that where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding not only on the litigating parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end.*
>
> *14. Keeping in view the avowed object, the expression 'transferee from the judgment debtor' has been interpreted to mean the 'transferee from a transferee from the judgment-debtor [vide **Vijayalakshmi Leather Industries (P) Ltd. Vs. K. Narayanan, Lalitha,** AIR 2003 Mad 203].*

15. In Vijayalakshmi Leather Industries, it was urged that the provisions of Rules 98 and 100 of Order XXI of the Code had limited application to the transferee of the judgment- debtor and could not extend to 'a chain of transactions' where the transferee of the judgment-debtor had transferred his interest.

16. Referring to statutory provisions and case law, the Court negatived the contention, stating-

> *"If such contention of the learned senior counsel for the appellant is to be accepted, then we are closing our eyes regarding the intention of the statute. It is obvious while interpreting the provisions of the statute, the court must give due weight to the intention of the statute in order to give effect to the provisions. If any narrow interpretation is given and thereby the purpose of the statute is being defeated, the courts must be careful to avoid such interpretations. If we look at Section 52 of the Transfer of Property Act and Rule 102 of Order 21 C.P.C, it is very clear that the intention of the Parliament with which the statute had been enacted is that the rights of one of the parties to the proceeding pending before the court cannot be prejudiced or taken away or adversely affected by the action of the other party to the same proceeding. In the absence of such restriction one party to the proceeding, just to prejudice the other party, may dispose of the properties which is the subject matter of the litigation or put any third party in possession and keep away from the court. By such actions of the party to the litigation the other party will be put to more hardship and only to avoid such prejudicial acts by a party to the litigation these provisions are in existence. When in spite of such statutory restrictions, for the transfer of the properties, which are the subject matter of litigation by a party to the proceeding, the courts are duty bound to give effect to the provisions of the statute."*

The above observations, in our opinion, lay down correct proposition of law."

22. The observations in the above judgment, in the opinion of the

Court, are in no way different from what Section 52 states; its object is to strike at those transfers and alienations of properties during pending proceedings "in which any right to immovable property is directly-and specifically in question". In **Rajender Singh & Ors v. Santa Singh & Ors.,** AIR 1973 SC 2537, Section 52 was further analysed as follows:

> *"The doctrine of lis pendens was intended to strike at attempts by parties to a litigation to circumvent the jurisdiction of a court, in which a dispute on rights or interests in immovable property is pending, by private dealings which may remove the subject matter of litigation from the ambit of the court's power to decide a pending dispute of frustrate its decree.. Alienees acquiring any immovable property during a litigation over it are held to be bound, by an application of the doctrine, by the decree passed in the suit even though they may not have been impleaded in it. The whole object of the doctrine of Its pendens is to subject parties to the litigation as well as others, who seek to acquire rights in immovable property which are the subject matter of a litigation, to the power and jurisdiction of the Court so as to prevent the object of a pending action from being defeated."*

23. The Court is of the opinion that NAFED'S argument that the objector's title is subject to the doctrine of lis pendens is contrary to the substantive provision. In the present case, NAFED'S claim was one for money in arbitral proceedings. Pending adjudication, it sought for interim measures, including attachment of the judgment debtor's properties, to secure a possible future award in its favour. That it secured an attachment did not enlarge the scope of its claim into one encompassing *"any right to immovable property" "directly"* or *"specifically"*. Consequently, in the absence of any restriction as to the marketability of the title, or direction by the Court, amounting to an encumbrance or charge of some kind, the order of 18.12.2007 operated to lift the attachment. This was done to facilitate sale; the direction in the previous order of 14.12.2007 that NAFED could retain the title deeds till it was paid Rs.18 crores was meaningless and inapplicable in regard to the property in question, because the title deeds were with ICICI Bank, which were later redeemed by the purchaser objector, who was made aware of the mortgage in favour of that bank.

24. The last question is whether the sale of the property in question fell within the mischief of Section 53 of the Transfer of Property Act. That provision directs that properties sold with intent to defraud creditors of the transferor shall be void. In this context, it would be useful to recollect the observations of the Karnataka High Court in **Basavegowda and etc. v. S. Narayanaswamy (by LRs) and Ors.,** AIR 1986 Karn. 225:

> *"10.....it must be borne in mind that the onus of proving want of good faith in the transferee is on the creditor who impugns the transactions. But where fraud on the part of the transferor is established, i.e. by the terms of Para (1) of S. 53(l), the burden of proving that the transferee fell within the exception upon him and in order to succeed the transferee must establish that he was not a party to the design of the transferor and that he did not share the intention with which the transfer has been effected but that he took the sale honestly believing that the transfer was in the ordinary and normal course of business. (See: C. Abdul Shukoor Saheb v. Arji Papa Rao, AIR 1963 SC 1150)".*

25. In the present case, far from discharging the onus of proving want of good faith, NAFED merely relied on a textual interpretation of the orders dated 14.12.2007 and 18.12.2007 and argued that the property was sold for inadequate consideration. The learned Single Judge accepted the latter argument. However, there was no shred of evidence in support of such finding. Concededly the impugned order is based on "judicial notice" having been taken about the prices of land. With respect, this Court cannot subscribe to such an approach. The law casts a burden on the decree holder (NAFED), who has gotten its rights crystallized subsequently in the award. Till then, it had no claim in respect of the suit property, which for a brief while, faced attachment. That attachment was lifted, to enable its sale, in order to satisfy NAFED's claims. If it had really wished that the sale ought to have proceeded in a particular manner, nothing prevented it from insisting upon imposition of conditions. Having failed to do so, its mere allegations of undervaluation of the property, without any proof, could not have resulted in the impugned finding.

26. In view of the above discussion, the appeal has to succeed. It is accordingly held that the appellant's rights over the property in question were not the subject matter of any attachment, impediment or restriction as to defeat its title. The impugned order is, therefore, set aside. The appeal is allowed. There shall be no order as to costs.

ILR (2014) II DELHI 1038
CRL. A.

DEEP CHAND ....APPELLANT

VERSUS

STATE & ANR. ....RESPONDENTS

(S.P. GARG, J.)

CRL.A. NO. : 433/2001 DATE OF DECISION: 02.12.2013

Indian Penal Code, 1860—Section 308—Attempt to commit culpable homicide—Section 34—Common intention—Appellant and one Harish inflicted injuries to the victim fled the spot after causing injuries—Injured removed to hospital by brother—Information given to the police station DD No. 63B recorded at PS Najafgarh police reached hospital FIR No. 189/1998 u/s. 308/34 IPC lodged making endorsement DD No. 63B—Statement of injured recorded injuries opined to be grievous accused persons arrested charge sheet filed accused persons charged prosecution examined eight witnesses statement of accused persons recorded denied involvement and pleaded false implication examined one witness in defence appellant convicted for offence u/s. 308 IPC accused Harish convicted for offence u/s. 323 IPC and released on probation appellant sentenced to substantive sentence

aggrieved appellant preferred appeal contended injured in the habit of teasing the women folk and was beaten report not lodged immediately soon after the incident unexplained delay of three days crime weapon not recovered blood stained clothes of the injured not seized no independent public witness associated name of the assailant not disclosed to the doctor— Doctor who declared injured unfit for statement not examined APP contended no strong reasons to discard the testimony of injured grievous injuries inflicted on vital organs testimony corroborated by medical evidence Held:- No challenge to the injuries sustained by victim testimony of PW2 remained unchallenged injuries opined to be grievous causes by blunt object testimony of doctors remained unchallenged presence at the crime scene at the time of incident not denied by the appellant not disclosed whom the victim used to tease no complaint lodged against the victim for teasing no reason for victim falsely implicate the accused persons material facts deposed by injured remained unchallenged cogent and reliable testimony of victim cannot be brushed aside on account of delay in recording his statement non examination of independent public witness of no consequence non recovery of weapon of offence not fatal discrepancies/ omissions in injured's statement do not affect the prosecution case testimony of victim in consonance with medical evidence no vital discrepancy in cross examination to doubt his version specific motive attributed to the appellant all relevant contentions taken into consideration judgment warrants no interference substantive sentence modified compensation awarded appeal disposed of.

Important Issue Involved: On account of delay of three days in recording the statement of the victim under section 161 Cr. P.C., the otherwise cogent and reliable testimony of the victim cannot be brushed aside.

Non examination of independent public witness is of no consequence.

There is no legal impediment in convicting the person on the sole testimony of a single witness. It is open to a competent court to fully and completely rely on a solitary witness if his testimony has a ring of truth, is cogent, credible and trustworthy.

It is not the number or the quantity, but the quality that is material. The evidence has to be weighed and not counted.

If the discrepancies/omissions and improvements are not of that magnitude as to affect the core of prosecution case, the unjured's statement cannot be discarded.

Omission of the victim to not disclose the name of the assailant to the doctor cannot be taken as none was the author of the injuries or that it were accidental in nature.

Non-recovery of weapon of offence is not fatal.

[Vi Ku]

APPEARANCES:

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

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

CASES REFERRED TO:

1. *Bijoy Singh & Anr.* vs. *State of Bihar* (AIR 2002 SC 1949).
2. *Devinder* vs. *State of Haryana* (AIR 1997 SC 454).
3. *G.B.Patel & Anr.* vs. *State of Maharashtra* (AIR 1979 SC 135).
4. *Bhagirath* vs. *State of Madhya Pradesh* (AIR 1976 SC 975).
5. *Balakrushna Swain* vs. *the State of Orissa* (AIR 1971 SC 804).

RESULT: Appeal disposed of.

S.P. GARG, J.

1. Deep Chand (the appellant) and Harish were arrested in Case FIR No.189/1998 under Section 308/34 IPC registered at Police Station Najafgarh and sent for trial on the allegations that on 28.04.1998 at 02.00 P.M. near 'Park' at Chawla Bus Stand, Najafgarh, they inflicted injuries to Umesh. The police machinery came into motion when Daily Diary (DD) No.63-B (Ex.PW-6/1) was recorded at 04.45 P.M. on getting information from duty Ct.Sunil Kumar at Safdarjang hospital about the admission of Umesh Kumar by his brother Dalip in injured condition. The investigation was assigned to HC Shyambir who with Ct.Baljit went to the hospital and moved an application (Ex.PW4/1) seeking permission to record injured's statement but could not do so as he was declared unfit for statement. He lodged First Information Report after making endorsement (Ex.PW-4/2) on DD No.63-B. During investigation, statements of the witnesses conversant with the facts including that of the injured Umesh were recorded. The accused persons were arrested. After completion of investigation a charge-sheet was submitted against them in the court and they were duly charged and brought to trial. The prosecution relied upon the testimonies of eight witnesses besides medical evidence to bring home the charge. In their 313 statements, the accused persons denied their involvement in the crime and pleaded false implication. DW-1 (Tilak Singh) appeared in defence. After considering the rival contention of the parties and appreciating the evidence on record, the Trial Court by the impugned judgment convicted Deep Chand for committing offence under Section 308 IPC and Harish under Section 323 IPC. By an order dated 02.05.2001 Deep Chand was awarded Rigorous Imprisonment for two years with fine Rs. 500/-. Harish was released on probation. It is relevant to note that Harish did not challenge conviction under Section 323 IPC.

2. I have heard the learned counsel for the parties and have examined the record. Appellant's counsel urged that the Trial Court did not appreciate the evidence in its true and proper perspective and relied upon the sole testimony of injured Dalip Kumar who was in the habit of teasing women folk of the locality and was beaten. No reliance can be placed on his testimony as he did not lodge the report soon after the incident and recorded statement after unexplained delay of three days The crime weapon could not be recovered during investigation and the Investigating Officer did not seize the blood stained clothes of the injured. No

independent public witness was associated during investigation. Name of the assailant was not disclosed to the doctor who medically examined the injured. It is not clear as to when the victim was discharged from the hospital. Non-examination of the doctor who declared the victim 'unfit for statement' is fatal. Reliance was placed on **Balakrushna Swain v. the State of Orissa** (AIR 1971 SC 804); **G.B.Patel & Anr. v. State of Maharashtra** (AIR 1979 SC 135); **Bijoy Singh & Anr. v. State of Bihar** (AIR 2002 SC 1949); **Devinder v. State of Haryana** (AIR 1997 SC 454) and **Bhagirath v. State of Madhya Pradesh** (AIR 1976 SC 975). Learned Additional Public Prosecutor supporting the findings urged that there are no sound reasons to discard the testimony of the injured who suffered grievous injuries on vital organ and the testimony has been corroborated by medical evidence.

3. There is no challenge to the injuries sustained by the victim. The appellant's only plea/defence is that he was not the author of the injuries and these were caused to him by public at large when as usual, he teased the women folk of the locality. Since he (the victim) nurtured grudge against him for teasing his wife, he was falsely implicated. Umesh was taken to Safdarjang hospital soon after the occurrence by his brother (PW-2) Dalip Kumar who deposed that after coming to know Umesh lying unconscious in the house, he went there and took him to Safdarjang hospital. His testimony remained unchallenged. MLC (Ex.PW-1/1) records arrival time of the patient at about 05.00 P.M. PW-1 (Dr.Manisha) examined the patient at 05.00 P.M. The patient was brought by his brother with the alleged history of assault at around 02.00 P.M. at Najafgarh and hit by wooden stick on the head, face, arm and legs. The following injuries were found on the body:

(i) Swelling behind the right ear about 3 cms in diameter.

(ii) Swelling and tenderness on the right forearm in the lower 1/3rd.

(iii) Contusion 15cms x 4 cms on the lateral aspect left arm about 20 cms above the elbow joint yellow reddish in colour.

(iv) Abrasion and tenderness at left knee joint.

(v) Line bruises on the back 4 in number-2 on the right and 2 on the left side. 3 cms broad with intervening gap of + cms each about 15 to 20 cms. long on the inter and

intrascapular region reddish in colour.

(vi) Swelling on the lower lip.

Nature of injuries was given as 'grievous' by blunt object. There was fracture of right parital bone and left Ulna. PW-5 (Dr.Rajiv Chaudhary), who examined X-ray plate found fracture of right parietal bone and left Ulna vide report (Ex.PW5/1). The doctors were not cross-examined despite an opportunity given and their opinion remained unchallenged. Apparently, Umesh Kumar had sustained grievous injuries with blunt object on his body in the occurrence.

4. Umesh Kumar in his court statement as PW-3 implicated both Deep Chand and Harish for inflicting injuries to him. He deposed that at about 02.00 P.M. when he was going to bakery of Bhardwaj Bread Supplier near telephone exchange, Najafgarh, from his house on 28.04.1998 and reached Chawla Bus Stand, Deep Chand came there with a hockey and gave blows on his head, hands and legs. After some time Harish also came there and gave him fists and kicks blows. They both fled the spot after the occurrence. In the cross-examination, he fairly admitted that he had not disclosed the name of the assailants to the examining doctors. He reiterated that he remained admitted in the hospital for three days. He denied the suggestion that he had a quarrel with someone else and falsely implicated the accused. Apparently, the appellant was unable to elicit any material or vital discrepancy in the cross-examination to suspect or doubt his version. The accused persons did not deny their presence at the crime scene at the time of incident and did not set up plea of alibi. Nothing was suggested to him as to who else was the assailant who had caused injuries to him and what was his motive. The accused did not reveal to whom the victim used to tease and who had injured him for that. No such victim or her relative appeared in defence. No complaint was ever lodged prior to the occurrence against the victim for teasing the women folk. The victim who had sustained extensive injuries on the body was not expected to spare the real assailant and to falsely implicate the accused persons charge-sheeted by the prosecution. There are no strong grounds for rejection of the evidence of the injured witness which has got a special status in law. Material facts deposed by the victim remained unchallenged in the cross-examination. It is true that there is delay of three days in recording the statement of the victim under Section 161 Cr.P.C. but for remissness of the IO, otherwise cogent and reliable

testimony of the victim cannot be brushed aside. Application (Ex.PW-4/1) was moved by the Investigating Officer on 28.04.1998 to seek permission from the doctor to record injured's statement. However, he was declared unfit for statement by the concerned doctor and endorsement appears on portion 'A' of Ex.PW-4/1. The appellant did not challenge the statement of PW-4 (HC Shamvir Singh) in this regard in cross-examination. No explanation was sought from the Investigating Officer for not recording the statement of the victim soon after the incident. He was not asked as to when the victim became fit to make statement in the hospital. No specific suggestion was put to the doctors who were examined as PWs 1 and 5.

5. Non-examination of independent public witnesses is of no consequence. There is no legal impediment in convicting the person on the sole testimony of a single witness. It is not the number or the quantity, but the quality that is material. The evidence has to be weighed and not counted. It is open to a competent court to fully and completely rely on a solitary witness if his testimony has a ring of truth, is cogent, credible and trustworthy. The oral testimony of the victim is in consonance with medical evidence and there is no conflict between the two. It is not the case that the First Information Report was lodged after three days of the occurrence. The fact is that the police came into motion soon after the occurrence when DD No.63-B (Ex.PW-6/1) was recorded and the Investigating Officer moved an application (Ex.PW4/1) to record the statement of the injured. Non-recovery of weapon of offence is not fatal. Discrepancies/omissions and improvements highlighted by the appellant's counsel are not of that magnitude to affect the core of prosecution case and to discard the injured's statement. Omission of the victim to not disclose the name of the assailant to the doctor cannot be taken as none was the author of the injuries or that it were accidental in nature. The complainant attributed specific motive to the appellant for inflicting injuries as he had suspected him of teasing his wife. All the relevant contentions of the appellant have been taken into consideration by the Trial Court and the impugned judgment is based upon fair appraisal of the evidence and warrants no interference.

6. The appellant was awarded Rigorous Imprisonment for two years with fine Rs. 500/- Nominal Roll dated 02.12.2010 shows that he remained in custody for three months and eighteen days. The injuries suffered by the victim were grievous in nature and he remained admitted

in hospital for three days. Repeated blows on vital organs were caused with blunt object deliberately and intentionally. The incident pertains to the year 1998. The appellant was not involved in any criminal case and was employed as 'Karigar' at Aggarwal Sweets House on the day of incident. Considering these circumstances, Sentence order is modified and the substantive sentence is reduced to one year. Other terms and conditions of the order are left undisturbed. The appellant shall pay Rs. 25,000/- as compensation to the victim Umesh Kumar and shall deposit it within 15 days in the Trial Court. The amount shall be released to the victim after notice.

7. The appeal stands disposed of in the above terms. The appellant shall surrender before the Trial Court on 09.12.2013 to serve the remaining period of sentence. The Registry shall transmit the Trial Court records forthwith.

ILR (2014) II DELHI 1045
RFA (OS)

STATE TRADING CORPORATION OF INDIA LTD. ....APPELLANT

VERSUS

MILLENNIUM WIRES (P) LTD. & ORS. ....RESPONDENTS

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

RFA (OS) NO. : 139/2013, C.M. NO. : 17920/2013 (FOR STAY) DATE OF DECISION: 10.12.2013

Code of Civil Procedure, 1908—Order VII Rule 11—'Associateship' agreement dated 02.12.2011—STC and Millennium import of continuous cast copper rods—Millennium importing such rods from two Synergic companies (Synergic, Singapore and Synergic,

Malaysia)—Letter of Credit (LC) opened by STC through Allahabad Bank payable to the two Synergic companies through foreign bank plaintiffs, Millennium and STC contended before the learned Single Judge that the two Synergic companies had defrauded STC documents concerning shipment of the products were false and fabricated learned Single Judge rejected plaint on two grounds first, LC constitutes an independent transaction, obligations are not contingent on the intricacies of the underlying contract rather, on the presentation of the necessary documents to the bank in question second limited exception in interfering with LC is that of fraud played upon by the seller on the purchaser and the paying bank was has notice of such fraud—Comprised solely of allegations of fraud learned single judge rejected the suit under Order VII Rule 11 CPC—Hence this appeal. Held: Payment under LC injuncted first, there is a possibility of irretrievable damage second, were there is fraud in the underlying transaction which is brought to the notice of the bank contract of the bank guarantee or the LC is independent of the main contract between the seller and the buyer irrevocable bank guarantee or LC the buyer cannot obtain injunction against the banker on the ground that there was a breach of the contract by the seller—Documents constitute complying presentation of LC is solely that of the issuing bank (Allahabad Bank) bank does so determine, the non-acceptance by the buyer (STC/Millennium) is not determinative issuing bank accepted the documents considerable lapse of time, informed the foreign bank about the discrepancy which could not be done in view of Article 16 UCP notice to be given no later than the close of the fifth banking day fraud exception to honouring an LC foreign bank must have notice or knowledge of such fraud before making payment evidence must be clear both as to the fact of fraud and as to the bank's knowledge plaint in this case

disclosed sufficient pleadings as to the alleged fraud played upon STC/Millennium by the two Synergic companies only reference to the foreign bank's knowledge of such fraud plaint refers casually and vaguely, without referring to any details, to the question of notice of fraud on the foreign bank, which forms a crucial part of the cause of action absence of any particulars pleaded, or any evidence to support, the claim that the foreign bank colluded with the Synergic companies, or even had notice of such fraud, the claim as disclosed in the plaint is bound to fail, as the cause of action pleaded does not entitle STC to the remedy it prays for.

Important Issue Involved: (A) Payment under an LC can injuncted only when (a) there is a possibility of irretrievable damage, in that the buyer may not be able to recover the money already released by the negotiating bank, or (b) where there is fraud in the underlying transaction which is brought to the notice of the bank.

(B) temporary injunction Order 39, Rule 1 CPC injunction to restrain encashment of Bank guarantees or Letters of Credit can be issued if the plaintiff is prima facie able to establish that the case comes within these two exceptions- (i) fraud and (ii) irretrievable damage.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. Dinesh Agnani, Sr. Advocate with Ms. Leena Tuteja, Advocate.

FOR THE RESPONDENT : Mr. Ajay Monga with Mr. Ateev. K. Mathur and Mr. Devmani Bansal, Advocates, for Resp. No.5.

CASES REFERRED TO:

1. *Fortis Bank SA/NV and another* vs. *Indian Overseas Bank* 2011 (2) Lloyd.s LR 33.
2. *Himadri Chemicals Industries Limited* vs. *Coal Tar Refining Co.,* (2007) 8 SCC 110.
3. *UBS AG* vs. *State Bank of Patiala,* 2006 (5) SCC 416.
4. *Federal Bank Ltd.* vs. *VM Jog Engineering Ltd. and Ors.,* (2001) 1 SCC 663.
5. *ITC Limited* vs. *Debts Recovery Appellate Tribunal and Others,* (1998) 2 SCC 70.
6. *Glencore International AG* vs. *Bank of China* 1996 (1) Lloyd's Rep 135.
7. *UP Cooperative Federation Ltd.* vs. *Singh Consultants and Engineers (P) Ltd.,* (1988) 1 SCC 174.
8. *(Azhar Hussain* vs. *Rajiv Gandhi,* 1986 SCR (2) 782, paragraph 12).
9. *United Commercial Bank* vs. *Bank of India,* AIR 1981 SC 1426.
10. *United Commercial Bank* vs. *Bank of India,* (1981) 2 SCC 766.

RESULT: Appeal dismissed.

S. RAVINDRA BHAT, J.

1. This is an appeal from an order of the learned Single Judge rejecting the plaint in CS(OS) 545/2012 under Order VII Rule 11 Code of Civil Procedure (hereafter "CPC"). The suit – of Millennium Wires, (hereafter "Millennium") the first plaintiff and State Trading Corporation (STC, the second plaintiff) sought a permanent injunction against the Allahabad Bank; it also sought to restrain the other defendants, including the fourth defendant, the Malayan Bank (hereafter the "foreign bank") from honouring a Letter of Credit (LC) issued by the Allahabad Bank at the behest of STC.

2. The suit relates to an 'Associateship' agreement (dated 02.12.2011, hereafter *"the AA"*) between the STC and Millennium for the import of continuous cast copper rods. Millennium had been, as per its case before

the learned Single Judge, importing such rods from Synergic Material Services PTE Ltd. and Synergic Industrial Material Services Malaysia, group companies based in Singapore and Malaysia respectively (hereinafter *"Synergic, Singapore"* and *"Synergic, Malaysia"* respectively, and collectively as *"the Synergic companies"*). With a view to importing 400 metric tons of the rods, STC and Millennium entered into the agreement. Under the AA, STC was to import the rods for Millennium through the Synergic companies. Further, the agreement also stipulated that Millennium shall provide STC with margin money as advance of 25% of the value of the letter of credit to be opened by STC (Clause 4, agreement), along with a 25% cash advance and a post-dated cheque for 102.5% of the value of the consignment in favour of STC along with a legal undertaking. (Clause 3, of the agreement). The AA also provides for STC's trading margin (Clause 5, AA), and stipulates in Clause 7, importantly, that Millennium shall,

> *"7.....approve acceptance of quantity and quality certificate issued at loan port by Supplier/Manufacturer. Hence, the Buyer [MWPL] shall ensure that quality and quantity are in order....."*

3. Under the structure of the transaction, an LC was to be opened by STC through Allahabad Bank, payable to the two Synergic companies through foreign bank (the negotiating and beneficiary bank). STC and Millennium stated-in the plaint, that the manner in which the transaction was worked was as follows: Oral orders were placed by Millennium on the two Synergic companies and thereafter, the latter sent sales contract/ proforma invoices to STC. The proforma invoices were then to be issued by Synergic, Singapore in favour of STC, specifically mentioning Millennium's name as "A/c -Millennium Wires Pvt. Ltd." On the acceptance of the said proforma invoice, final invoice was to be issued by the two Synergic companies, as the case may be, which on acceptance by Millennium was to be sent back to the two companies, and this constituted the contract between STC/Millennium on one side and the two Synergic companies on the other. At that stage, LCs were to be opened by STC through Allahabad Bank payable to the two Synergic companies, as the case may be, through foreign bank.

4. In terms of this arrangement, the rods were despatched from Port Klang, Malaysia with the final destination being the International

Container Depot, Ludhiana. A number of documents were, in the ordinary course, sent by the Synergic companies to Allahabad Bank, the issuing bank, with a copy to STC. These included a bill of lading, letter of credit, beneficiary certificate, beneficiary's letter of undertaking, facsimile letter, inspection report, test certificate, advice of import bills received, invoice, packing list, marine cargo insurance policy, certificate of Malaysian origin, and shipping agent's certificate. Here, it is stated that the advance copy of these documents were sent through courier to STC, which in turn sought acceptance from Millennium. The STC averred that the courier receipt of dispatch of the above documents was one of the negotiable documents presented under the LCs to Malayan Bank and sent to Allahabad Bank. Under this arrangement, STC states, the Synergic companies could negotiate the LCs with the foreign bank for release of the payment, which in turn was entitled to claim the amount from Allahabad Bank.

5. A total of four LCs were opened by STC for the import of the rods from Synergic, Singapore. These were:

a. L/C No. 0189111FLU000150, opened on 07.12.2011. This was negotiated by Malayan Bank with Allahabad Bank on 14.12.2011. Acceptance was conveyed by Millennium to Malayan Bank on 23.12.2011. The bill of lading for the shipment of goods was dated 08.12.2011. The final payment for this LC has been made by Malayan Bank to Synergic, Singapore.

b. L/C No. 0189111FLU000151, opened on 07.12.2011. This was negotiated by Malayan Bank with Allahabad Bank on 12.12.2011. Acceptance was conveyed by Millennium to the foreign bank on 31.12.2011. The bill of lading for the shipment of goods was dated 09.12.2011. The final payment for this LC has been made by the foreign bank to Synergic, Singapore.

c. L/C No. 0189111FLU000154, opened on 17.12.2011. This was negotiated by the foreign bank with Allahabad Bank on 22.12.2011. The bill of lading for the shipment of goods was dated 31.12.2011. The final payment for this LC has been made by the foreign bank to Synergic, Singapore.

d. L/C No. 0189111FLU000159, opened on 02.01.2012. This was negotiated by the foreign bank with Allahabad Bank on 06.01.2012. Acceptance was conveyed by Millennium to the foreign bank on 16.01.2012. The bill of lading for the shipment of goods was dated 07.01.2012.

6. The plaintiffs, Millennium and STC contended before the learned Single Judge that the two Synergic companies had defrauded STC, because the documents concerning shipment of the products were false and fabricated. Both before the learned Single Judge, and in the appeal memorandum presently, instances of alleged fraud have been urged by STC. It was argued that the Synergic companies made false statements as to sending couriers with the relevant documents (as mentioned above) to STC, and that on checking with DHL and Skynet Courier, (the courier companies involved), the shipment waybill numbers were found to have no attached package sent to STC, or that these waybill numbers did not exist. Based on this, it was argued that the two Synergic companies had fabricated the documents in question, and thus, played a fraud on STC.

7. It was argued furthermore, based on the plaint allegations, that the bills of lading for the shipments were also forged, as the shipping Agent denied having ever issued them, and that no shipment had in fact been physically sent, as was falsely communicated to STC and Millennium. Also, based on correspondence with the authorities at Port Klang, it was argued that the vessels on which the shipment was alleged to have been sent were not available for loading at the port on the days indicated by the bills of lading, further pointing to fraud. Therefore, given that the bills of lading, which were the ultimate proof of export, were fabricated, it was argued that clear evidence of fraud is available, so as to annul the letters of credit in this case.

8. In view of these arguments, and the evidence of fraud played by the two Synergic companies upon STC, and also Millennium, the plaintiffs, STC and Millennium approached the learned Single Judge for a decree of permanent, mandatory and perpetual injunction against Synergic, Singapore from claiming any benefit under the LCs in question, and against the foreign bank to prevent any action, or release of funds, under the LC.

9. The defendants, i.e. the Synergic companies and the foreign bank, in response to the summons, entered appearance and resisted the

suit claim. The foreign bank also filed an application for rejection of plaint, under Order VII Rule 11 CPC. In this, it was urged that it had accepted the documents since they were in conformity with the terms of the LCs. The LCs were negotiated on 12th, 14th and 22nd December 2011 and 6th January 2012 respectively. The amounts were accordingly paid to Synergic Singapore. The stand is that any dispute between STC and Synergic Singapore could not impede reimbursement to be made to the foreign bank in accordance with UCP-600 (Uniform Customs and Practice for Documentary Credits, Sixth Edition) hereafter referred to by its acronym *"UCP-600"*. It is stated that the foreign bank did not receive any notice in accordance to Article 16 of UCP-600 from the Allahabad Bank. It was stated that as regards LC No. 151, no notice under Article 16 of UCP-600 was received from the said Allahabad Bank. A message dated 31st January 2012 was received from Allahabad Bank that it would not make payment under the said LC as the STC *"alleged the documents to have been fabricated and that the Letter of Credit was fraudulently negotiated."* With respect to LC No. 154, the stand is that no notice from STC under Article 16 of UCP-600 was received by the foreign bank. It was only on 15th March 2012 it received copy of the order dated 2nd March 2012 from the lawyers of the Plaintiffs. In relation to LC No. 159 it is stated that Allahabad Bank confirmed receipt of the documents by a message dated 16th January 2012 and undertook to make the payment. However, later it reiterated that STC had alleged that the documents were fabricated.

10. Contrary to this, STC had argued that with respect to LCs 150, 154 and 159, *"the plaintiffs (i.e. STC and MWPL) came to know that the Defendant No. 2 company had manufactured courier receipt to demonstrate export and had falsely declared that fax message have been sent and further fabricated other documents to prove exports"*. With respect to LC 151, STC had argued that the documents received were duly rejected and this fact was communicated to Allahabad Bank.

11. In this context, Allahabad Bank's stand was that *"after receiving from Plaintiff No. 2 acceptance of the sets of documents received from the Defendant No.4, the answering Defendant No.1 communicated the same to the Defendant No. 4 advising the due dates of payment in respect of the following three LCs: (a) 0189111FLU000150 (b) 0189111FLS000154 (c) 0189112FLU000159."* Thus, the Allahabad Bank confirms that with respect to these 3 LCs, at the least, complying

presentation was made, and that acceptance from STC (and Millennium) was made.

12. The foreign bank contended that in terms of UCP-600 once the LC stands paid by the negotiating bank, it is an irrevocable undertaking of the issuing bank to make the payment especially when it has accepted the documents and agreed to pay on the date of maturity. It is stated that there is no allegation of fraud against Allahabad Bank, the Synergic Companies and the foreign bank, the plaint had to be rejected. The foreign bank also relied on the judgment of the Supreme Court in **United Commercial Bank v. Bank of India,** (1981) 2 SCC 766. It stated that payments were made by it (the foreign bank) to Allahabad Bank without any knowledge of fraud and therefore, Allahabad Bank was obliged to honour its commitment under each of the LCs in terms of UCP-600. As regards LCs 150, 154 and 159, the foreign bank, in line with the stand of Allahabad Bank, maintains that the documents were accepted by STC, and thus, no dispute arises in that regard. As regards LC 151, the foreign bank argues that, again, notice under Article 16 of UCP-600 was made, such that payment under the LC could be injuncted within the framework of UCP-600, which is argued to regulate the entire LC transaction, as opposed to the contractual relations between STC/Millennium and the Synergic companies.

13. The foreign bank also sought vacation of the interim stay granted by the order dated 2nd March 2012. Reliance was placed upon Articles 4, 5, 15 and 16 of UCP-600 to argue that the underlying contract is independent of the letter of credit, which constitutes a distinct agreement to pay upon complying presentation in terms of UCP-600. Specifically, it was argued that once the documents required to release the payment under the LC have been presented, and are in compliance with the requirements under the terms of the LC, then the bank is under an obligation to make the payment irrespective of the views of the purchaser, as any dispute that the latter may have against the seller is to be raised inter se in alternate proceedings. Thus, it was argued that *"as there is no discrepancy in the documents - nonacceptance of documents by Plaintiff No.2, in such circumstances, is of no consequence."*

14. The learned Single Judge rejected the suit under Order VII, Rule 11, for failure to disclose a cause of action. Though the learned Single Judge records and appreciates the various allegations of fraud

levelled by STC against the two Synergic companies, the plaint was rejected on two grounds: *first,* that a letter of credit constitutes an independent transaction, obligations under which are not contingent on the intricacies of the underlying contract, but rather, on the presentation of the necessary documents to the bank in question; *secondly,* that given the general proscription on interfering with letters of credit, the only limited exception is that of fraud played upon by the seller on the purchaser, if, crucially, the paying bank has notice of such fraud. In the absence of such notice, the learned Single Judge held, the obligation to pay under the LC continues and the defrauded party will have to pursue independent litigation against the seller to recover the money. Accordingly, the learned Single Judge also vacated the interim stay granted by the order dated 02.03.2012 in IA No. 4103/2012 in CS(OS) 545/2012. In reaching this decision, and in reliance on various decisions of the Supreme Court, the learned Single Judge concluded on the points of law involved in this case as follows:

> "30. The law in regard to the LCs can therefore, be summarised as under:
>
> (i) The Court should be slow in granting an order of injunction restraining the realization of a bank guarantee or a LC;
>
> (ii) There are two exceptions to the above rule. The first is that it must be clearly shown that fraud of an egregious nature has been committed and to the notice of the bank. The second is that injustice of the kind which would make it impossible for the guarantor to reimburse himself, or would result in irretrievable harm or injustice to one of the parties concerned, should have resulted.
>
> (iii) It is not enough to allege fraud but there must be clear evidence both as to the fact of fraud as well as to the bank's knowledge of such fraud."

15. In the absence of any substantial pleadings on the knowledge of the foreign bank of the fraud, the learned Single Judge held that the cause of action disclosed in the plaint which comprised solely of allegations of fraud against the two Synergic companies and not of any specifics of fraud committed by the foreign bank, or of notice given to the foreign bank of the fraud, was insufficient to merit the final prayer, and thus

liable to rejection under Order VII Rule 11 CPC.

16. The appellant argues that the fraud urged here was of a kind that could clearly be termed "egregious" and manifestly perceptible for anyone to see, to justify a remedy in equity. It was argued that the documents clearly revealed that the bills of lading were issued much prior to the dates when the goods could be shipped in terms of the contract and especially contrary to the terms of the letters of credit. Counsel for the STC sought to urge that the instructions clearly were to ship the goods by the end of December; yet the bill of lading revealed that it was issued at least two weeks prior to that; furthermore, there was clearly a manipulation, visible to the naked eye. The failure or omission by the Allahabad bank to notify the foreign bank about discrepant documents and return them in accordance with UCP-600 did not mean that the Court had to deprive itself of the jurisdiction to grant equitable relief, of injunction.

17. The limited question that arises in this case is whether payment by the negotiating bank under a letter of credit can be injuncted. As the Supreme Court recognized in **United Commercial Bank v. Bank of India,** AIR 1981 SC 1426,

> *"48.....[i]t is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by bunks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which these merchants take. In this case the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged."*

This principle is also reflected in Article 4(a), UCP-600, which is binding as regards the LC contracts are concerned:

> *"(a) A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary.*
>
> *A beneficiary can in no case avail itself of the contractual relationships existing between banks or between the applicant and the issuing bank."*

Similarly, Article 5 also creates the distinction between the documents to be presented to the bank for release of payment, and the products/goods that those documents are concerned with ultimately, in the following words:

> *"Banks deal with documents and not with goods, services or performance to which the documents may relate."*

18. It is well-established in Indian law, as the learned Single Judge correctly noted, that payment under an LC can be injuncted only when (a) there is a possibility of irretrievable damage, in that the buyer may not be able to recover the money already released by the negotiating bank, or (b) where there is fraud in the underlying transaction which is brought to the notice of the bank. This was clearly recognized by the Supreme Court in **Federal Bank Ltd. v. VM Jog Engineering Ltd. and Ors.,** (2001) 1 SCC 663:

> *"57. In several judgments of this Court, it has been held that Courts ought not to grant injunction to restrain encashment of Bank guarantees or Letters of Credit. Two exceptions have been mentioned -(i) fraud and (ii) irretrievable damage. If the plaintiff is prima facie able to establish that the case comes within these two exceptions, temporary injunction under Order 39, Rule 1 CPC can be issued. It has also been held that the contract of the Bank guarantee or the Letter of Credit is independent of the main contract between the seller and the buyer. This is also clear from Arts. 3 and of the UCP (1983 Revision). In case of an irrevocable Bank guarantee or Letter of Credit the buyer cannot*

obtain injunction against the Banker on the ground that there was a breach of the contract by the seller....."

19. The bank's obligation, in this case of the foreign bank, is to honour the LC, and in the words of the Court,

"if the seller prima facie complies with the terms of the Bank Guarantee or Letter or Credit, namely, if the seller products the documents enumerated in the Bank Guarantee or Letter of Credit. If the Bank if satisfied on the face of the documents that they are in conformity with the list of documents mentioned in the Bank Guarantee or Letter of Credit and there is no discrepancy, it is bound to honour the demand of the seller for encashment."

20. This obligation is not affected merely because the buyer disputes the due performance of the contract. The obligation is unaffected, as long as the documents presented are in accordance with the terms of the LC. That is the essence of the documentary autonomy of the LC. In this case, the documents presented for LCs 150, 154 and 156 were in order, and this was never disputed by STC or Millennium. Quite to the contrary, STC admitted to having conveyed its acceptance with respect to these three LCs to Allahabad Bank. As regards LC 151, the foreign bank's position is that the documents complied with the requirements under the LC, and, the obligation therefore, to pay was triggered. Here, Article 16, UCP-600 is crucial, which reads as follows:

"Discrepant Documents, Waiver and Notice:

(a) When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank determines that a presentation does not comply, it may refuse to honour or negotiate.

(b) When an issuing bank determines that a presentation does not comply, it may in its sole judgement approach the applicant for a waiver of the discrepancies. This does not, however, extend the period mentioned in sub-article 14 (b).

(c) When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank decides to refuse to honour or negotiate, it must give a single notice to that effect to the presenter.

The notice must state:

(1) that the bank is refusing to honour or negotiate; and

(2) each discrepancy in respect of which the bank refuses to honour or negotiate; and

(3) (a) that the bank is holding the documents pending further instructions from the presenter; or

(b) that the issuing bank is holding the documents until it receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver; or

(c) that the bank is returning the documents; or

(d) that the bank is acting in accordance with instructions previously received from the presenter.

(d) The notice required in sub-article 16

(c) must be given by telecommunication or, if that is not possible, by other expeditious means no later than the close of the fifth banking day following the day of presentation.

(e) A nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank may, after providing notice required by sub-article 16 (c) (iii) (a) or (b), return the documents to the presenter at any time.

(f) If an issuing bank or a confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation.

(g) When an issuing bank refuses to honour or a confirming bank refuses to honour or negotiate and has given notice to that effect in accordance with this article, it shall then be entitled to claim a refund, with interest, of any reimbursement made."

21. Article 16(f), therefore, casts a responsibility on the issuing and confirming banks to be diligent in following the provisions of Article 16, failing which the documents would be deemed to constitute complying performance for the purpose of releasing payment under the LC, with or without the waiver from the buyer. Crucially, the decision as to whether

the documents constitute complying presentation is solely that of the issuing bank (i.e. its *"sole judgment"*, in terms of the sub-clause (b), in this case, Allahabad Bank), which may, in case a discrepancy in the documents is found, approach the buyer for a waiver. However, in a case where the issuing bank does decide that the documents do not meet the compliance requirements under the LC, in terms of clause (c), such notice must be given *"no later than the close of the fifth banking day following the day of presentation."*

22. Thus, in case the payment under the LC is to be injuncted, a notice under Section 16 is mandatory, within the terms of that article. In this case, as regards LCs 150, 154 and 159, the documents were accepted by Allahabad Bank, and no notice was given under Section 16, thus rendering payment under those LCs by the foreign bank proper. As regards LC 151, the only LC as regards which STC/Millennium claim to have rejected the documents, two points are important: first, that under Article 16, UCP, it is the sole judgment of Allahabad Bank to determine whether the documents constitute a complying presentation, and if that bank does so determine, the non-acceptance by the buyer (STC/ Millennium) is not determinative. However, if Allahabad Bank were to determine that the documents do not constitute complying presentation, the same could be waived by STC/Millennium. In this case, however, as regards LCs 150, 154 and 159, no such question arose; whereas with regard to LC 151, the refusal to honour the LC by Allahabad Bank (after receiving notice of non-acceptance by STC) came after 5 days from presentation of the LC by the foreign bank. In such a case, the terms of Article 16(d), read with 16(f), are clear, in that payment under the LC subsequently by the foreign bank cannot be objected to.

23. In this context, it would be necessary to recollect the status of UCP600 and all its previous versions. International documentary credit practise and law has been codified as a collaborative (and one may add, cooperative) effort and spirit to ensure consistency of approach of all banking and financial institutions dealing with such instruments. The importance of recognizing the normative compulsions and binding effect upon those dealing with such instruments has been underlined time and again. In Schetze & Fontane, Documentary Credit Law throughout the World (2001) (ICC Publication No 633), there is a useful discussion at paragraph 2.2.4 on the relationship of national law and the UCP where the meaning of the UCP is in dispute or UCP does not contain an express

provision for the issue that is before a national court:

> *"While the UCP aim to harmonise worldwide trade practices and aim to safeguard the interests of the international trade and banking community, national laws vary from country to country. The application of national laws to issues not expressly addressed by the UCP can result in a deinternationalisation of the rules and conflict with their purpose. The application of national laws and doctrines needs to be handled carefully. If the UCP generally address an issue in question but do not provide for an explicit solution to a particular aspect of it, there is also the option of considering whether a solution can be found in a general rule contained in the UCP. An interpretation of the UCP in accordance with* their aims and evaluations is generally preferable."

The Court of Appeals in the UK, recognized this principle in **Glencore International AG v Bank of China** 1996 (1) Lloyd's Rep 135:

> *"Practice is generally governed by the Uniform Customs and Practice for Documentary Credits (the "UCP"), a code of rules settled by experienced market professionals and kept under review to ensure that the law reflects the best practice and reasonable expectations of experienced market practitioners. When courts, here and abroad, are asked to rule on questions such as the present they seek to give effect to the international consequences underlying the UCP."*

24. Dealing with a somewhat analogous set of circumstances, the UK Court of Appeals, in **Fortis Bank SA/NV and another v Indian Overseas Bank** 2011 (2) Lloyd's LR 33, held that:

> *"It is fundamental to the operation of letters of credit that, when the issuing bank determines that the documents do not conform, it may reject them. If it does, then it cannot be entitled to retain the documents, as it is implicit in rejection that it has refused to accept them. It must either hold them at the disposal of or in accordance with the instructions of the presenter or return them. Therefore once the issuing bank has rejected the documents, it cannot do anything else but act in accordance with its chosen option. Thus, it was not necessary to spell out in the article the issuing bank's obligation to act in accordance with the notice.*

It was implicit in the wording of the article.

38 Second, the obligation to act in accordance with the notice is what is required by the standard international banking and trading practice set out at paras 31–35 above. It is necessary to make letters of credit work in practice so that the presenter can deal with the goods which are represented by the documents which the issuing bank has rejected. The consequences of the inability of the presenter to deal with the documents are too well known to need enumeration; illustrations are obvious such as in the case of a perishable cargo, or where the market falls or where the ship arrives and seeks to discharge the cargo.."

Thus, the issuing bank (in this case, the Allahabad Bank) was under an obligation to state its position and either accept or reject the documents. It chose to accept the documents and after considerable lapse of time, informed the foreign bank about the discrepancy. Clearly it could not do so, in view of Article 16 UCP.

25. Coming finally to the question of fraud, STC alleges fraud by the two Synergic companies upon itself. While fraud is an exception to honouring an LC, it is crucial such the foreign bank had notice or knowledge of such fraud before it made the payment, in order for the exception to be applicable. This question was considered by the Supreme Court in **UBS AG v. State Bank of Patiala,** 2006 (5) SCC 416, in the following terms:

"31. The facts of these three appeals are clear and simple. The Letters of Credit were issued by the issuing bank to the confirming-bank with a request to inform the beneficiary that an irrevocable Letter of Credit had been established for the sum indicated therein to be paid by the Appellant-Bank on negotiation of documents to be presented by the beneficiary. Such documents having been presented by the beneficiary to the Appellant-Bank, it made payment under the Letter of Credit to the beneficiary and was entitled to receive reimbursement for the same from the Respondent-Bank. If the fraud had been detected earlier and the Appellant-Bank had been informed of such fraud and put on caution prior to making payment, the Respondent-Bank may have had a triable issue to go to trial. That is not so in these three cases. In these cases, the fraud was detected after the Letters of Credit had been negotiated and hence such fraud alleged to have been committed by the constituent of the Respondent-Bank cannot be set up even as a plausible defence in the suit filed by the Appellant-Bank." (emphasis supplied).

26. The fact that fraud in itself existed or exists, is insufficient, but what is material is that, notice of such fraud to the foreign bank must be proven – a factor recognized by the Supreme Court in **Himadri Chemicals Industries Limited v. Coal Tar Refining Co.,** (2007) 8 SCC 110, in stating that

"XXXXXX XXXXXX XXXXXX

11.....the evidence must be clear both as to the fact of fraud and as to the bank's knowledge....."

27. In order, therefore, to disclose a cause of action, both elements must be pleaded. Whist the plaint in this case disclosed sufficient pleadings (and supporting evidence) as to the alleged fraud played upon STC/ Millennium by the two Synergic companies, the only reference to the foreign bank's knowledge of such fraud is found in paragraphs 17 and 47 of the plaint which only disclose the mere assertion that the foreign bank *"is in active collusion with"* the Synergic companies, and that the facts give *"rise to a suspicion, that it (Malayan Bank) is hand in glove"* with the Synergic companies.

28. There is no doubt that the "failure of the pleadings to disclose a cause of action is distinct from the absence of full particulars" (*Liverpool and London SP and I Asson Ltd. v. MV Sea Success I and Another,* (2004) 9 SCC 512; at the same time, in cases of fraud, the Court has recognized that

"144. .....the material facts are required to be stated but not the evidence except in certain cases where the pleading relies on any misrepresentation, fraud, breach of trust, wilful, default, or undue influence."

(emphasis supplied)

29. The plaint, in the present case refers casually and vaguely, without referring to any details, to the question of notice of fraud on the foreign bank, which forms a crucial part of the cause of action. As recognized by the Supreme Court in **ITC Limited v. Debts Recovery**

Appellate Tribunal and Others, (1998) 2 SCC 70, the mere circumstance that the goods were not shipped would not, ipso facto, lead to an inference of fraud and further particulars are to be placed on record. As the Court noted:

> *"27..... non-movement of goods by the seller could be due to a variety of tenable or untenable reasons, the seller may be in breach of the contract but that by itself does not permit a plaintiff to use the word 'fraud' in the plaint and get over any objections that may be raised by way of filing an application under Order 7 Rule 11 CPC. As pointed out by Krishna Iyer, J. in T. Arivandandam's case, the ritual of repeating a word or creation of an illusion in the plaint can certainly be unravelled and exposed by the Court while dealing with an application under Order 7 Rule 11 (a). Inasmuch as the mere allegation of drawal of monies without movement of goods does not amount to a cause of action based on 'fraud', the Bank cannot take shelter under the words 'fraud' or 'misrepresentation' used in the plaint."*

30. The ratio in **UP Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.,** (1988) 1 SCC 174, in the opinion of this Court, too applies squarely to this case. The Supreme Court observed that the:

> *"48.....bank, however, was not allowed to determine whether the seller had actually shipped the goods or whether the goods conformed to the requirements of the contract....."* (emphasis supplied).

31. Indeed, the *"whole purpose of conferment of such powers is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the court"* (**Azhar Hussain v. Rajiv Gandhi,** 1986 SCR (2) 782, paragraph 12). Thus, in such a case, given the absence of any particulars pleaded, or any evidence to support, the claim that the foreign bank colluded with the Synergic companies, or even had notice of such fraud, the claim as disclosed in the plaint is bound to fail, as the cause of action pleaded does not entitle STC to the remedy it prays for. In other words, even if fraud as alleged is proved (by the Synergic companies on STC/Millennium), this would not lead to the remedy that the foreign bank is to be prevented from

releasing any benefit, or the Synergic companies are to be refused any benefit, under the LCs in question.

32. Thus, for the reasons above, this Court finds no reason to interfere with the order of the learned Single Judge. The appeal and pending application are accordingly dismissed, but with no order as to costs.

ILR (2014) II DELHI 1064
OMP

FOOD CORPORATION OF INDIA ....PETITIONER

VERSUS

PRATAP RICE & GENERAL MILLS ....RESPONDENT

(RAJIV SHAKDHER, J.)

OMP NO. : 1278/2013 DATE OF DECISION: 20.12.2013

Limitation Act, 1963—Sec. 5—Arbitration and Conciliation Act, 1996—Sec. 34—Condonation of delay in re-filing the petition U/s 34 of Arbitration & Conciliation Act, 1996—After deducting 30 days which is maximum cumulative period permissible for removing the objections, under Delhi High Court Rules., the net delay in re-filing of 138 days. Held the Court is empowered to condone the delay in re-filing, provided there is no neglect and sufficient causes shown to explain the delay. The sufficiency of cause would depend facts & circumstances of the case. Held further that the span of delay as well as bonafides/ quality of the explanation tendered seeking condonation are both relevant factors, especially in the context of the Arbitration Act, 1996, where as per Sec. 34 (3) of the Act Sec. 5 of the Limitation Act 1963

would have no applicability. Held a large number of time spent in refiling would itself tend to demonstrate negligence, unless a credible explanation is set forth. The reason put forth in this case was that paper book was inadvertently placed in a file by the clerk of the counsel and was not traceable. The negligence and callousness on the part of FCI in prosecuting the matter is clear from the fact that FCI did not seek to know from its counsel about status of its petition—Petition for condonation of delay in re-filing dismissed.

[Di Vi]

APPEARANCES:

FOR THE PETITIONER : Mr. S. Kumar Pattjoshi, Sr. Adv. with Mr. Manohar Lal Sharma, Advocate.

FOR THE RESPONDENT : None.

CASES REFERRED TO:

1. *Union of India* vs. *M/s Ravinder Kapoor;* decision dated 23.09.2013 in OMP No.477/2013 and IA Nos.7795/2013 & 7796/2013.
2. *Delhi Transco Ltd. & Anr.* vs. *Hythro Engineers (P) Ltd.* 2012 (3) Arb.L.R. 349 (Delhi).
3. *Delhi Development Authority* vs. *M/s. Durga Construction Co.;* decision dated 07.11.2013 passed in FAO (OS) Nos.485-86/2011].
4. *Union of India* vs. *M/s. Ravinder Kapoor; The Executive Engineer (Irrigation & Flood Control)* vs. *Shree Ram Construction* Co. 2010 (120) DRJ 615.
5. *Balwant Singh (Dead) vs. Jagdish Singh & Ors.* (2010) 8 SCC 685].
6. *Delhi Jal Board* vs. *Digvijay Sanitations & Anr.,* 2009 (2) Arb. LR 576 (Delhi).
7. *UOI* vs. *Popular Construction Co.* (2001) 8 SCC 470.

RESULT: Petition dismissed.

RAJIV SHAKDHER, J.

IA Nos. 20809/2013 (condonation of delay of 1 day in filing) & 20811/2013 (condonation of delay of 108 days in re-filing)

1. These are two applications which have been filed by the petitioner, i.e., the Food Corporation of India (in short FCI) to seek condonation of delay in filing the petition under Section 34 of the Arbitration & Conciliation Act, 1996 (in short the Act) and thereafter, for re-filing the said petition. According to the FCI there is one day's delay in filing the petition and a delay of 108 days in re-filing the same.

2. The averments made in IA No. 20809/2013 reveal that the impugned award dated 15.03.2013 was received by FCI on 01.04.2013. It is the case of the FCI that the petition was filed on 01.07.2013.

2.1 In so far as the registry of this court is concerned, they have submitted a report, which establishes the fact that the petition was initially filed on 01.07.2013. The registry, on examination of the petition, recorded its objections on 02.07.2013 and, returned the same to the filing counter for being handed over to the counsel for the FCI on the very same date. There were eight (8) objections listed out by the registry.

2.2 The FCI's counsel re-filed the petition on 26.07.2013. On scrutiny the registry found that none of the objections had been removed and the registry had raised one new objection apart from the objections cited earlier. The scrutiny was carried out on 26.07.2013 itself and the petition was returned to the filing counter on 26.07.2013.

2.3 The counsel for the FCI, thereafter, re-filed the petition on 30.07.2013 and 03.08.2013. The petition was returned to the filing counter on 05.08.2013. It was re-filed on 16.12.2013. After examination, it was cleared for listing on 19.12.2013.

3. The aforesaid would show that in so far as IA No. 20809/2013 is concerned, the same would have to be allowed as the initial filing by FCI appears to be in time, if limitation is counted from the date when it claims it had received the signed copy of the award. The said IA is accordingly, allowed.

3.1 However, in so far as condonation of delay in re-filing is concerned, it is the stand of the FCI that, even according to it, there is a delay of 108 days, however, the registry of this court has stated in its

report that the FCI took 168 days in removing the objections and if it is given credit of 30 days, which is the maximum cumulative period permissible for removing the objections, under Section 5 of Chapter I (Volume V) of the High Court Rules, 1967 (in short the Rules) the net delay in re-filing is of 138 days. To be noted, under the aforementioned Rules, a party is given seven days at a time for removing defects, as pointed out by the registry, after a petition is filed.

3.2 There is no gainsaying that the court is empowered to condone the delay in re-filing, provided there is no neglect and sufficient cause is shown to explain the delay. The sufficiency of cause would depend on the facts and circumstances of the case. [See **Union of India vs M/s Ravinder Kapoor;** decision dated 23.09.2013 in OMP No.477/2013 and IA Nos.7795/2013 & 7796/2013; as affirmed by the order dated 06.11.2013 of the Division Bench in FAO(OS) No.478/2013 titled **Union of India vs. M/s. Ravinder Kapoor; The Executive Engineer (Irrigation & Flood Control) vs. Shree Ram Construction Co.** 2010 (120) DRJ 615; **Delhi Transco Ltd. & Anr. vs. Hythro Engineers (P) Ltd.** 2012 (3) Arb.L.R. 349 (Delhi); and **Delhi Development Authority vs. M/s. Durga Construction Co.;** decision dated 07.11.2013 passed in FAO (OS) Nos.485-86/2011].

3.3 The expression 'sufficient cause', which is the measure adopted for condonation of delay, itself pre-supposes the absence of negligence or inaction on the part of the applicant seeking condonation. The expression implies presence of 'legal' and 'adequate reasons' and, therefore, it is imperative that besides, the applicant, acting in a bonafide manner, it should be able to demonstrate that it had taken all possible steps within its power and control to approach the court without unnecessary delay. The test articulated by the courts as to whether the cause is sufficient or not is one whereby the party is able to demonstrate that it could not have avoided the delay despite due care and attention. [See **Balwant Singh (Dead) vs Jagdish Singh & Ors.** (2010) 8 SCC 685].

4. While examining the issue of condonation of delay in re-filing, the crucial question which the court is often faced with is: what should be the measure for condoning the delay? Should it depend on the span of the period involved? Or the bonafides/ quality of the explanation tendered to seek condonation of delay.

4.1 In my opinion, both factors would be required to be kept in

mind, especially in the context of the Act, one is presently dealing with and, the view taken by the Supreme Court, in the case of **UOI vs. Popular Construction Co.** (2001) 8 SCC 470, which clearly mandates that once the period provided in Section 34(3) of the Act for instituting a petition under Section 34 is exhausted, the provisions of Section 5 of the Limitation Act, 1963 would have no applicability. In effect the court would have no power to condone the delay in regard to the period provided under Section 34(3) of the Act.

4.2 A large period of time spent in re-filing would itself tend to demonstrate negligence on the part of the party desirous of impugning the award; unless a credible explanation is setforth. This is more so, in view of the fact that once a petition is filed under Section 34 of the Act, the other party to the litigation, which wishes to execute the award is statutorily restrained from doing so by virtue of provisions of Section 36 of the Act. The successful party is thus deprived of the fruits of adjudication.

4.3 There could be another situation where the period of delay in re-filing may not be large, but the explanations given are false and contrived. Even in such cases, a court could come to a conclusion that the delay in re-filing ought not to be condoned. The reason for this, in my view, is quite simple. The legislature in the Act has provided sufficient bandwidth, in terms of time, to a party, aggrieved by the award of an arbitral tribunal, to institute a petition under Section 34 of the Act. The period of three (3) months and thirty (30) days thereafter, in my view, ordinarily provides enough leeway for the aggrieved party to come to a decision as to whether or not it wishes to impugn the award, with or without the assistance of counsel, and also have the objections removed so that it is ready for listing in court.

5. In the context of the above, let me examine the explanations given for re-filing by FCI in the present case. IA No. 20811/2013 contains one singular paragraph, which articulates that the reason for delay was that the "paper book was inadvertently placed in a file by the clerk of the counsel and was not traceable. The paper book has now been located and is being re-filed".

5.1 From the dates set out hereinabove, it is clear that after the registry had returned the petition with objections for the second time on 26.07.2013, (with all objections remaining unliquidated and one new

objection being added), the FCI did not remove the objections cited for a period of almost five (5) months and re-filed the petition only on 16.12.2013. Though IA No. 20811/2013 is accompanied by the affidavit of the counsel, it does not unfortunately inspire confidence. The reason being, that while the blame for delay has been put on the doorstep of the clerk of the counsel for the FCI, the application is not accompanied by the affidavit of the clerk. There is no reference to the date on which the file resurfaced, that is, was traced by the FCI's counsel. The sense one gets is that both FCI and its counsel forgot about the matter once the initial filing had been made. What surprises me, is as to why the FCI did not seek to know from its counsel as to what was the status of its petition which was filed in July, 2013. IA No. 20811/2013 demonstrates neglect and callousness on the part of the FCI in prosecuting its matters with expedition.

5.2 I am impelled to come to this conclusion, in view of the fact that on my board today there are four other matters filed (apart from the captioned matter), out of which in three matters there are applications seeking condonation of delay in re-filing, where delay ranges from 59 days to 161 days and in one matter, which is, OMP No. 1279/2013, there is a delay of 70 days, in fact, in the initial filing itself and consequently, it had to be dismissed in limine. The reasons advanced for seeking condonation of delay are identical (except in OMP No. 1279/2013), that is, the case file in issue was misplaced by the clerk. In OMP No. 1279/2013, which was dismissed in limine, the reason advanced was that the office of the lawyer remained under lock and key as it was being treated for termites. On the face of it the reasons supplied to explain the delay are perfunctory and that they do not inspire confidence, as indicated above.

5.3 I have, however, passed separate orders in respect of each of the petitions and the accompanying applications as the dates and the periods involved are not the same.

6. In this context, I may only refer to a judgment of a Single Judge of this court, cited on behalf of FCI by Mr Pattjoshi, learned senior counsel, in support of his contention that the delay ought to be condoned as the delay occurred on account of the fault committed by the counsel. Mr Pattjoshi relied upon the judgment in the case of **Delhi Jal Board vs. Digvijay Sanitations & Anr.,** 2009 (2) Arb. LR 576 (Delhi). The principle

echoed in the judgment of Hon'ble Mr. Justice S.N. Dhingra is no different from, that which has been articulated by this court in judgment after judgment. One cannot quibble with the proposition that the court has the power to condone the delay in re-filing, the decision, however, whether or not to condone the delay would depend on the facts and circumstances of the case. In that case the court found the explanation bonafide, in as much as, the reason given for delay was that the relative of the counsel for the petitioner, i.e., his uncle, had suffered a heart-attack, and there was nothing on record to show that this explanation was incorrect. The fact situation here, is different. The explanation, if it can be labelled as one, is one, which tends to fault the clerk. There is no affidavit of the clerk filed, which would at least prima facie demonstrate that the averments in IA No. 20811/2013 are true. Therefore, in my view, the judgment in the case of **Delhi Jal Board vs. Digvijay Sanitations & Anr.** is distinguishable.

7. For the foregoing reasons, I am of the view that the delay in re-filing ought not to be condoned. It is ordered accordingly. IA No. 20811/2013 is dismissed.

OMP No. 1278/2013

8. In view of the orders passed hereinabove, the petition would have to be dismissed. It is ordered accordingly.

ILR (2014) II DELHI 1071
CRL. APPEAL

MOHD. SHAMIM & ORS. ....PETITIONERS

VERSUS

THE STATE THROUGH GOVT. OF NCT OF DELHI ....RESPONDENT

(GITA MITTAL & V.K. SHALI, JJ.)

CRL. APPEAL NOS. : 246/2010, 265/2010, 378/2010 & 917/2010 DATE OF DECISION 20.12.2013

Indian Penal Code, 1860—Section 394 voluntarily causing hurt in robbery—Section 397 robbery with attempt to cause death or grievous hurt—Section 120B criminal conspiracy—Section 302 murder—Section 34 common intention complainant informed police about looting in his house DD No. 51B recorded police reached the spot wife and servant of the complainant found in injured condition household articles scattered in the house injured sent to hospital complainant declared fir for statement on statement of complainant FIR no. 539/2003 PS New Friends Colony under sections 395/396/397/120B/412/307/34 IPC and 27 Arms Act recorded complainant wife caught by two boys hands of the servant tied and made to lie down hands of the another person (PW-15) also tied up behind his back one of the boys hit the complainant-complainant started raising hue and cry one of the witnesses caused injuries to the complainant, his wife and servant two boys threatened other two ransacked and looted the house disconnected telephone lines complainant gave description of the boys wife of the complainant declared brought dead cause of death asphyxia as a result of smothering list of missing/stolen articles prepared blood stained rope, blood stained pillow,

blood stained guaze, blood stained muffler blood stained cushion cover seized appellants Pradeep and Mohd. Shamim arrested jewellery articles, watch and mobile phone recovered at their instance one desi katta also recovered made disclosure statement led to recovery of stolen property appellant Kanhaiya Lal arrested on the pointing out of appellant Shamim made disclosure produced a pulanda containing jewellery articles a knife also produced appellant Sonu arrested at the pointing our of appellants made disclosure produced a bag containing ornaments knife also recovered from the bag accused Kanhaiya Lal s/o. Shri Laxmi Narain arrested at the pointing of appellants made disclosure statement ornaments recovered from his house appellants refused to join TIP jewellers to whom jewellery articles sold arrested the person who sold country made pistol also surrendered TIP of recovered articles conducted charge sheet filed charges for offence u/s. 120B/302/394/395/396 IPC framed against all the appellants and for offence u/s. 390 IPC against appellant Mohd. Shamim for offence u/s. 412 IPC against jewellers u/s. 27 Arms Act against appellant Kanhaiya Lal framed prosecution examined 23 witnesses statement of appellants recorded u/s. 313 Cr. P.C. appellants examined witnesses in their defense appellants convicted of offences under section 120B, 394 r/w.397 and u/s. 302/34 IPC aggrieved appellants preferred appeals contended secret information, disclosure statements, arrests and recoveries implausible and not believable identification of appellants improper no injuries on the body of the deceased no eye-witnesses to strangulation by any of the appellants doctor who conducted post mortem nor examined gagging of mouth was done only to silence her no intention to cause such injury as may cause death. Held: Witnesses identified appellants as intruders having weapon during examination challenge to disclosure statements

and recoveries misconceived jewellery items recovered at the instance of and from the appellants identified as stolen articles appellants armed with pistol, dagger barged into the house in pursuance of criminal conspiracy of committing robbery disconnected telephone lines immobilised the occupants mouth of the PW 15 and others gagged not allowing them to raise alarm rooms ransacked and jewellery stolen mouth of the wife of the complainant gagged—She was unable to breath and suffered asphyxia appellants deemed to have knowledge that injuries are such as would cause her death done in pursuance of conspiracy all appellants liable no evidence of intention of appellants to cause her death-death of the lady cannot be murder act do.

[Vi Gu]

APPEARANCES:

FOR THE PETITIONER : Mr. K.K. Verma, Advocate.

FOR THE RESPONDENT : Ms. Ritu Gauba, APP for the State

GITA MITTAL, J.

1. The above appeals have been filed by the appellants assailing the judgment dated 15th December, 2009 whereby they have been convicted for commission of offences under Sections 394, 397, 120B read with Section 302/34 of the Indian Penal Code and the order of sentence dated 18th December, 2009 passed as a result thereof. Inasmuch as all the appellants stand convicted for commission of the same offence on the 13th December, 2003 upon a joint trial and raise similar questions of law and fact, these appeals are taken up together for consideration.

2. The case of the prosecution was that on the 13th December, 2003, PW-4 S.P. Narula came to the Police Station Friends Colony, New Delhi in an injured condition and informed that certain anti-social elements had looted his house bearing no.D-826, New Friends Colony, New Delhi. DD No.51-B was recorded at the police station and SI Ram Baresh was sent at the spot. They found Smt. Soharsh Narula, wife of Shri S.P.

Narula and his servant PW-5 Shatrughan Rai in an injured condition with the household articles scattered in the house. Smt. Soharsh Narula as well as Shatrughan Rai were sent to the Holy Family Hospital for treatment while complainant Shri S.P. Narula was sent to the All India Institute of Medical Sciences (AIIMS) through PCR No.E-27. Constable Sudesh Kumar and Constable Jagdish reached the house and were left at the spot for its preservation.

3. PW 4 Satya Paul Narula was declared fit for statement by the doctors at the AIIMS. On his statement, a case being FIR No.539/2003 was registered by the Police Station New Friends Colony, New Delhi under Sections 395/396/397/120B/412/307/34 of the Indian Penal Code and Sections 27/54/59 of the Arms Act.

4. So far as the statement of PW 4 Shri S.P. Narula is concerned, he had informed the police that on the 13th December, 2003, he had gone to a satsang at 5.15 p.m. at the Safdarjung Development Area as per his daily routine and had returned to his residence only at 8.10 p.m. when he found the lights of gate and porch switched off. He switched on the light and proceeded to the first floor. When he heard the cry of his wife, he went in the drawing room and saw that his wife had been caught hold by two boys who had also tied the hands of the domestic servant Shatrughan and had made him to lie down. PW 15 Sandeep Surma, a property dealer was also present whose mouth had also been tied up.

5. When PW 4 resisted the efforts of these boys to tie his hands, one of them hit him from behind as a result of which he fell down. The complainant states that he started raising a hue and cry whereupon one of the intruders hit him and his servant Shatrugan Rai with the dagger (chhura) and also caused injury to his wife Soharsh Narula. His wife tried to raise a hue and cry, whereupon one of the boys pressed her mouth and then tied the complainant's hands as well as the hands of his wife. The hands of PW 15 Sandeep Surma and PW 5 were tied behind their backs. Two of these boys then threatened and overpowered them while the other two boys ransacked and looted their house.

6. These boys took away a Citizen's watch and a gold chain with an Om pendant as well as the mobile phone from PW 15 Sandeep Surma. They snatched a Seiko watch from the complainant (PW 4) and also,

broke open the locks of the Almirah and looted articles therefrom.

7. So far as the description of these boys is concerned, the complainant had informed the police that the boys were between 20-25 years of age. While one of them was of wheatish complexion, the other was of dark complexion. The boy who was armed with the dagger was wearing a jacket while the dark complexioned boy was carrying a pistol which he had positioned on the left temple of the complainant to intimidate him. The other two boys who had looted the house were of average physique. These boys had also cut the telephone line. PW 5 Shatrugan Rai had somehow untied the complainant's hands. As there was no telephone available, the complainant rushed to the police station and made the afore-noticed complaint.

8. The site was visited by the crime team with the dog squad. The dogs followed the trail of the accused persons upto the main gate of the house. A site plan of the spot was made at the instance of PW 15 Sandeep Surma and the blood; 'sootrassi (cotton rope); blood stained gauze and a blood stained muffler were seized and sealed by the police and taken into possession.

9. As per SI Ram Baresh, he had proceeded to the Holy Family Hospital where he learnt that Soharsh Narula had been declared as having been brought dead and that she had been taken to the mortuary of the All India Institute of Medical Sciences in the custody of Constable Raj Singh.

10. PW 5 Shatrugan Rai was discharged after treatment. His MLC was proved in the evidence of PW 7 Dr. Anjana Kharbanda, CMO of Holy Family Hospital who had stated that the she had prepared his MLC vide no.3.53792 (Exh.PW 7/A) and that Shatrughan Rai was having stab injury over his chest which was grievous in nature.

11. PW 7 Dr.Anjana Kharbanda also proved the MLC No.3.53793 (Exh.PW 7/B) pertaining to Soharsh Narula who was declared brought dead in the casualty. PW 7 had also issued the medical certificate Exh.PW 7/A regarding Soharsh Narula having been brought dead to the hospital. PW 7 Dr. Anjana Kharbanda had opined the cause of her death as 'strangulation' in the certificate issued by her.

12. It is in evidence that on 15th December, 2003, a post-mortem

was conducted on the dead body of Soharsh Narula by Dr. Prashant Kulshrestha vide the post mortem report no.1296/03 (Exh.PW 24/A). It is necessary to notice the material contents of the report of the post-mortem conducted on the dead body of Mrs.Soharsh Narula. The same has been proved in the evidence of PW 24 Dr. Raghuvendera, a junior resident from the Department of Forensic Sciences of AIIMS. So far as the external injuries on the body of the deceased was concerned, the report has noticed the following injuries:-

> *"On postmortem examination there were external injuries present. Abrasion size 1.4 cm length at lower end of left forearm. Another abrasion size 2.5 x 3 cm over lower back right side. One contused abrasion of size 1.5 cm x 0.5 cm over left mandibular angle. One laceration of size 3.1 cm below the right eye. One laceration of size .5 cm x .5 cm over lower lip. Nasal bone fracture."*

As per the opinion of the expert, the cause of death was opined as *"asphyxia as a result of smothering which was sufficient to cause death in the ordinary course of nature"*. So far as the injuries were concerned, it was opined that they were blunt force injury.

13. During investigation, the police recorded the statement of Ms. Anuja, (examined as PW 1 during the trial) the daughter of the deceased, who also deposed in court as the first prosecution witness. Though not an eye-witness, she played a vital role in preparation of the list of missing jewellery articles as well as identification of the recovered articles. According to PW 1 - Anuja, on the 13th December, 2003, she had left the house no.D-826, New Friends Colony, New Delhi at about 3:30/4:00 p.m. to visit a temple in Karampura with her friend. When she returned to the house the next day i.e. 14th December, 2003 at about 10:00 a.m., she was informed about the robbery committed in her house and the fact that her parents were in hospital. She later found that her father was admitted in AIIMS and that her mother had died. Her sister had found a packet with a courier's address on the envelope in the house which was handed over to the police vide memo Exh.PW 1/A. PW 1 also stated that she had handed over a hand written list of missing articles which were initially noticed as missing from the house about two or three days after the incident. The prosecution has proved this list as Exh.PW 1/C. On 4th February, 2004, PW 1 Anuja, daughter of the deceased handed

over another typed list of missing articles (Exh.PW 1/B) to the police. According to this witness, she had also prepared a handwritten list of still missing stolen articles (Exh PW 1/C) which was given to the police by her father on 18th December, 2003. Photographs of missing jewellery items (Exh.PW 1/D-1 to D-5) when they had been worn by the deceased mother, sister and herself were also shown to the police. These photographs along with other photographs were also handed over by this witness to the police.

14. As per the prosecution, secret information was received by PW 13-SI Suresh Sharma (who was then posted as Sub-Inspector in the Special Staff, South District) regarding presence of the accused in the present case in the Badarpur market. He was deputed to pass on this information to the SHO of the police station New Friends Colony. On the directions of the SHO, a raiding party was constituted consisting of PW 13-SI Suresh Kumar, PW 22-SI Prasun; Head Constable Ram Kishan of Special Staff, South District; SI Ram Baresh; ASI H.A. Khan; Ct. Ranbir and Ct. Jagdev.

15. The raiding party proceeded to the Badarpur market in a Government vehicle where they met the informer. On the pointing out of the secret informer, they apprehended appellants Pradeep and Mohd. Shamim who reached the spot on a motorcycle bearing no.DL 3S AJ 1815 of the Hero Honda Passion make. Personal searches of these two persons were effected vide memos (Exhs.PW 13/A & B respectively). The police witnesses have proved that the appellant Mohd. Shamim handed over one Seiko make wrist watch and one mobile of Panasonic make vide the memo Exh.PW-13/C to the police. The motor cycle was also seized vide memo Exh.PW 13/D.

16. The appellant Pradeep is stated to have led the police to his house in Balmiki Mohalla, Tuglakabad Extension and got recovered other jewellery items from his house which were part of the robbed articles. The investigating officer seized the articles vide Exh.PW 13/G.

17. Mohd. Shamim also took the police team to his house at Jhuggi No.228, Gola Kuan, Tehkhand, Okhla and got recovered a pulanda from below the wooden door on the roof of the house which pulanda contained nine jewellery articles consisting of one kara, one ear tops, one ladies ring, two brooches one silver chain, one silver chain along with pendent,

one gold chain and pair of ear rings. Mohd. Shamim also got recovered one desi 'katta' (weapon) of .315 bore and one live cartridge. The jewellery articles, the 'katta' and the cartridge were separately seized and sealed by the investigating officer. The investigating officer prepared the sketch of the desi 'katta' and live cartridge vide the memo Exh.PW 13/H.

18. PW 22 – SI Prasun has deposed that on interrogation, the two accused persons gave disclosure statements Exh.PW 13/E and 13/F which led to the discovery of the factum of the other appellants being involved in the offence in question. Their voluntary disclosures also led to the recovery of stolen properties (jewellery items) which were recovered vide memo Exh.PW 13/G and 13/W. The case property recovered from the accused Pradeep was proved on record as Exh.P 29 to P 34 while ear tops were produced as Exh.PW 34/A-1. PW 22 SI Prasun also identified the case property which was recovered from the accused Mohd. Shamim.

19. It is in the evidence that one gold chain with an Om pendant was earlier recovered from the accused. It is also in the testimony of PW 13 SI Suresh Sharma that one recovered wrist watch of the make Designer was handed over by him to the investigating officer. It is further in the evidence led by the prosecution that the appellants Pradeep and Shamim thereafter took the police team to the TSR stand in Tehkhand, Okhla. On the pointing out of the accused Shamim, Kanhaiya Lal @ Mottu son of Nek Ram was apprehended. His voluntary disclosure statement was recorded vide memo Exh.PW 13/L. Pursuant to this disclosure statement, Kanhaiya Lal son of Nek Ram led the police team to his jhuggi and from an almirah, he produced one cloth pulanda before the investigating officer. In this pulanda, it is alleged that one chain, gold bracelet, one gold ring gents, one silver pajeb, one pair of silver ear rings, two silver coins, two silver brooches and one key ring, all part of the robbed items were found. The accused also handed over one knife to the IO who prepared a sketch thereof vide memo Exh.PW 13/M.

20. Pursuant to their disclosure statement, these accused persons further led the police team to a jhugi in main market JJ Colony, Tehkhand, Okhla to the Khokha of accused Sonu and on their pointing out of accused persons, accused Sonu-appellant was apprehended and his disclosure statement was recorded as Exh.PW 13/Q. The accused Sonu

handed over a blue coloured bag Classic with the words *'Top of the world; East; West; North & South'*, written on it. This bag contained five ornaments one being a white pearl/diamond necklace, one diamond ring, one diamond pendent, one gold bracelet and two brooches. These articles were kept in a pulanda and sealed and one knife was also recovered from the bag. The IO prepared the sketch of the knife Ex.PW 13/R, kept the same in the same pulanda and sealed it with the seal of 'PM' and seized both the pulandas vide memos Ex.PW 13/S & T.

21. Thereafter, the accused persons are stated to have taken the police team to Gali No.19, Ratia Marg, Sangam Vihar, Delhi and on the pointing out of the accused persons, accused Kanhaiya Lal S/o Laxmi Narain was apprehended. It is claimed that he was interrogated and a disclosure statement was recorded vide memo Exh.PW 13/U and four ornaments were recovered from the first floor room of his house, which were also seized by the police.

22. These accused persons were identified by PW 13 SI Suresh Sharma as well as PW 22 SI Prasun in the witness box. These two police witnesses also identified the case property recovered from these persons respectively.

23. The prosecution has also claimed that the faces of the accused persons were kept muffled and they were produced before the concerned Magistrate along with an application for a Test Identification Parade (TIP). The appellants Pradeep Kumar, and Sonu refused to participate in the test identification parade (TIP). The appellant Mohd. Shamim finally agreed for getting his TIP done. The police contends that though the face of Mohd. Shamim was kept muffled during the period of two days police remand, however, on 23rd December, 2003, the accused Mohd. Shamim also refused to join the TIP before the concerned Magistrate in the Tihar jail.

24. The accused person also pointed out the jewellery shop of Dharam Pal and Manish Soni to whom some stolen property was sold. These jewellers were also arrested by the police. Based on the disclosures, Santosh Kumar, driver of the three wheeler scooter no.DL 1RC 8210 was arrested and from his possession, a bank note of Rs.500 was recovered along with his three wheeler scooter.

25. One Amjad Khan (since deceased) surrendered before the court who is alleged to have sold country made revolver to the appellant Shamim.

26. The Test Identification Parade of the recovered articles was conducted in the presence of PW 22- Ms. Ila Rawat, Metropolitan Magistrate by PW 1 Anuja, daughter of the deceased and of some the articles by PW 15 Sandeep Surma. It is stated that TIP of some of the jewellery items, which were foreign made, could not be carried out for the reason that similar jewellery was not available for mixing with the recovered articles. On completion of the investigation, the police filed a challan.

27. On completion of the investigation, the police filed a charge sheet in court. By an order dated 6th October, 2004, the court found a prima facie case for commission of offences punishable under Sections 120B/302/394/395/396 of the IPC against all the accused persons except Dharampal and Manish Soni. A prima facie case for commission of an offence under Section 390 of the Indian Penal Code was round made out additionally against the accused Mohd. Shamim, Sonu & Kanhaiya. A prima facie case for commission of offence under Section 412 of the IPC was found made out against the accused Dharam Pal and Manish Soni. Furthermore, a case under Section 27/54/59 of the Arms Act was found made against the accused Kanhaiya, son of Nek Ram. Charges were accordingly drawn up against accused persons by the order dated 6th October, 2004 to which they pleaded not guilty and claimed trial.

28. The prosecution examined 23 witnesses in support of its case. We find that thereafter the incriminating circumstances in the prosecution evidence were put to the accused persons who had opportunity to explain the same in their statements recorded under Section 313 of the Cr.P.C.

29. The appellants opted to lead defence evidence. Mohd. Shamim; Sonu; Kanhaiya (son of Laxmi Narain); Kanhaiya (son of Nek Ram) and Pradeep lead defence evidence to establish that they had been arrested from their respective residences and not in the manner alleged by the prosecution.

30. After a detailed consideration of the evidence, by the judgment dated 15th December, 2009, the trial court concluded that the offence of dacoity was not established inasmuch as it was the case of the prosecution

witnesses that only four intruders were guilty of actually committing the crime. It was, therefore, held that the prosecution had made out a case of robbery and not dacoity. It was also held that the accused Manish Soni & Dharam Pal, though charged for commission of offence under Section 412 of the IPC, were guilty of offences under Section 411 of the IPC. We may note that Manish Soni and Dahram Pal have not assailed their conviction and/or the sentence imposed upon them.

31. The appellants Mohd. Shamim; Pradeep; Kanhaiya (son of Nek Ram) Kanhaiya (son of Laxmi Narain) and Sonu were found guilty and convicted under Section 120B IPC for conspiracy to commit offences under Section 394/397 as well as 302 of the IPC.

32. It was held that the appellants Mohd. Shamim; Kanhaiya (son of Nek Ram); Kanhaiya (son of Laxmi Narain) Pradeep & Sonu were guilty of commission of offences under Section 394 IPC read with Section 397 of the IPC. Furthermore, Kanhaiya (Son of Nek Ram) Mohd. Shamim; Pradeep and Sonu were found guilty of commission of offence under Section 302/34 IPC. The prosecution of the appellants under the Indian Arms Act failed for the reason that no sanction had been obtained against them.

33. The present appeals are based on similar grounds. The same evidence is relied upon to base the conviction of the present appellants and as such these appeals have been taken up together for the purposes of the present consideration.

34. Learned counsel for all the appellants have primarily assailed the judgment on the ground that the case of the prosecution with regard to the alleged secret information; disclosure statements; arrests and the recoveries is implausible and cannot be believed. The appellants also challenge as improper their identification of the four appellants by PW 4 Shri S.P. Narula; PW 5 Shri Shatrugan Rai and PW 15 Sandeep Surma.

35. Even if the evidence against the appellants was to be believed, it is urged that it is the case of the prosecution that no injuries were noticed by PW 7 Dr. Anjana Kharbanda, CMO, Holy Family Hospital in the MLC on the body of the deceased and, therefore, no injuries were inflicted on the body of the deceased by any of the appellants.

36. It is further contended that PW 7 opined the cause of death as

strangulation. None of the eye-witnesses have given evidence of the deceased being strangulated by any of the accused person.

37. PW 24 Dr.Raghuvendra who has proved the post-mortem report had on the other hand opined that the cause of death was 'asphyxia. due to smothering. It is contended that the doctor who conducted the post-mortem examination was not examined by the prosecution and the appellants were thereby deprived an opportunity to cross-examine him.

38. It is further urged that the gagging of the mouth of the deceased was not done with the intention of causing her death but was intended only to silence her protest. It is urged that the appellants had no intention to cause such injury as would result in the death of any of the persons in the house.

39. We have heard learned counsels for the appellants and Ms. Ritu Gauba, learned APP at great length. We may advert to the testimony of PW 4 S.P. Narula, one of the injured persons who has stated that when he returned from his spiritual class to his residence D-826, New Friends Colony, New Delhi on 13th December, 2003, at about 8.00 p.m., he saw that the door to his house was open and some noise was coming from the kitchen. He noted something cooking on the stove in the kitchen and felt that something unusual was afoot. At this stage, he heard the sound of shouting from the drawing/dining room. When he opened the door of drawing/dining room, somebody hit him thrice on his head and he started bleeding. PW 4 stated that to protect himself, he held one of the intruders. He saw that another intruder was holding and trying to overpower his wife which she was resisting. PW 4 told that person to let his wife alone.

40. At that stage, a third person came into the room and stabbed PW-4 on the left side and as a result, there was a lot of bleeding. However, PW 4 did not let go of the intruder whom he was holding. At this, the person who was holding the wife of PW 4, came and stabbed PW 4 three or four times. Then both of them tied the hands of PW 4 and gagged his mouth with a cloth and dragged him to the balcony in front of the drawing room where their servant Shatrughan and a property dealer Sandeep Surma had been tied. One of the persons tied the left leg of PW 4 with his wife's right leg.

41. PW 4 Shri S.P. Narula identified the accused Santosh, Pradeep,

Kanhaiya (son of Nek Ram) & Sonu as the intruders who had come to the house and were involved in the incident. They had overpowered his wife and stabbed him with a *"churra"*.

42. PW 4-Shri Satya Paul Narula has also deposed that his wife wanted to protest when she was told by the property dealer PW-15-Sandeep Surma to keep quiet. PW 4 states that he also tried to quieten his wife. At that time, one of the accused came and strangulated his wife with a rope. One accused grabbed the wrist watch from his hand as well as the money lying in his pocket. After some time, PW 4 told their servant, PW-5-Shatrughan Rai to untie his hands and go to the neighbour Mohan to get his hands untied.

43. We may also refer to the testimony of PW 5 Shatrughan Rai, another injured eye-witness who was working as a servant in the house of Col. Narula at D-826, New Friends Colony, New Delhi. On the fateful day at about 8.00 p.m., PW-15-Sandeep Surma was having a discussion with the landlady of the house (Smt. Soharsh Narula) and he was working in the kitchen at that time when two persons entered the house. Within five to seven minutes of their entry, there was a shout from the lady and on her shout, PW 5 Shatrughan Rai went to her. He saw that the two men were standing near her, one was armed with a knife while the other was holding a pistol. When PW 5- Satrughan Rai entered the drawing room, he saw a third intruder also present who held PW 5 - Shatrughan Rai by the neck and was holding a pistol. The third person held PW 5-Shatrughan Rai by his muffler and had put the knife to his neck. At that stage, a fourth intruder also entered the house and these four persons took all three of the captives to a bigger room.

44. According to PW 5, at this stage, Mr. S.P. Narula also reached the spot and was badly beaten by these persons. They stabbed PW-4-Mr. S.P. Narula as well as PW 5 Shatrughan Rai with a knife and stuffed a cloth inside the mouth of deceased Ms. Narula and killed her. They took PW-15-Sandeep Surma to another room while they kept Mr. & Mrs. Narula and PW 5 in one room. These intruders looted the house. PW-5-Shatrughan Rai identified Kanhaiya (son of Laxmi Narayan); Pradeep; Sonu who were present, as three who had entered the house had beaten Mr.& Mrs. Narula, Sandeep and himself. The witness also has stated that Kanhaiya (son of Nek Ram) could be the fourth person. However, he

was not sure. The identification of Kanhaiya (son of Laxmi Narayan) as one of the intruders as by this witness is therefore unreliable.

45. The testimony of PW 15 Sandeep Surma with regard to the incident, is also material. He has stated that he reached D-826, New Friends Colony at about 7.30 p.m. on 13th December, 2003 to meet Mrs. Narula with whom some negotiations was going on regarding a property transaction. Only Mrs. Narula with her servants was present in the house and she was watching television. At about 8.00 p.m., the call bell rang and a person came with a courier packet which did not bear any name. Mrs. Narula told the person that the packet may be belonging to the tenant and he should give it to him. At this stage, this person took out a knife. The other person who had accompanied the knife-carrying person, was in possession of a 'katta'. On seeing the knife, Mrs. Narula started crying loudly. Hearing the cries, Mrs. Narula's servant came out. The intruders took all three into the drawing room after giving them a beating. The witness identified the appellant-Pardeep as the person who was carrying the knife and the appellant – Mohd. Shamim present in court as the person who was carrying the katta in his hand. After five or seven minutes, PW-4-Col. Narula also arrived there. Two associates of these two intruders who were also armed with knives followed him (Mr. Narula) into the house. The intruders were demanding keys from Mrs. Soharsh Narula. When the intruders did not get the keys from her, one of them tied her hands from behind while others gagged her mouth by putting piece of cloth into it. PW-4 – Col. S.P. Narula cried out on reaching the spot, whereupon Mohd. Shamim hit Mr.Narula on his head with the butt of the pistol. One of the intruders stabbed Mr.Narula in his abdomen. The intruder also gave a stab blow to the PW 5 whose hands were also tied. The intruders removed PW 15's mobile; a watch of Designer make; a gold chain; an Om locket and some cash from his purse. PW-15-Sandeep Surma's hands were also tied by the intruders. The intruders also robbed articles from the house.

46. PW 15 managed to escape from the room where he was confined only at about 9.00 pm and got his hands untied from labourers present at the neighboring house where construction was going on. He requested three or four boys to accompany him to the spot. When PW-15 returned to the house with the boys, the intruders fled from the spot. PW-15 identified Sonu present in court as the person who had removed

his watch, golden chain, locket and mobile.

47. The challenge to the disclosure statements and recoveries is misconceived and unsustainable. The quantities of the jewellery items recovered at the instance of and from the appellants coupled with its identification as stolen articles as well as the oral testimony of the witnesses establishes the prosecution case beyond any doubt qua the appellants. The defence led by the appellants has been rightly rejected by the learned trial judge.

48. The appellants were armed with pistol, dagger (chura). It is no doubt clear from the sequence of events and the testimony adduced by the prosecution that pursuant to their criminal conspiracy all the accused persons had barged into the house of the complaint primarily with the intention of committing the robbery. This is evident from the testimony of witnesses that they had disconnected the telephone lines and immobilized the occupants including the domestic servant PW5 Shatrugan Rai. Similarly, the mouth of PW15 Shri Sandeep Surma, was also gagged. The purpose of tying the hands and the gagging the mouth of the victims was to ensure that they do not raise an alarm. The keys of the almirah were also demanded and the rooms ransacked and the jewellery stolen. The hands of Mrs.Soharsh Narula were also tied down and cloth was pushed into her mouth by the accused persons so that she is not able to raise an alarm. The site plan was prepared at the instance of PW15 Sh.Sandeep Surma. From the spot sutrassi, blood stained cushion cover, blood stained rope, blood stained pillow, blood stained gauze and blood stained muffler were seized by the police which were duly exhibited before the Court. PW15 Sh.Sandeep Surma has testified that it was at this point of time that the victim/deceased Mrs.Soharsh Narula was pushed into the bed room and her mouth was gagged by putting cloth in her mouth and made to lie on the ground. As a result of this, the victim/deceased Mrs.Soharsh Narula was unable to breath and she suffered asphyxia and consequently could not survive. It is also recorded in the MLC of the victim/deceased Mrs.Soharsh Narula that she was brought dead. All these facts clearly show that the injuries were inflicted upon the deceased Mrs.Soharsh Narula were likely to cause death. Mrs.Soharsh Narula died because of asphyxia. The accused persons are deemed to have the knowledge that the injuries were of such a nature that the same will cause her death. Since these acts were done in furtherance of their criminal conspiracy,

therefore, all the accused became liable.

49. The deceased Mrs.Soharsh Narula was not killed by use of any arms. Unfortunately the appellants attempted to silence her protests by stuffing a cloth in her mouth which led to her suffocation ('asphyxiation') and consequential death. There is no evidence of intention on the appellants to cause her death. Although, the acts do not fall in the first two categories of Section 299 IPC where the intention to kill or intention to cause such bodily injury is necessary, but it certainly does fall in the third category that the nature of injuries were such which were within the knowledge of the accused persons to be of such a nature as would cause the death of the victim. The knowledge of injuries being imminently dangerous and consequently in all probability causing death as enunciated in Clause 4 Section 300 IPC requires higher degree of knowledge which perhaps cannot be imputed to the accused persons in the instant case. This is on account of the fact that the larger purpose of immobilizing or neutralizing the victims including Mrs.Soharsh Narula (since deceased) was to ensure that the appellants succeed in committing the offence of robbery without any resistance from the occupants of the house. Therefore, in our view, the offence of death of Mrs.Soharsh Narula cannot be categorized as an offence of murder but it certainly tantamounts to culpable homicide not amounting to murder within the third sub clause of Section 299 IPC and punishable under Section 304 Part II.

50. In this background, we hold the appellants guilty of culpable homicide not amounting to murder punishable under Section 304 Part II of the IPC.

51. Let us now examine the orders on sentences imposed by the learned trial judge. The trial court has found the appellants Kanhaiya son of Nek Ram, Mohd. Shamim, Soni & Pradeep, guilty for commission of offences under Sections 302/304 as well as 394/397 IPC. For their conviction, under Section 394/397 IPC, the trial court has sentenced them to life imprisonment and fined them in the sum of Rs.2,000/- each. In default of payment of fine, the defaulting appellant is required to undergo simple imprisonment of three months.

52. For commission of the offence under Section 302/34 of the IPC, the appellants have been sentenced to life imprisonment.

53. The trial court also convicted the appellants under Section 120B of the IPC. However, since they are sentenced as afore-noticed for the substantive offences committed in furtherance of conspiracy, no separate sentence under Section 120B of the IPC has been awarded to them.

It was also directed that the substantive sentences of imprisonment awarded to the appellants shall run concurrently.

54. It is noteworthy that the prosecution had also arrayed one Kanhaiya Lal son of Laxmi Narain, as a co-conspirator in the case who was also convicted by the impugned judgment dated 18th December, 2009. Kanhaiya son of Laxmi Narain had filed Criminal Appeal No.285/2010 which was accepted by this court by its judgment dated 17th September, 2013 whereby his conviction was set aside.

55. In the impugned judgment dated 18th December, 2009, it was held that though he was part of the conspiracy, he had not joined the present appellants in commission of the offences. We have rejected the finding of his complicity in the conspiracy in the judgment dated 17th September, 2013. The evidence on record also reflects that only the four appellants entered the house to commit the offence of theft and cause injury to the occupants of the house. Kanhaiya son of Laxmi Narain stands acquitted of the charges.

56. We have found that pursuant to a criminal conspiracy, the appellants entered the house of the deceased to commit robbery. In order to commit the robbery, they not only put fear of instant hurt but actually caused hurt and wrongfully restrained the deceased Smt. Soharsh Narula, her husband Shri S.P. Narula, their servant Shatrugan Rai as well as a visitor Sandeep Surma in the house. They forcibly and dishonestly took away valuables from these persons as well as from the house which have been recovered at their instance.

57. The above discussion also reflects the grievous injuries caused by the appellants to Smt. Soharsh Narula, her husband (PW 4 Sh. S.P. Narula), servant (Shri Shatrughan Rai) and their visitor (PW 15 Sandeep Surma) while committing the robbery. We have held that the appellants had the knowledge that the injuries inflicted on Soharsh Narula could result in her death. The injuries actually resulted in her death. The appellants also succeeding in commission of the robbery.

We hold that the appellants have rightly been found guilty for entering into conspiracy under Section 120B IPC for commission of offences under Sections 394/397 of the IPC. We also find the appellants guilty for commission of the offences under Section 394/397 and Section 299 of the IPC. The judgment of the trial court finding the appellants guilty of commission of offence under Section 302 IPC shall stand modified to this extent.

58. Before us, it has been fervently prayed that the appellants are extremely young and first time offenders. By now they have undergone imprisonment of over nine years. Other than the Sonu whose sentence was suspended for a short period between 22nd April, 2008 to 29th April, 2008, the appellants have remained continuously in jail since they were arrested on 24th December, 2003. We have held that they entered the house of the deceased pursuant to the conspiracy to commit robbery. Grievous injuries resulted in their acts to overcome the resistance by the occupants of house and silence protests. We have found the appellants guilty of commission of the offence under Section 299 of the Indian Penal Code and have modified their conviction under Section 302 of the IPC.

59. So far as the sentence which must be imposed on the appellants for commission of the offence under Sections 394/397 of the IPC is concerned, we hereby sentence each of the appellants to undergo rigorous imprisonment for a term of ten years and also sentenced to pay fine in the sum of Rs.2,000/-. The appellants shall not be entitled to any remissions in the sentences. In case of default of payment of fine, the appellants shall undergo simple imprisonment of three months.

60. For the commission of the offence under Section 299 of the IPC punishable under Section 304 part II, we hereby impose on each of the appellants the sentence of rigorous imprisonment of ten years without remission and fine of Rs.5,000/- each. In case of default of payment of fine, each of the appellants shall further undergo simple imprisonment for three months.

61. The four appellants have been rightly held guilty by the learned trial Judge for an offence of conspiracy to commit the offence of murder and dacoity which has been converted into robbery and culpable homicide not amounting to murder by this court. Therefore, the appellants deserve

to be sentenced separately for offence of criminal conspiracy as envisaged under Section 120B of the IPC. The statutory provision lays down that the sentence which can be awarded to the convict is two years onwards and in cases where no express provision is made, in that case it shall carry the same punishment as if the offence has been abetted.

62. Having regard to the fact that all the accused persons have been already found guilty for the death of Soharsh Narula and sentenced to rigorous imprisonment of ten years, we are of the view that the interests of justice would be met in case they are sentenced for the offence of criminal conspiracy also to a sentence of rigorous imprisonment of ten years under Section 120B IPC and the said sentence shall run concurrently with the other sentences.

63. The substantive sentences awarded to the appellant have already been directed to run concurrently. This direction is maintained. The appellant shall also be entitled to set off the detention already undergone by them during investigation and trial of the case as well as the pendency of the present appeals in accordance with Section 128 of the Criminal Procedure Code.

64. The impugned judgment dated 15th December, 2009 and order of sentence dated 18th December, 2009 shall stand modified to the above extent.

These appeals are disposed of in these terms.

A copy of this judgment be supplied to each of the appellants forthwith.

ILR (2014) II DELHI 1090
R.C. REV.

NARENDER KUMAR JAIN ....PETITIONER

VERSUS

R.S. SEWAK ....RESPONDENT

(NAJMI WAZIRI, J.)

R.C. REV. NO. : 5/2014 DATE OF DECISION: 06.01.2014

Delhi Rent Control Act, 1958—Section 25B—Petitioner filed revision petition challenging order of learned ACJ-cum-CCJ-cum-ARC (E) dismissing application of petitioner-tenant seeking leave to defend and passing order of eviction against tenant in Eviction Petition—Plea taken, landlord already possesses a chamber, which has been allotted to him in Rohini District Courts and this fact has been suppressed from learned ARC and by stating that he is not in possession of any chamber—Shop adjoining suit property would be more suitable for running a lawyer's chamber out of, in view of its on looking a wider road than suit property and hence requirement of landlord is not bona fide—Per contra plea taken, document now sought to be relied upon by tenant list issued by Rohini Courts Bar Association was not before learned ARC and hence cannot be considered—In any case, list does not indicate that landlord is in possession of any chamber—Held—This Court, in exercise of its power under proviso to Section 25-B of Act acts only as a Court of revision, and not of appellate Court—Not being appellate Court, this Court cannot, at this stage, consider fresh evidence that was not before learned ARC—It would not be a proper exercise of power under Section 25-B of Act if Court were to now decide

this petition on basis of said document—Learned ARC has, in fact, given a reasoned order in this regard and held that it is a bona fide request of landlord, which is reasonable and well within his prerogative—Issue of whether another property in possession of landlord is more suitable than suit property and whether requirement of landlord is bona fide are issues of fact that this Court would abstain from getting into—All that this Court is mandated to do is to satisfy itself as to whether impugned order is in accordance with law i.e., whether finding that requirement of landlord is bona fide is a finding in accordance with law—This Court finds no merit in petition requiring exercise of its jurisdiction under Section 25-B of Act.

Important Issue Involved: (A) High Court, in exercise of its power under the proviso to Section 25-B of the Act acts only as a Court of revision, and not of an appellate Court. No being an appellate Court, High Court cannot consider fresh evidence that was not before the learned ARC.

(B) The issue of whether another property in possession of the landlord is more suitable than the suit property and whether the requirement of the landlord is bona fide are issues of fact that this Court would abstain from getting into.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONERS : Mr. Ganesh Kumar, Sharma, Adv.

FOR THE RESPONDENT : Mr. G.B. Sewak, Advocate.

CASES REFERRED TO:

1. *M. L. Prabhakar* vs. *Rajiv Singal,* (2001) 2 SCC 355.
2. *Shiv Sarup Gupta* vs. *Mahesh Chand Gupta (Dr),* (1999) 6 SCC 222.

3. *Ram Narain Arora* vs. *Asha Rani,* (1999) 1 SCC 141.
4. *Sarla Ahuja* vs. *United India Insurance Co. Ltd.* [(1998) 8 SCC 119].
5. *Prativa Devi* vs. *T. V. Krishnan,* (1996) 5 SCC 353.

RESULT: Dismissed.

NAJMI WAZIRI, J. (Open Court)

1. This is a revision petition filed under Section 25-B of the Delhi Rent Control Act, 1958 ("Act"), challenging the order of 9th September, 2013 of the learned ACJ-cum-CCJ-cum-ARC(E), Karkardooma Courts ("impugned order"). By the impugned order, the learned ARC dismissed the application of the petitioner-tenant ("tenant") seeking leave to defend and passing an order of eviction against the tenant in Eviction Petition No. E-113 of 2012.

2. The dispute can be traced back to an eviction petition filed by the respondent-landlord ("landlord") before the learned ARC, wherein the landlord sought eviction of the tenant from the suit property – a shop – on the grounds of his bona fide requirement. The case of the landlord, who was himself an advocate of about 80 years of age, was that he required the suit property for setting up a law chamber for his son – an advocate practicing since 2004 – to practice from. It was admitted by the landlord that he had one other shop apart from the suit property, being the adjoining shop no. 2. He submitted that however, the said shop is only 6' x 10' and would not be suitable for setting up a chamber. The landlord had proposed to take the wall between the suit property and the said shop no. 2 and use the larger space of 12' x 10.3' as the chamber for his son. It was stated, on affidavit before the learned ARC, that the son does not possess any other chamber.

3. The tenant filed an application seeking leave to defend the petition on various grounds, which this court need not go into in the present matter; the challenge in the revision is not qua those findings. Germane to the present lis, it was contended before the learned ARC that the landlord's requirement was not bona fide and that the landlord has indulged in suppressio veri and suggestio falsi as it is inconceivable that the landlord's son could have operated without a chamber. It was also contended that the landlord was already in possession of a property out of which his son could have operated his chamber and hence the claim

that the suit property was required for that purpose is not bona fide. Lastly, it was contended that since the petitioner – having himself operated without a chamber – has operated out of the Central Hall of the Tis Hazari Courts Complex, it would be possible for his son to so do as well. Thus, it was argued that there was no bona fide requirement on the part of the landlord. It is clarified that although other contentions were raised before the learned ARC, they are not being recounted herein as (a) the findings qua those contentions have not been specifically challenged by the tenant before this court in this petition, and (b) the findings are, in the opinion of this court, in accordance with law.

4. The learned ARC, after considering the above contentions of the tenant, held inter alia that the landlord has indeed come to the Court with clean hands inasmuch as he as has admitted to the availability of the other shop and has explained why the suit property is needed despite the availability of the second shop. The learned ARC reasoned that the desire of the landlord to join the suit property and the vacant shop adjoining the same to create a larger space to operate the chamber out of is fair, reasonable and well within his prerogative and it would not be for the tenant to impose his will on the landlord by insisting that the chamber be operated out of a smaller area. As a logical sequitur, the learned ARC held that the contention that the landlord's son ought to be compelled to operate out of the Central Hall of the Tis Hazari Courts Complex, the way his father had, is meritless and undeserving for grant of leave to defend, on that basis.

5. Accordingly, the leave to defend was rejected which has been impugned in this petition.

6. However, before this Court, the tenant has sought to raise certain new facts / grounds. He contended that the landlord already possesses a chamber, which has been allotted to him in Rohini District Courts and this fact has been suppressed from the learned ARC and by stating that he is not in possession of any chamber. In this regard, the tenant, before this Court, produced a copy of a list issued by the Rohini Court Bar Association regarding members held not eligible for allotment of chambers. Especial reliance was placed on this list to contend that it indicates that the landlord was indeed allotted a chamber by the Rohini District Courts. It is also contended in the petition that the shop adjoining the suit property would be more suitable for running a lawyer's chamber out of, in view

of its onlooking a wider road than the suit property and hence the requirement of the landlord is not bona fide. Additional grounds that were raised including: (a) that of lack of explanation as to why the landlord's son did not seek to start his chamber from the suit property or the adjoining property till 2012, even though he was practicing since 2004, and (b) that of lack of explanation as to why the landlord's son – who has, allegedly, till date been practicing out of his elder brother's chamber – would now need to practice out of his own chamber.

7. The counsel for the respondent, appearing on advance notice, submitted that the grounds in the petition are frivolous, baseless and have, in any case, been considered and adjudicated upon by the learned ARC. He submitted that the document now sought to be relied upon by the tenant – the list issued by the Rohini Courts Bar Association – was not before the learned ARC and hence cannot be considered. He submitted that in any case, the list does not indicate that the landlord is in possession of any chamber. He also submitted a certificate issued by the Delhi Bar Association that states that the respondent does not have any chamber in the Tis Hazari Courts. A copy of the certificate is also handed over to the counsel for the petitioner in the course of the hearing. He reiterated that the landlord does not have any other chamber or office to facilitate his or his son's legal practice anywhere in the NCT of Delhi.

8. It is settled law that this court, in exercise of its power under the proviso to Section 25-B of the Act acts only as a court of revision, and not of an appellate court. The Supreme Court, after undertaking an appraisal of the earlier authorities on the issue of the scope of jurisdiction under the proviso, held in **Shiv Sarup Gupta v Mahesh Chand Gupta (Dr),** (1999) 6 SCC 222:

> *"The phraseology of the provision as reproduced hereinbefore provides an interesting reading placed in juxtaposition with the phraseology employed by the legislature in drafting Section 115 of the Code of Civil Procedure. Under the latter provision the exercise of revisional jurisdiction of the High Court is circumscribed by the subordinate court having committed one of the three errors, namely (i) having exercised jurisdiction not vested in it by law, or (ii) having failed to exercise a jurisdiction so vested, or (iii) having exercised its jurisdiction with illegality or material irregularity. Under the proviso to sub-section (8) of*

Section 25-B, the expression governing the exercise of revisional jurisdiction by the High Court is "for the purpose of satisfying if an order made by the Controller is according to law". The revisional jurisdiction exercisable by the High Court under Section 25-B(8) is not so limited as is under Section 115 CPC nor so wide as that of an appellate court. The High Court cannot enter into appreciation or reappreciation of evidence merely because it is inclined to take a different view of the facts as if it were a court of facts. However, the High Court is obliged to test the order of the Rent Controller on the touchstone of "whether it is according to law". For that limited purpose it may enter into reappraisal of evidence, that is, for the purpose of ascertaining whether the conclusion arrived at by the Rent Controller is wholly unreasonable or is one that no reasonable person acting with objectivity could have reached on the material available. Ignoring the weight of evidence, proceeding on a wrong premise of law or deriving such conclusion from the established facts as betray a lack of reason and/or objectivity would render the finding of the Controller "not according to law" calling for an interference under the proviso to sub-section (8) of Section 25-B of the Act. A judgment leading to a miscarriage of justice is not a judgment according to law. (See: ***Sarla Ahuja v. United India Insurance Co. Ltd.*** *[(1998) 8 SCC 119] and* ***Ram Narain Arora v. Asha Rani*** *[(1999) 1 SCC 141].)"*

(Emphasis supplied)

9. Not being an appellate court, this court cannot, at this stage, consider fresh evidence that was not before the learned ARC. The document sought to now be produced before this Court, i.e., the list of the Rohini Courts Bar Association, was not before the learned ARC. To the contrary, the tenant has averred before the learned ARC that, to his knowledge, the landlord was practicing out of the Central Hall, Tis Hazari Courts. Given the same, it would not be a proper exercise of the powers under section 25-B of the Act if the Court were to now decide this petition on the basis of the said document. In any case, the document merely indicates that the landlord is ineligible to be allotted a chamber in the Rohini Courts Complex and the reason is stated as "not practicing in Rohini, already chamber". Given that it is admitted that the landlord does not practice in the Rohini Courts, it is understandable that he would not

be eligible for allottment of a chamber there – something that the document sets out clearly. This document is a fortiori to be ignored by this Court in view of the fact that the suit property is stated to be required for the landlord's son and not for himself. Given the same, this Court cannot look into the said document.

10. The other grounds of challenge have already been dealt with in detail by the learned ARC. The learned ARC has, in fact, given a reasoned order in this regard and held that it is a bona fide request of the landlord, which is reasonable and well within his prerogative. I have already, in R. C. Rev. 6 of 2014 set out in detail how this court exercises limited jurisdiction qua findings of facts in exercise of its jurisdiction under Section 25-B of the Act. The issue of whether another property in possession of the landlord is more suitable than the suit property and whether the requirement of the landlord is bona fide are issues of fact that this Court would abstain from getting into. All that this Court is mandated to do is to satisfy itself as to whether the impugned order is in accordance with law – i.e., whether the finding that the requirement of the landlord is *bona fide* is a finding in accordance with law.

11. On the issue of when a requirement of the landlord can be regarded as bona fide, the judgement of the Supreme Court in **Shiv Sarup Gupta** (supra) itself clearly held:

> "13. Chambers 20th Century Dictionary defines bona fide to mean "in good faith : genuine". The word "genuine" means "natural : not spurious : real : pure : sincere". In Law Dictionary, Mozley and Whitley define bona fide to mean "good faith, without fraud or deceit". Thus the term bona fide or genuinely refers to a state of mind. Requirement is not a mere desire. The degree of intensity contemplated by "requires" is much more higher than in mere desire. The phrase "required bona fide" is suggestive of legislative intent that a mere desire which is the outcome of whim or fancy is not taken note of by the rent control legislation. A requirement in the sense of felt need which is an outcome of a sincere, honest desire, in contradistinction with a mere pretence or pretext to evict a tenant, on the part of the landlord claiming to occupy the premises for himself or for any member of the family would entitle him to seek ejectment of the tenant. Looked at from this angle, any setting of the facts and circumstances

protruding the need of the landlord and its bona fides would be capable of successfully withstanding the test of objective determination by the court. The judge of facts should place himself in the armchair of the landlord and then ask the question to himself – whether in the given facts substantiated by the landlord the need to occupy the premises can be said to be natural, real, sincere, honest. If the answer be in the positive, the need is bona fide. The failure on the part of the landlord to substantiate the pleaded need, or, in a given case, positive material brought on record by the tenant enabling the court drawing an inference that the reality was to the contrary and the landlord was merely attempting at finding out a pretence or pretext for getting rid of the tenant, would be enough to persuade the court certainly to deny its judicial assistance to the landlord."

(Emphasis supplied)

12. In the instant case, as earlier recounted, the learned ARC has held that the requirement of the landlord – i.e., that of the suit property being required for the purpose of setting up a chamber for his son, who is practicing law – is *bona fide* and genuine. It has held that it is reasonable for the landlord to want to use not just the presently available – but smaller – shop, but also the suit property , in order to create a bigger space, out of which to operate the chamber. This, the Court finds, is once again in accordance with the law laid down by the Supreme Court in **Shiv Sarup Gupta** (supra), where it observed,

"it could not have been the intendment of the rent control law to compel the landlord in such facts and circumstances to shift to a different house and locality so as to permit the tenant to continue to live in the tenanted premises. If the landlord wishes to live with comfort in a house of his own, the law does not command or compel him to squeeze himself tightly into lesser premises protecting the tenant's occupancy."

(Emphasis supplied)

13. Even the finding that the currently available premises would not be suitable in view of its size and the stated profession of the landlord's son – for whom the suit property is stated to be required – is not

opposed to the law as laid down by the Supreme Court in **M. L. Prabhakar v Rajiv Singal,** (2001) 2 SCC 355, where, after taking into account the earlier authorities in this regard, including **Prativa Devi v T. V. Krishnan,** (1996) 5 SCC 353, **Ram Narain Arora v Asha Rani,** (1999) 1 SCC 141 and **Shiv Sarup Gupta** (supra), it held:

"8. It is thus to be seen that the suitability has to be seen from the convenience of the landlord and his family members and on the basis of the totality of the circumstances including their profession, vocation, style of living, habits and background."

14. It is understandable that a room which is merely 6' x 10' would not be suitable for a law chamber. However, if, so the landlord desires it can be extended by removing the wall separating it from the other adjoining premises of the landlord, so as to extend its area to 12' x 10.3' then the same could provide a fair amount of space to set up an office/ chamber to practice from.

15. Given the above, this Court finds no merit in the petition requiring exercise of its jurisdiction under section 25B of the Act.

16. For the above said reasons, the matter is dismissed.

ILR (2014) II DELHI 1099
RC. REV.

PAWAN PATHAK ....PETITIONER

VERSUS

CHHAJJU RAM ....RESPONDENT

(NAJMI WAZIRI, J.)

RC. REV. NO. : 6/2014 DATE OF DECISION: 06.01.2014
& CM NO. : 117/2014

Delhi Rent Control Act, 1958—Section 25B—Revision petition filed challenging order of learned SCJ-cum-RC dismissing application of petitioner-tenant seeking leave to defend and passing order of eviction against tenant in eviction petition—Plea taken, site plan of ground floor clearly shows four shops and landlord would have demolished one wall between two shops to make it seem like one shop—Held—Jurisdiction of this Court in exercise of its powers under Section 25B has to be to a limited extent and only to ensure that findings of fact are in accordance with law—Tenant, by this petition, is praying that Court upset reasoned findings of learned ARC in impugned order—Findings of learned ARC on basis of documents on record is a possible interpretation and is reasonable, based on documents on record—Given same, this Court does not find it appropriate to substitute reasoned findings of learned ARC with any other possible opinion.

Important Issue Involved: The jurisdiction of this Court in exercise of its powers under Section 25-B has to be to a limited extent and only to ensure that the findings of facts are in accordance with law.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Ram Lal, Advocate.

FOR THE RESPONDENTS : None.

CASES REFERRED TO:

1. *Ram Narain Arora* vs. *Asha Rani,* (1999) 1 SCC 141.
2. *Sarla Ahuja* vs. *United India Insurance Co. Ltd.,* (1998) 8 SCC 119.
3. *Hiralal Kapur* vs. *Prabhu Choudhury,* (1988) 2 SCC 172.
4. *Helper Girdharbhai* vs. *Saiyed Mohmad* (1987) 3 SCC 538.
5. *Sushila Devi* vs. *Avinash Chandra Jain,* (1987) 2 SCC 219.
6. *Sri Raja Lakshmi Dyeing Works* vs. *Rangaswamy Chettiar* (1980) 4 SCC 259.

RESULT: Dismissed.

NAJMI WAZIRI, J. (Open Court)

1. This is a revision petition filed under Section 25-B of the Delhi Rent Control Act, 1958 ("Act"), challenging the order of 21st September, 2013 of the learned SCJ-cum-RC, Karkadooma Courts ("impugned order"). By the impugned order, the learned ARC dismissed the application of the petitioner-tenant ("tenant") seeking leave to defend and passing an order of eviction against the tenant in Eviction Petition No. E-10 of 2013.

2. The dispute can be traced back to an eviction petition filed by the respondent-landlord ("landlord") before the learned ARC, wherein the landlord sought eviction of the tenant from the suit property – a shop – on the grounds of his bona fide requirement. The case of the landlord, who was – at the time of filing of the petition before the ARC – about to retire, was that he required the suit property for setting up a provisions / grocery store for his son. He had submitted that after his retirement, he would not be able to support his son and hence needs to set up a business for his son, who has studied only till 7th standard and a daily wage earner. He had submitted that he had no other suitable alternative accommodation for the same.

3. It was admitted that on the ground floor of the building containing the suit property, there were three shops on the ground floor that belonged to the landlord. Of the three shops, it was submitted, one was sold by the landlord to one Ms. Gayatri Devi, in April, 2009 to meet the expenses of one of his daughter's marriage, one was being used by the landlord's other daughter for running a beauty parlour, and the third is the suit property. The tenant, before the ARC filed an application seeking leave to defend the petition and raised four grounds:

(i) There are four shops on the ground floor, not three as contended. The wall between the shop being used as a beauty parlour and the shop adjoining it might have been broken down to show the same as one shop instead of two. The landlord, although he is showing to have only three shops, is really in possession of four shops.

(ii) No beauty parlor is being run by the said daughter of the petitioner as alleged or otherwise and the shop said to have been run as the beauty parlour is available to the landlord.

(iii) The tenant has spent a considerable amount as conversion charges towards the suit property.

(iv) The landlord and his family members are already possessed of sufficient means – they have many commercial vehicles and have sufficient credit in bank. Thus the contention that the landlord needs the property to set up a shot or that his son is a daily wage earner is false and concocted.

4. The learned ARC, after considering the contentions of the landlord and those of the tenant, as earlier observed, dismissed the application for leave to defend. He reasoned as follows:

(i) It has already been admitted by the landlord that one of the shops on the ground floor has been sold. It is not believable that the wall between two shops adjoining the tenant's shop could have been taken down by the landlord without the tenant knowing of it. It is not even the case of the tenant that the wall has been taken down recently so as to defeat any claims of the tenant.

(ii) The tenant has not been able to lead any material to show that the ground floor has four shops. On the other hand, it is

amply clear from the documents produced by the landlord that there are only three shops therein.

(iii) The denial qua the daughter of the landlord not running any beauty parlour and of not being in possession of one of the shops is a mere bald denial and is fit to be ignored. While the landlord has produced the electricity bill of 2007 in the name of the said daughter in support of his submissions, the tenant has not even pleaded as to whose possession the shop is in or what business was being carried out thereform.

(iv) That the tenant has spent a large amount towards conversion charges is irrelevant in the context of this dispute.

(v) The contention that the landlord and his family members are in possession of commercial vehicles or that they have sufficient credit in the bank is not relevant in considering whether the requirement of the landlord is bona fide.

(vi) When the son of the landlord is shown to have studied only till the 7th standard, and not in possession of any shop to run any business from, and when the landlord himself is shown to be a retired person who might be in need of further means to support his family, the bona fide requirement is clearly proven.

5. Thus reasoning, the learned ARC, by the impugned order, rejected leave to defend and passed an order of eviction. The tenant has hence filed the instant petition seeking revision of the impugned order.

6. Before this Court, the counsel for tenant strenuously contended that the learned ARC has misinterpreted and misconstrued the facts and documents on record in passing the impugned order. Particular reliance was placed on two documents:-

(i) an agreement to sell between the landlord and Ms. Gayatri Devi, and, (ii) of rent receipts issued in respect of the suit property. It was submitted that since the agreement to sell referred to shop no. 697/4 and the rent receipts referred to shop no. 697/3, it is indicative of the fact that the ground floor has four shops and that the tenant is in possession of shop no. 3 and not shop no. 2 as alleged.

7. It was further contended that the site plan of the ground floor

clearly shows four shops and the landlord would have demolished one wall between two shops to make it seem like one shop. Additionally, the tenant largely reiterated his contentions before the ARC and submitted that the findings of the ARC qua the same are incorrect and ought to be reversed.

8. This court is unpersuaded by the contentions of the tenant, which are issues of fact; it finds no infirmity with the findings of the learned ARC that requires interference under the proviso to section 25-B of the Act. The learned Supreme Court, even as early as in 1987, in the case of **Sushila Devi v Avinash Chandra Jain,** (1987) 2 SCC 219, held that the scope of jurisdiction of the High Court under the proviso to Section 25-B is wider than that under Section 115 of the Code of Civil Procedure, 1908. It held:

> *3. ...It is necessary to emphasise that unlike Section 115 of the Code of Civil Procedure, 1908 where the High Court's power of interference in revision touches jurisdiction, the power of the High Court to interfere in revision under sub-section (8) of Section 25-B of the Act is much wider in scope and enables the High Court to satisfy itself as to whether the decision rendered by the Rent Controller on the facts in issue is in accordance with law, that is to say, in accordance with the well-settled principles."*

9. However, in the very next year, in the case of **Hiralal Kapur v Prabhu Choudhury,** (1988) 2 SCC 172, the Supreme Court had opportunity to clarify that the scope of jurisdiction, even if wider than that under Section 115 of the Code of Civil Procedure, 1908, ought to not be exercised to enter into the merits of the matter. It observed:

> *"8. ...Though under Section 25(B)(8) of the Delhi Rent Control Act the powers of the High Court are somewhat wider than similar powers of revision under Section 115 of the Civil Procedure Code, it is well established by a series of decisions of this Court that the power of revision under the Rent Control Acts does not entitle the High Court to enter into the merits of the factual controversies between the parties and to reverse findings of fact in this regard. It is sufficient, in this context, to refer to the decision of this Court in **Helper Girdharbhai v. Saiyed Mohmad** [(1987) 3 SCC 538] which reviewed earlier decisions. The decision in **Sushila Devi v. Avinash Chandra Jain** [(1987) 2 SCC 219] to which counsel for the respondent referred, lays down no different principle."*

10. On the issue of when the High Court can interfere with findings of the learned ARC on questions of fact, the Supreme Court, in **Ram Narain Arora v Asha Rani,** (1999) 1 SCC 141, held:

> *"12. It is no doubt true that the scope of a revision petition under Section 25-B(8) proviso of the Delhi Rent Control Act is a very limited one, but even so in examining the legality or propriety of the proceedings before the Rent Controller, the High Court could examine the facts available in order to find out whether he had correctly or on a firm legal basis approached the matters on record to decide the case. Pure findings of fact may not be open to be interfered with, but (sic:if) in a given case, the finding of fact is given on a wrong premise of law, certainly it would be open to the revisional court to interfere with such a matter."*

11. In a decision that reprised the dicta of the precedents and clarified as to the limited scope of the provision, the Supreme Court, in **Sarla Ahuja v United India Insurance Co. Ltd.,** (1998) 8 SCC 119, observed:

> *"5. Section 25-B of the Act lays down "special procedure for the disposal of application for eviction on the ground of bona fide requirement". Sub-section (1) says that every application for recovery of possession on the ground specified in Section 14(1)(e) of the Act shall be dealt with in accordance with the procedure specified in Section 25-B. Sub-section (8) says that no appeal or second appeal shall lie against an order for the recovery of possession of any premises made by the Rent Controller in accordance with the procedure specified in this section. The proviso to that sub-section reads thus:*
>
> *"Provided that the High Court may, for the purpose of satisfying itself that an order made by the Controller under this section is according to law, call for the records of the case and pass such order in respect thereto as it thinks fit."*
>
> *"6. The above proviso indicates that power of the High Court is supervisory in nature and it is intended to ensure that the Rent*

Controller conforms to law when he passes the order. The satisfaction of the High Court when perusing the records of the case must be confined to the limited sphere that the order of the Rent Controller is "according to the law". In other words, the High Court shall scrutinize the records to ascertain whether any illegality has been committed by the Rent Controller in passing the order under Section 25-B. It is not permissible for the High Court in that exercise to come to a different fact finding unless the finding arrived at by the Rent Controller on the facts is so unreasonable that no Rent Controller should have reached such a finding on the materials available.

"7. Although, the word "revision" is not employed in the proviso to Section 25-B(8) of the Act, it is evident from the language used therein that the power conferred is revisional power. In legal parlance, distinction between appellate and revisional jurisdiction is well understood. Ordinarily, appellate jurisdiction is wide enough to afford a rehearing of the whole case for enabling the appellate forum to arrive at fresh conclusions untrammelled by the conclusions reached in the order challenged before it. Of course, the statute which provides appeal provision can circumscribe or limit the width of such appellate powers. Revisional power, on the contrary, is ordinarily a power of supervision keeping subordinate tribunals within the bounds of law. Expansion or constriction of such revisional power would depend upon how the statute has couched such power therein. In some legislations, revisional jurisdiction is meant for satisfying itself as to the regularity, legality or propriety of proceedings or decisions of the subordinate court. In ***Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar*** *[(1980) 4 SCC 259] this Court considered the scope of the words ("the High Court may call for and examine the records à to satisfy itself as to the regularity of such proceedings or the correctness, legality or propriety of any decision or order à") by which power of revision has been conferred by a particular statute. Dealing with the contention that the above words indicated conferment of a very wide power on the revisional authority, this Court has observed thus in the said decision: (SCC p. 262, para 3)*

"The dominant idea conveyed by the incorporation of the words 'to satisfy itself' under Section 25 appears to be that the power conferred on the High Court under Section 25 is essentially a power of superintendence. Therefore, despite the wide language employed in Section 25 the High Court quite obviously should not interfere with findings of fact merely because it does not agree with the finding of the subordinate authority."

12. Given the above, it is amply clear that the jurisdiction of this Court in exercise of its powers under Section 25-B has to be to a limited extent and only to ensure that the findings of facts are in accordance with law. The tenant, by this petition, is praying that the court upset the reasoned findings of the learned ARC in the impugned order. The findings of the learned ARC on the basis of the documents on record is a possible interpretation and is reasonable, based on the documents on record. Given the same, this Court does not find it appropriate to substitute the reasoned findings of the learned ARC with any other possible opinion.

13. For the above reasons, the petition is dismissed.

ILR (2014) II DELHI 1106
CM (M)

SHRI RAMESH KUMAR & ANR. ....PETITIONERS

VERSUS

SANGEETA KHANNA ....RESPONDENT

(NAJMI WAZIRI, J.)

CM(M) NO. : 8/2014 DATE OF DECISION: 06.01.2014

Constitution of India, 1950—Article 227—Indian Evidence Act, 1872—Section 63—Code of Civil Procedure, 1908—Section 151, Order VII Rule 14 (3)

and Order VIII Rule 1A(3)—Applications filed by petitioner for placing documents on record and for leading secondary evidence qua photocopies of documents so filed dismissed by Trial Court—Order challenged before High Court—Plea taken, Trial Court has failed to exercise jurisdiction vested in it by not granting leave to file documents—Petitioner was always diligent in prosecuting case and in any event, respondent would not be prejudicially affected if documents were placed on record—Documents were necessary for effective adjudication of dispute before Trial Court and hence they ought to be allowed to be exhibited—Held—Appropriate time for filing a document in support of a defendant's defence is when written statement is filed—A document that is not produced along with written statement or entered in list filed with written statement ought not to be received in evidence without leave of Court—Injunction of law under Order VIII Rule 1A(1) is not one to be lightly ignored, a fortiori and especially in matters such as present case, where excessive delay of over 11 years, has been caused by defendant in eventually approaching Court under said provision—For exercise of discretion by Court under Order VIII Rule 1A(3) of Code in Favour of a defendant, defendant would have to satisfy Court to qualifying criteria (i) that documents were earlier not within knowledge of party; or (ii) that documents could not be produced despite exercise of diligence on part of defendant —Petitioner has failed to provide sufficient and cogent reasons for allowing documents to be filed—It is not case of petitioner that documents were not within his power nor has petitioner made out any case of exercise of diligence, despite which documents could not be filed—To the contrary, impugned order observes lack of diligence on part of petitioner, as documents had not been filed for a period of eleven years from date of filing of written statement and not even adverted to

in evidence filed later—Only explanation proffered by petitioner is inadvertence which cannot be regarded as a ground for exercise of discretion under Order VIII Rule 1A(3)—Impugned order does not suffer from material irregularity warranting interference of this Court in its revisionary jurisdiction.

Important Issue Involved: (A) For exercise of discretion by the Court under Order VIII Rule 1A(3) of the Code in favour of a defendant, the defendant would have to satisfy the Court to the following qualifying criteria:

(i) that the documents were earlier not within the knowledge of the party; or

(ii) that the documents could not be produced despite exercise of diligence on the part of the defendant.

(B) The injunction of the law under Order VIII Rule 1A(3), where it enjoins the Court from accepting in evidence a document that has not be produced as per the mandate of Order VIII Rule 1A(1) is not one to be lightly ignored, a fortiori and especially in matters such as the present case, where excessive delay of over 11 years, has been caused by the defendant in eventually approaching the Court under and provision.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Ajit Dayal with Mr. M.K. Bansal, Advs.

FOR THE RESPONDENT : Nemo.

CASES REFERRED TO:

1. *F. Hoffman La Roche Ltd.* vs. *Cipla Ltd.,* (2012 (52) PTC 1).

2. *Aligarh Roller Flour Mills Pvt. Ltd.* vs. *Parvinder Khanna,* (judgement dated 30th August, 2010 in CM(M) No. 1085 of 2010).

3. *Durga Devi* vs. *Lalita Rakyan, (judgement dated 9th September,* 2010 in CM(M) No. 1141 of 2010).

4. *Y. N. Gupta* vs. *Jagdish Chander Sharma & Anr.,* (CM(M) No. 1199 of 2009).

5. *Harkesh Singh & Anr.* vs. *Ved Raj,* (order dated 2nd February, 2010 in CM(M) No. 945 of 2007).

6. *Gold Rock World Trade Ltd.* vs. *Veejay Lakshmi Engineering Works Ltd.* (2007 (143) DLT 113).

7. *Salem Bar Advocates Association* vs. *Union of India* ((2005) 6 SCC 344).

8. *Salem Advocate Bar Assn. (I)* vs. *Union of India,* 2002 Indlaw SC 1374.

9. *Madan Lal* vs. *Shyam Lal,* (2002) 1 SCC 535.

RESULT: Dismissed.

NAJMI WAZIRI, J. (Open Court)

1. This petition impugns under Article 227 of the Constitution of India, an order of 11th September, 2013 ("impugned order") of the learned Civil Judge – 14, Tis Hazari Courts ("Trial Court") in Suit No. 1327 of 2011 ("Suit") which dismissed two applications of the petitioner; one filed under Section 151 CPC for placing documents on record and the other filed under Section 63 of the Indian Evidence Act for leading secondary evidence qua photocopies of the documents so filed. The case of the petitioner is that the said documents which are now being sought to be brought on record and for which secondary evidence is being sought to be led, were inadvertently not filed alongwith the Written Statement (WS) since all these years the petitioner/defendant had been under the impression that they had already been filed. The respondent/plaintiff had opposed the application before the Civil Judge on the ground that these documents existed prior to the WS being filed therefore they could not be permitted to be taken on record now.

2. The Suit was filed by the respondent against the petitioner in

January, 2000 seeking possession of the suit property and injunction against interference with possession. The petitioner filed his Written Statement in July, 2002 taking an objection as to the maintainability of the Suit while, otherwise, opposing the Suit. He filed his affidavit in evidence on 2nd April, 2013. On 14th August, 2013 – i.e., eleven years after filing his WS and four months after filing his affidavit of evidence – he filed two applications, one to place on record additional documents and another to lead secondary evidence qua the same on the ground that the same could be placed on record due to inadvertence; that the petitioner was under the bonafide impression that the documents had already been filed but this illusion was discovered only when the occasion arose for exhibiting the documents. The application was opposed by the respondent on the ground that documents which are now sought to be adduced are of a period prior to the filing of the WS, they could have been procured and filed alongwith the WS and surely cannot be permitted 11 years thereafter.

3. After considering the submissions of the parties, the Trial Court rejected both the applications. It observed that the defendant's contention that the documents – fifteen of them – were not filed at the time of filing of the WS nor at the time of filing the affidavit of evidence was due to inadvertence is neither believable nor a sufficient ground for granting leave at this stage – when the plaintiff's evidence had been closed. It observed that it was inconceivable that a party would have – over a period of eleven years after the filing of the Written Statement, and even after filing an affidavit in evidence, inadvertently not filed such numerous documents. It reasoned the applicant ought to provide cogent and sufficient reason for having failed to file the evidence. It held that mere ignorance of the documents not having been filed –is neither sufficient nor cogent reason in law. Observing that the respondent has already led evidence in the matter and it is only at the stage of leading of petitioner's evidence that the petitioner sought to produce these documents, it held that the respondent is likely to be prejudicially affected by the grant of leave to file the documents.

4. Aggrieved by the impugned order, the petitioner has preferred the instant petition. It was contended that the Trial Court has failed to exercise jurisdiction vested in it by not granting leave to file the documents. It was contended that the petitioner was always diligent in prosecuting

the case and, in any event, the respondent would not be prejudicially affected if the documents were placed on record. Learned Counsel for the petitioner vehemently argued that the documents were necessary for effective adjudication of the dispute before the Trial Court, and hence they ought to be allowed to be exhibited.

5. I am not persuaded by the arguments of the petitioner; there is no reason requiring interference with the impugned order. To the contrary, the impugned order is well in keeping with the law as laid down by the Supreme Court and this Court in respect of grant of leave to file documents not filed originally with the Written Statement.

6. Although neither the application before the Trial Court nor the impugned order makes specific reference to the provision, the instant matter is to be governed by the provisions of Order VIII Rule 1A(3) of the First Schedule to the Code of Civil Procedure, 1908 ("Code"). The said provision reads as under:

> **1A. Duty of defendant to produce documents upon which relief is claimed or relied upon by him**
>
> (1) Where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set off or counter claim, he shall enter such document in a list, and shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement.
>
> (2) Where any such document is not in possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.
>
> (3) A document which ought to be produced in Court by the defendant under this rule, but, is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit..
>
> (4) Nothing in this rule shall apply to documents-
>
> (a) produced for the cross-examination of the plaintiff's witnesses, or

> (b) handed over to a witness merely to refresh his memory.

7. Thus, it is evident that the application of the petitioner to file additional documents is one to be tested on the touchstone of Order VIII Rule 1A (3) of the Code. The said provision, which was added to the Code by way of an amendment in 1999, provides that the appropriate time for filing a document in support of a defendant's defence is when the Written Statement is filed. It provides that as a matter of rule, a document that is not produced alongwith the Written Statement or entered in the list filed with the Written Statement ought to not be received in evidence without the leave of the Court.

8. The injunction of the law under Order VIII Rule 1A(3), where it enjoins the Court from accepting in evidence a document that has not be produced as per the mandate of Order VIII Rule 1A(1) is not one to be lightly ignored, *a fortiori* and especially in matters such as the present case, where excessive delay – of over 11 years, has been caused by the defendant in eventually approaching the Court under said provision. The Supreme Court, speaking through P. K. BALASUBRAMANYAN J (who concurred with the majority) in **R. N. Jadi Brothers & Ors. v Subhashchandra,** ((2007) 6 SCC 420) stressed the importance of following a strict interpretation and giving full effect to the amendments to the Code in 1999 – which included the present provision. He observed that the legislative intent in the amendments is apparent – to prevent undue delay in litigation by the parties, especially the defendant in a Suit. The Trial Judge was right in refusing to lightly consider the application of the petitioner to file additional documents after such an inordinate delay without any justified reasons for the delay.

9. This Court too through a learned Single Judge of this Court cautioned against lightly ignoring the mandate of Order VIII rule 1A(3) in **Y. N. Gupta v Jagdish Chander Sharma & Anr.,** (CM(M) No. 1199 of 2009):

> *"Even unamended Civil Procedure Code gave a specific procedure for filing of pleadings and documents and the circumstances under which additional documents could be filed by parties. All documents were supposed to be filed by the parties along with pleadings. The documents not in power and possession of the parties were required to be mentioned in a list and against each*

document it was to be mentioned in whose possession it is, if it has been lost or how the document is sought to be proved in the court. This procedural requirement was necessary so that trial proceeds in an orderly manner and both the parties know each others' case and the documents relied upon by them. Only those documents could be withheld by the parties which they intended to put in cross-examination to the witnesses. The additional documents could be produced by the parties only where despite, due diligence and effort, the party could not lay hand on any of those documents or the documents were not within the knowledge of the party and they were discovered later on by the party during pendency of the trial. The court before allowing the additional documents was to be satisfied not only about the relevancy of documents but also about the reasons as to why the documents could not be filed at the initial stage either along with the plaint or along with written statement.

The amendments which were made by the Parliament from time to time in Code of Civil Procedure and other laws were made after observing the working of the Code and after considering that there was need to change the law. These statutory amendments cannot be ignored or thrown to winds by the courts because in one or the other case, they are to the disadvantage of a party. Disadvantage of an individual cannot be a ground to ignore the statute. Statutory provisions are made for general application and to give certainty to the law. If the law remains uncertain, it becomes a hay day for the parties to twist the law and that is why it is necessary that the procedural aspects of the law also must be settled and should not be considered so lightly that the courts have liberty to ignore the procedural aspects whenever and wherever they like. No doubt, procedure is hand maid of justice but what is justice cannot be a concept and idea of an individual judge. Justice has to be looked from the broader prospective. If a judge is given discretion to decide applications without following procedure, as laid down by Parliament, that will result into total chaos and would breed contempt for law and infuse corruption."

(Emphasis supplied)

10. In the aforementioned case, the Trial Court had, despite observing that no explanation was given for the delay in filing the documents, allowed the application under Order VIII Rule 1A(3) merely on the ground that no objection has been raised as to the veracity of the documents and the documents were relevant for effective adjudication of the dispute. However, in the present case, the Trial Court was right in dismissing the contention of the petitioner that the documents ought to be taken on record merely because they were allegedly necessary for effective adjudication of the dispute.

11. That a document that is not filed at the appropriate stage shall not be received by the Court is a principle that the Supreme Court emphasised in **Madan Lal v Shyam Lal,** (2002) 1 SCC 535. This principle has been followed qua applications under Order VIII Rule 1A(3) by this Court in **Aligarh Roller Flour Mills Pvt. Ltd. v Parvinder Khanna,** (judgement dated 30th August, 2010 in CM(M) No. 1085 of 2010) and **Durga Devi v Lalita Rakyan,** (judgement dated 9th September, 2010 in CM(M) No. 1141 of 2010).

12. Being in *pari materia* with the provisions of Order VII Rule 14 (3) CPC – a factum recognised even by the Supreme Court in **Salem Bar Advocates Association v Union of India** ((2005) 6 SCC 344) – the principles applicable to the said provision would apply on all fours to considering applications under Order VIII Rule 1A(3) CPC. A similar view was taken earlier by a learned Single Judge of this Court in **F. Hoffman La Roche Ltd. v Cipla Ltd.,** (2012 (52) PTC 1).

13. Discussing the background in which the provision came into existence and the scope of the discretionary power of the courts under Order VII Rule 14, a learned Single Judge of this Court, in **Gold Rock World Trade Ltd. v Veejay Lakshmi Engineering Works Ltd.** (2007 (143) DLT 113), observed:

> *"4. I have heard counsel for the parties. The Supreme Court decision in Salem Advocate Bar Association (supra) was in the context of additional evidence. By virtue of the 1976 amendment, Rule 17-A had been introduced in Order 18. The said Rule 17-A granted discretion to the Court to permit production of evidence not previously known or which could not be produced despite due diligence. Rule 17-A of Order 18 was deleted by the Code*

of Civil Procedure (Amendment) Act, 1999 which took effect on 1.7.2002. While considering the effect of this deletion the Supreme Court observed:-

> *13. In* ***Salem Advocate Bar Assn. (I) v. Union of India,*** *2002 Indlaw SC 1374, it has been clarified that on deletion of Order 18 Rule 17-A which provided for leading of additional evidence, the law existing before the introduction of the amendment i.e. 1-7-2002, would stand restored. The Rule was deleted by Amendment Act of 2002. Even before insertion of Order 18 Rule 17-A, the court had inbuilt power to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence. Order 18 Rule 17-A did not create any new right but only clarified the position. Therefore, deletion of Order 18 Rule 17-A does not disentitle production of evidence at a later stage. On a party satisfying the court that after exercise of due diligence that evidence was not within his knowledge or could not be produced at the time the party was leading evidence, the court may permit leading of such evidence at a later stage on such terms as may appear to be just.*

Thus, the Supreme Court held that the insertion of Rule 17-A was only clarificatory of the in-built power of the Court to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence. The learned counsel for the plaintiff sought to invoke this in- built power of the court even in respect of Order 7 Rule 14 (3) which relates to production of documents at a belated stage. There would be no difficulty in holding that the in-built power referred to in the said Supreme Court decision could also be invoked when the question of granting leave arises in the context of Rule 14 (3) of Order 7. Consequently, before leave of the Court can be granted for receiving documents in evidence at a belated stage, the party seeking to produce the documents must satisfy the Court that the said documents were earlier not within the party's knowledge or could not be produced at the appropriate time in spite of due diligence. It has been submitted by the

learned counsel for the defendant that the documents pertain to a settlement between the plaintiff and a foreign party (COGETEX). The settlement was arrived at, as per the statement recorded in the cross-examination of PW1, on 7.10.1996.

However, there is not a whisper of this statement even in the replication which was filed on 11.9.1997. In fact, the affidavit by way of evidence was filed by the plaintiff in the year 2003 and even in that affidavit, there is no reference to the documents which are now sought to be introduced. In my view, these circumstances clearly show that the conditions necessary before leave of the Court can be granted have not been satisfied. It cannot be said that the plaintiff was not aware of the documents earlier, or that the same could not be produced in spite of due diligence on the part of the plaintiff. All the material now sought to be introduced, was well within the knowledge of the plaintiff at least in the year 2003. As the plaintiff was not diligent enough at that point of time, this Court is left with no alternative but to reject its request." (Emphasis supplied)

14. For exercise of discretion by the Court under Order VIII Rule 1A(3) of the Code in favour of a defendant, the defendant would have to satisfy the court to the following qualifying criteria:

i) that the documents were earlier not within the knowledge of the party; or

ii) that the documents could not be produced despite exercise of diligence on the part of the defendant.

15. In yet another case a similar view was held by a learned Single Judge of this Court in Dr. J. K. Jain v Krishnaram Baldeo Investment & Finance Co. Ltd., (judgement dated 14th August, 2008 in CM(M) No. 217 of 2008), where it was observed:

> *"The Court may permit the production of such documents only on showing sufficient cause. In the present case, the documents sought to be produced by the petitioner later on were not such which were not in the power of the petitioner or could not have been obtained by the petitioner. The petitioner had not made any reference to these documents in the written statement neither*

filed a list of documents relied upon. I find no reason as to why the court should allow filing of such documents at a belated stage when the petitioner is not able to satisfy the court about the relevancy of these documents and reasons for not filing the same with the written statement or before framing the issues."

16. The impugned order has clearly set out that the petitioner has failed to provide sufficient and cogent reasons for allowing the documents to be filed. It was not the case of the petitioner before the Trial Court that the documents were not within his power, nor has the petitioner made out any case of exercise of diligence, despite which the documents could not be filed. To the contrary, the impugned order observes the lack of diligence on the part of the petitioner, as the documents had not been filed for a period of eleven years from date of filing of the Written Statement and not even adverted to in the evidence filed later. The only explanation proffered by the petitioner is inadvertence, which cannot be regarded as a ground for exercise of discretion under Order VIII Rule 1A(3) – a view echoed by a judgement of a learned Single judge of this Court in **Harkesh Singh & Anr. v. Ved Raj,** (order dated 2nd February, 2010 in CM(M) No. 945 of 2007).

17. As discussed above, the petitioner has not made out a sufficient case it is without merit. The reasons for and the conclusion arrived at in the impugned order is a plausible view in law. It does not suffer from material irregularity warranting interference of this Court in its revisionary jurisdiction. For the aforesaid reasons, the petition is dismissed.

ILR (2014) II DELHI 1118
W.P. (C)

MADAN LAL PAWAN KUMAR ....PETITIONER

VERSUS

GOVT. OF NCT OF DELHI & ORS. ....RESPONDENTS

(G.S. SISTANI, J.)

W.P. (C) NO. : 1095/2008 & 2146/2008 **DATE OF DECISION: 08.01.2014**

Constitution of India, 1950—Article 226— Writ Petition—Delhi Kerosene Oil (Export & Price) Order, 1962—Clause 6—Cancellation of licence—Conviction-transfer of licence in the name of petitioner upon the death of father—Petitioner firm was issued a licence for distribution of kerosene oil in the year 1977-on 28.04.1995 inspection staff of respondent found shortage of 1233 litres for the period from 01.04.1995 to 28.04.1995 an FIR registered deceased father of the petitioner proprietor of the firm at that time on 07.06.1995 an Assistant Commissioner (East) suspended the licence on the basis of report on 16.08.1995 Assistant Commissioner (Judicial) after considering the facts and circumstances-material placed on record revoked the order of suspension imposed the penalty of forfeiture of security amount-ground-actual shortage 68 litres within permissible limit not on higher side—Meanwhile proceedings initiated upon filing of FIR—Additional Sessions Judge vide judgment dated 03.04.2001 convicted the father of the present proprietor and sentenced him to undergo imprisonment till rising of the Court and imposed fine of Rs. 2000/- after conviction the father continue to run the kerosene depot till his death on 24.02.2006-in June,

2006 present proprietor applied for change of the name of the proprietor in the licence due to death of his father—Assistant Commissioner vide order dated 13.06.2006 allowed the change of the name—directed to deposit security amount on 17.08.2007 show cause notice issued as to why authorization may not be cancelled under Clause 6 (3) of Delhi Kerosene Oil (Export & Price) Control Order, 1962—Reply filed—Respondent dissatisfied with reply cancelled the licence vide order dated 01.09.2007—Appeal preferred—dismissed preferred writ petition—Contended act of respondent cancelling the licence after long period-unjustified—Respondent allowed change of proprietor name in 2006—No action survives against present petitioner same stale act of previous proprietor condoned—Show cause notice issued after gap of 6 years licence renewed from time to time—Penalty of forfeiture of security amount already imposed—Punishment of the same offence cannot be imposed again on the present proprietor-per contra-the respondent well within their right to take action in terms of Control Order—Delay procedural due to transfer of Assistant Commissioner—Held—Statutory authority required to act reasonable, fairly and expeditiously no reasonable or plausible explanation for gross delay—Respondent waived their right to take action—Respondent agreed to transfer the licence in the name of present proprietor condoned the act of previous licencee—Licence of present proprietor cannot be canceled for the act of previous proprietor—Cancellation quashed—Writ petition allowed.

Admittedly, action was taken by the Assistant Commissioner against the father of the present proprietor and a penalty of forfeiture of security amount was imposed. No further administrative action was taken against the petitioner firm for more than 12 years. Thus in my view no action lies at

such a belated stage and that too against the present proprietor of petitioner firm for the act committed by the previous licence holder. Even otherwise having not taken any administrative action for 12 years and on the contrary having renewed licence of the petitioner firm from time to time would amount to condoning the act of the wrong doer; and after 12 years, the respondents are estopped from taking action against the petitioner firm having waived off their rights by their own conduct. The Government must act in a fair, just and expeditious manner. The delay and inaction on the part of the respondent has resulted in creation of valuable rights in favour of the petitioner firm. **(Para 16)**

It is settled law that a statutory authority is required to act reasonably, fairly and expeditiously. **(Para 17)**

[Gu Si]

Important Issue Involved: (a) The statutory authority is required to act reasonably, fairly and expeditiously. (b) the delay in taking action amounts to waiving off their right for taking any action.

APPEARANCES:

FOR THE PETITIONER : Mr. Kishan Nautiyal, Advocate.

FOR THE RESPONDENT : Mr. S.D. Salwan and Ms. Latika Dutta, Advocates.

RESULT: Writ Petition Allowed.

G.S. SISTANI (ORAL)

1. Rule. With the consent of counsel for the parties, present petition is set down for final hearing. Necessary facts for disposal of this petition are that the petitioner, M/s.Madan Lal Pawan Kumar was issued a licence (licence No.1783/77) for distribution of kerosene oil. The said Kerosene Oil Depot (KOD) is situated at Block No.6/499, Khichripur, Delhi under circle 38. The petitioner firm is a licence holder for distribution of kerosene

oil since 1977, a copy of the licence has been placed on record. On 28.04.1995 an inspection staff of the respondent came on a routine inspection to the depot of the petitioner firm. At that time, the father of the present proprietor, late Sh. Madan Lal was running the kerosene oil depot. Upon inspection of the depot, on account of allegation of shortage of 1233 litres of kerosene oil for the period 1.4.1995 to 28.4.1995, an FIR was registered. On 07.06.1995 the Assistant Commissioner (East) suspended the licence of M/s.Madan Lal Pawan Kumar on the basis of the said report. On 16.08.1995, Assistant Commissioner (Judicial) after considering the facts and circumstances of the case as also the materials placed on record, revoked the order of suspension and imposed a penalty of forfeiture of the security amount on the ground that actual shortage of kerosene oil was 68 litres, which was well within the permissible limit and not on the higher side.

2. In the meanwhile in the proceedings initiated upon filing of the FIR for prosecution of the offences under the Delhi Kerosene Oil (Export and Price) Control Order 1962, the Additional Sessions Judge vide his judgment dated 03.04.2001 convicted the father of the present proprietor and sentenced him to undergo imprisonment till rising of the court and also imposed fine of Rs.2,000/-.

3. It is the case of the petitioner that even after conviction, the father of the present proprietor of the petitioner firm continued to run the Kerosene Oil Depot, till 24.02.2006. Sh. Madan Lal (previous proprietor of the petitioner firm) expired on 24.2.2006. In June, 2006 the present proprietor of petitioner firm applied for change of name of proprietor in the licence of Kerosene Oil Depot, due to his father's death. The Assistant Commissioner vide order dated 13.06.2006 allowed the change of name and the present proprietor of the petitioner firm was directed to deposit an amount of Rs.5,000/- towards security of the Kerosene Oil Depot. It is only on 17.08.2007 that a show cause notice was issued by the Assistant Commissioner, as to why authorization may not be cancelled under clause 6 (3) of the Delhi Kerosene Oil (Export and Price) Control Order 1962. Reply to the show cause notice was filed on 30.08.2007. Respondents being dissatisfied with the reply so received passed an order dated 01.09.2007, cancelled the licence of the present proprietor. The appeal filed against the aforesaid order was also dismissed.

4. It is submitted by counsel for the petitioner that the act of the respondents of cancelling the licence of KOD after such a long period is unjustified, in light of the fact that the respondents had earlier in 2006 allowed the change of the proprietor's name. It is also submitted that no action survives against the present proprietor, as the same is stale and the act of the previous proprietor stands condoned, as the show cause notice was issued after a gap of more than 6 years and during this period the licence was renewed from time to time, moreover in the name of the present proprietor as well. The second argument of the counsel for the petitioner is that once the Assistant Commissioner (Judicial) vide its order dated 16.08.1995 had revoked the order of suspension and imposed a penalty of forfeiture of the security amount, punishment for the same offence cannot be imposed again and that too on the present proprietor, who has no connection with the offence committed by the previous proprietor.

5. Per contra, Mr. Salwan, counsel for the respondent submits that once the original licence holder had committed breach and was convicted the respondents were well within their right to take action in terms of Clause 6 of Delhi Kerosene Oil (Export and Price) Control Order 1962 dated 5.12.1962, which reads as under:

"6. Contravention of the terms and conditions of licence:

(1) If any licencee or his agent or servant or any other person acting on his behalf contravenes any of the terms and condition or directions or any provisions of this order then without prejudice to any other action that may be taken against licensee according to law, his licence can be suspended by order in writing by the Commissioner.

Proviso to clause 6(1) order vide Dt. 15.2.80.

(2) Without prejudice to the provisions of sub-clause 1 if the Commissioner is satisfied that the licensee has contravened any of the terms and conditions of a licence or the directions issued under clause 3-D or any provision of this order and cancellation of his licence is called for, may after giving the licencee a reasonable opportunity of stating his case against the proposed cancellation by order in

writing cancel his licence and shall forward a copy thereof to the licensee.

(3) Notwithstanding anything contains in this clause, where a licencee is convicted by a court of law for breach of the terms and conditions of the licence or contravention of the provision of this order the licensing authority may by order in writing, cancel his licence.

Provided that no such order shall be passed until the appeal, if any, filed against such conviction is dismissed and where no such appeal is filed until the period of limitation for filing an appeal expires."

6. With respect to the submissions made by counsel for the petitioner for delay, counsel for the respondent submits that the delay is procedural, as in the period of 18 years, 24 Assistant Commissioners had been transferred in one zone, and in another zone 12 Assistant Commissioners were transferred in 10 years.

7. In response to the above, the counsel for the petitioner stated that in case the respondents were to rely upon Clause 6 of Delhi Kerosene Oil (Export and Price) Control Order 1962, the same should have been invoked by them within the shortest span of time from the date of the cause of action and in any case within a reasonable period of time. It is further contended that on account of gross delay in taking action, the respondents are estopped from relying on Clause 6 of Delhi Kerosene Oil (Export and Price) Control Order 1962, which would be deemed to have been given up by the respondents, by virtue of their conduct; and on the contrary, vested rights have been created in favour of the petitioner by continuous renewal of licence, which cannot be taken away at this belated stage.

8. I have heard counsel for the parties and also perused the petition as also the annexures filed along with the petition.

9. In this case, father of the present proprietor was issued a licence for distribution of kerosene oil. On an inspection having been carried out shortage was found, which resulted in suspension of his licence. Subsequently the order of suspension of licence was revoked and a

penalty of forfeiture of security deposit was imposed on the father of the present proprietor on the ground that actual shortage of kerosene oil was 68 ltrs., which was well within the permissible limits. A copy of the order dated 16.8.1995 has been placed on record. Operative portion of the order reads as under:

"Hence, I Z.U. Siddiqui, Asst. Commissioner, Food & Supplies Dept. in exercise of powers conferred upon me under the provision of Delhi K. Oil (Export & Price) Control Order 1962, do hereby order forfeiture of entire security amount of Rs.100/- (One hundred rupees only) which should be deposited by the licencee within one week after the receipt of the order. The suspension order dated 7.6.95 is revoked and the K.oil Licence No 1783/77 held by M/s Madan Lal Pawan Kumar shall stand restored on depositing the forfeited amount of security. The licencee is also warned to be more careful to avoid reaccurance (sic. reoccurrence) of such irregularities. However, this order is passed by the undersigned without prejudice to any action / decision that shall be taken by the competent court in case of FIR lodged against the Depot holder."

10. In the meanwhile, an FIR was also lodged against the father of the present proprietor; and by a judgment dated 3.4.2001, he was convicted and sentenced to undergo imprisonment till rising of the Court, besides imposing fine of Rs.2000/-.

11. The present proprietor applied for change of name of proprietorship, upon death of his father which was permitted and the present proprietor continued to run his Kerosene Oil Depot since then. On 17.8.2007 a show cause notice was issued to the present proprietor as to why the authorization be not cancelled under Clause 6(3) of the Delhi Kerosene Oil (Export and Price) Control Order 1962. Reply to the show cause notice was filed. Being dissatisfied with the response of the present proprietor, the licence was cancelled.

12. In this case, admittedly on the administrative side the Assistant Commissioner (Judicial), upon going through the facts of the case revoked the order of suspension of licence and imposed a penalty of forfeiture of the security amount on the ground that actual shortage of kerosene was

68 liters which was well within the permissible limit and not on the higher side.

13. The arguments of counsel for the petitioner can be summarized as under:

(i) The violation/breach, if any, was committed by the father of the present proprietor and after his demise a fresh licence was issued in favour of the present proprietor, thus the act of his father stands condoned; and secondly, he cannot be made to suffer for the acts of the previous licence holder.

(ii) Administrative action was already taken against the previous licence holder and a penalty was imposed.

(iii) The impugned action initiated after almost 12 years, is stale.

14. The argument of counsel for the respondent is that the respondents were well within their rights to initiate action in terms of Clause (6) of the Delhi Kerosene Oil (Export and Price) Control Order 1962 being an independent action and mere delay by itself cannot be a ground to condone the acts of the petitioner firm.

15. The basic facts are not in dispute that the license was granted to the father of the present proprietor to run Kerosene Oil Depot. Upon inspection having been carried out, some irregularities were found during the lifetime of the father of the present proprietor, who was the licencee then. Resultantly the licence was suspended by the Assistant Commissioner (East) and thereafter the Assistant Commissioner (Judicial), revoked the order of suspension and imposed a penalty of forfeiture of the security amount. It is also not in dispute that as long as the father of the present proprietor was alive, no action was taken against him in terms of Clause (6) of the Delhi Kerosene Oil (Export and Price) Control Order 1962. Thereafter, licence stood transferred in the name of the present proprietor, who is a separate entity, and further the said licence was renewed from time to time. It is only after a gap of more than 12 years fresh show cause notice for cancellation of the KOD was issued and the licence was cancelled as according to the respondents, previous licencee had incurred

a disqualification having been convicted by a criminal court, in terms of the 1962 Order.

16. Admittedly, action was taken by the Assistant Commissioner against the father of the present proprietor and a penalty of forfeiture of security amount was imposed. No further administrative action was taken against the petitioner firm for more than 12 years. Thus in my view no action lies at such a belated stage and that too against the present proprietor of petitioner firm for the act committed by the previous licence holder. Even otherwise having not taken any administrative action for 12 years and on the contrary having renewed licence of the petitioner firm from time to time would amount to condoning the act of the wrong doer; and after 12 years, the respondents are estopped from taking action against the petitioner firm having waived off their rights by their own conduct. The Government must act in a fair, just and expeditious manner. The delay and inaction on the part of the respondent has resulted in creation of valuable rights in favour of the petitioner firm.

17. It is settled law that a statutory authority is required to act reasonably, fairly and expeditiously.

18. The respondents have not only slept over their right, but also there is no reasonable and plausible explanation for the gross delay, and, thus, the respondents waived their right for taking any action against the petitioner firm. Moreover, the respondents by agreeing to transfer the licence in the name of the present proprietor of petitioner firm have condoned the act of the previous licence holder of the petitioner firm; further, the respondents have given a reasonable belief to the present proprietor that his right and title is good and shall not be disturbed, hence, the licence of the present proprietor cannot be cancelled for the acts of the previous licencee.

19. Counsel for the respondent has placed reliance upon the report of Justice Wadhwa Committee constituted by the Supreme Court of India. In the light of the aforesaid facts and observations, respondents cannot at this stage get benefit of their inaction or the findings of the report.

20. In view of the aforesaid, present proprietor of the petitioner firm cannot be penalized, at this stage even more so since the published

act was never committed by the present license holder. A party is bound to act reasonably more so a statutory authority. The authority was under a duty to act reasonably and without prejudice to the rights of the petitioner. Given that the authority has itself renewed the licence of the petitioner firm, they themselves have condoned the earlier conviction. Further by not acting within a reasonable period of time and by agreeing to renew the licence in the name of the present proprietor of the petitioner firm, respondents have given him a reasonable cause to believe that a right has accrued in his favour.

21. Taking into consideration the fact that on the administrative side the respondents had decided to revoke the suspension of licence of the petitioner firm and only imposed a penalty of forfeiture of the security amount and thereafter despite the order of conviction no action was initiated by the respondent against the petitioner firm during the lifetime of the previous licence holder i.e. Sh.Madan Lal, the action of the respondents amounts to condoning the offence committed and by their action the respondents have themselves decided to resort to a lesser punishment on the petitioner. Accordingly, the impugned order of cancellation is quashed.

22. Rule is made absolute. Petition and the application stand disposed of in above terms. Parties shall bear their own costs.

ILR (2014) II DELHI 1128
CM (M)

BHARAT HEAVY ELECTRICAL LTD. ....APPELLANT

VERSUS

ASHUTOSH ENGINEERING INDUSTRIES & ORS. ....RESPONDENTS

(NAJMI WAZIRI, J.)

CM (M) NO. : 576/2011 WITH CM NOS. : 9336 & 11612/2011 DATE OF DECISION: 08.01.2014

Constitution of India, 1950—Article 227—Arbitration and Conciliation Act, 1996—Section 7, 16(2) and 37—Code of Civil Procedure, 1908—Order 1 Rule 10—Respondent No. 1 filed suit against petitioner and respondent no. 2 to 5 for recovery challenging action of petitioner in encashing a bank guarantee issued by respondent no.1 to petitioner in respect of certain purchase orders placed by petitioner on respondent no.1—Petitioner entered appearance in suit and raised a preliminary issue as to jurisdiction of Court to try suit in view of existence of arbitral clause/s in purchase orders—Respondent No. 1 sought to contend at that juncture that matter is not arbitrable inasmuch as it has raised issues of fraud against petitioner and respondents no.2 to 5—A joint application filed by parties for compromise whereunder parties agreed to refer controversy in suit to arbitration was allowed by Lok Adalat and respondent no.1 proceeded to file its claim before Sole Arbitration praying for substantially same relief as in suit, against petitioner and

respondent no.2 to 5—Application of petitioner to delete respondent no.2 to 5 from array of parties in claim allowed by arbitrator—Order of arbitrator set aside by learned Additional District Judge in appeal of respondent no. 1—Order of learned Additional District Judge challenged before High Court—Plea taken, order of lok adalat cannot bind respondents no.2 to 5, given that they never appeared before Lok Adalat nor were they party to joint compromise application—Per contra plea taken, given that order of Lok Adalat referred all parties to arbitration, logical sequitur thereof is that respondents no.2 to 5 were also referred to arbitration—Held—Scope of a reference has to be decided on basis of terms of arbitration agreement—Respondents no.2 to 5 are not party to any agreement embodied in document with respondent no.1 agreeing to refer their disputes to arbitration—Nor is it case of respondent no.1 that there has been exchange of statements of claims and defence in which it had alleged existence of arbitration agreement and same has been accepted and not denied by respondent no.2 to 5 in their defence statement—It is also not case of respondent no.1 that any exchange of letters, telex, telegrams, or other means of telecommunication referred to provide a record of any arbitration agreement between parties—Respondents no.2 to 5 are not party to purchase orders—Respondent no.1 has not led any evidence or even pleadings to contend that respondents no.2 to 5 had consented before Lok Adalat that matter be referred to arbitration—Findings in impugned order that order of Lok Adalat is binding upon respondents no.2 to 5 is in excess of jurisdiction and patently illegal being contrary to records—Consequently, impugned order deserves to be and is

accordingly set aside.

Important Issue Involved: Scope of a reference to arbitration has to be decided on the basis of the terms of the arbitration agreement.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Sudhir Nandrajog, Sr. Adv. with Mr. Arvind Chaudhary, Advocate.

FOR THE RESPONDENTS : Mr. K.G. Sharma, Advocate for R-1.

CASES REFERRED TO:

1. *Indowind Energy Ltd* vs. *Wescare (India) Ltd & Anr,* (2010) 5 SCC 306.
2. *Hindustan Petroleum Corporation Ltd* vs. *Pinkcity Motors,* (2003) 6 SCC 503).

RESULT: Allowed.

NAJMI WAZIRI, J. (Open Court)

1. This is a petition filed under Article 227 of the Constitution of India, challenging the order of 21st March, 2011 passed by the Learned Additional District Judge – 03 ("ADJ"), South District, Saket Courts ("impugned order") allowing Arb No. 131 of 2010 ("appeal"). The appeal was filed under section 37 read with section 16 (2) of the Arbitration and Conciliation Act, 1996 ("Act").

2. Shorn of irrelevant details the origin of the case can be traced to Civil Suit no. 14-B of 2009, filed by the respondent no. 1 herein in the court of the Additional District Judge, Raipur, Chhattisgarh against the petitioner and respondents no. 2 to 5 herein, for recovery ("Suit"). Admittedly, the Suit was filed by the respondent no. 1 challenging the action of the petitioner in encashing a bank guarantee issued by the respondent no. 1 to the petitioner for an amount of Rs. 5,22,611/-

(Rupees five lakh twenty two thousand six hundred eleven only). The said bank guarantee was issued in respect of certain purchase orders placed by the petitioner on the respondent no. 1.

3. Admittedly, the respondents no. 2 to 5, who are employees / officers of the petitioner, are not parties to the purchase orders. It is also admitted that the bank guarantee was not in favour of the respondents no. 2 to 5 herein and could not have been encashed by them in their personal capacity and they had only been corresponding with the respondent no. 1 qua the alleged illegal action of encashment of the bank guarantee.

4. The said amount of Rs. 5,22,611/- (Rupees five lakh twenty two thousand six hundred eleven only) is said to have been misappropriated by the petitioner and the respondents no. 2 to 5 when the petitioner invoked the bank guarantee as aforesaid; which invocation is supposed to have triggered the cause of action. It is an admitted position that the petitioner entered appearance in the Suit and raised a preliminary issue as to the jurisdiction of the Court to try the suit in view of existence of arbitral clause/s in the purchase orders. The respondent no. 1 sought to contend at that juncture that the matter is not arbitrable inasmuch as the it has raised issues of fraud against the petitioner and respondents no. 2 to 5.

5. The Suit was sent to the Lok Adalat, Raipur, Chhattisgarh. It is the case of the respondent no. 1 that before the Lok Adalat, a joint application for compromise was filed by the parties whereunder the parties agreed to refer the controversy in the suit to arbitration. The petitioner does not deny the factum of having filed the application or of having agreed to refer the controversy in the suit to arbitration. What the petitioner however denies is that the application for compromise has been filed qua the entire controversy in the suit, as is sought to be contended by the respondent no. 1. The application was allowed by the Lok Adalat by its order dated 6th September, 2009, the respondent no. 1 proceeded to file its claim before the learned Sole Arbitrator ("arbitrator"), praying for substantially the same relief as in the Suit, against the petitioner and the respondent no. 2 to 5.

6. The petitioner entered appearance in the arbitral proceedings and filed an application under Order I rule 10 of the Code of Civil Procedure, 1908 ("Code"). By the application, the petitioner sought deletion of respondents no. 2 to 5 from the array of parties in the claim. It was contended that the reference to arbitration was under the arbitral clause/s in the purchase orders and that the said respondents are neither party to the purchase orders, nor have they acted in their personal capacity in dealing with the respondent no. 1, and that in any case the proceeds from the encashment of the bank guarantee has admittedly gone only to the petitioner. In reply to the application the respondent no. 1 contended that the reference to arbitration is not under the purchase order/s, but is under the order of 6th September, 2009 of the Lok Adalat. The respondent no. 1 contended that the entire controversy in the Suit has been referred to arbitration and inasmuch as the suit included contentions and prayers against the respondents no. 2 to 5, the reference is qua not just the petitioner, but also the respondents no. 2 to 5.

7. The arbitrator, after considering the contentions of the parties, allowed the application and directed deletion of respondents no. 2 to 5 from the array of respondents in the arbitration. He reasoned:

7(i) The Suit was filed challenging the invocation of the bank guarantee – itself issued under the purchase orders that contain the arbitral clause/s – and the appropriation of monies therefrom by the petitioner.

7(ii) The Suit was referred to Lok Adalat on the basis of an application by the Petitioner.

7(iii) The Lok Adalat, by its order of 6th September, 2009, referred the matter to arbitration.

7(iv) The claim in the arbitration is filed seeking recovery of the same amount, on the same cause of action.

7(v) For an arbitration to commence, it has to be based on an agreement between the parties who have a defined legal relationship inter se.

7(vi) In the instant case, the relevant arbitral clause is the arbitral clause found in the purchase orders, on the basis of which the Suit, as well as the claim is filed.

7(vii) The respondents no. 2 to 5 are neither a necessary parties, nor proper parties to the proceedings, inasmuch as the respondents no. 2 to 5 are not party to the said arbitration agreement; (b) inasmuch as they did not deal with the respondent no. 1 in their personal capacity; and (c) inasmuch as the proceeds of the encashment of the bank guarantee has not gone to them.

8. Impugning this decision of the arbitrator, the appeal was preferred by the respondent no. 1 as aforesaid. In the appeal, the primary ground of challenge was that the arbitral clause/s in the purchase orders are not the relevant arbitration agreement qua the instant reference and the reference has been entered into by the parties on the basis of the order of 6th September, 2009 of the Lok Adalat, which referred all the controversies between the parties including those against the respondents no. 2 to 5. The petitioner herein, in reply, contended inter alia that the compromise application was, in any case, filed only by the petitioner and the respondent no. 1 and that the respondents no. 2 to 5 were not parties to the same.

9. The appeal was allowed by the impugned order. It, inter alia, reasoned:

9(i) The Suit was filed against the respondent no. 2 to 5 as well as the petitioners.

9(ii) The contract between the parties provides for resolution of disputes by arbitration before GM/(TBG), BHEL, Bhopal or any other person the sole arbitrator may nominate.

9(iii) Upon the Suit being referred to the Lok Adalat, a joint application was filed by the parties seeking reference to arbitration before GM (TBGMM), BHEL, Integrated Office Complex, Lodhi Road, New Delhi.

9(iv) This application seeking reference to arbitration is not only of disputes arising under the contract between the parties, but also qua alleged unlawful encashment on the bank guarantee.

9(v) By the order of 6th September, 2009, the Lok Adalat allowed this application and referred the parties before it to arbitration.

9(vi) Since on the date of passing of the order of 6th September, 2009, the logical sequitur thereof is that the order of reference of 6th September, 2009 is qua all the respondents before the Lok Adalat, including the respondents no. 2 to 5.

9(vii) The Suit had allegations of fraud and prayers against respondents no. 2 to 5 as well, which cause of action still subsists against them.

9(viii) The arbitrator has clearly misconducted the proceedings by assuming that the reference was under the contracts between the parties, when it was under the order of 6th September, 2009.

9(ix) Thus, the respondents no. 2 to 5 are necessary parties to the arbitration proceedings and ought to not have been deleted.

10. Aggrieved by the same, the petitioner has preferred the instant petition as aforesaid. Mr. Sudhir Nandrajog, learned Senior Counsel for the petitioner submits that the impugned order is patently illegal and contrary to the records. He submits that the order of 6th September, 2009 of the Lok Adalat cannot bind the respondents no. 2 to 5, given that they never appeared before the Lok Adalat, nor were they party to the joint compromise application. He drew the attention of the Court to the copy of the joint compromise application wherein only the signature of the authorised representative of the petitioner is affixed on behalf of the defendants. He submits that the said authorised representative was not authorised by the respondents no. 2 to 5 to represent them in their respective personal capacities in the proceedings, and hence, in any case, the said representative could not have agreed to any consent order on their behalf. He submitted that the impugned order, to the extent that it refers to arbitration persons who are not party to the purchase orders nor to the order of 6th September, 2009, is patently illegal and without jurisdiction.

11. In reply, the learned Counsel for the respondent contended that there is no infirmity in the impugned order. He submitted that the

compromise application was filed on behalf of all the parties before the Lok Adalat, including and on behalf of the respondents no. 2 to 5. He submitted that the order of 6th September, 2009, which was an order passed with the consent of the parties on the basis of the joint compromise application is binding on all parties to the Suit. It was contended that the Suit in itself had allegations of fraud and breach of trust – issues not directly arising out of the purchase orders – and hence any agreement to refer to arbitration would include such disputes over an above the issues arising out of the purchase order. Given that the order of the Lok Adalat referred all parties to arbitration, the logical sequitur thereof is that the respondents no. 2 to 5 were also referred to arbitration. Hence, he submitted, the impugned order was not in error of law and ought not to be interfered with.

12. I have perused the impugned order, the documents on record and have considered the submissions of the parties, and I am inclined to allow the petition. The impugned order is clearly in excess of the learned ADJ's jurisdiction as it has, in effect, compelled the respondents no. 2 to 5 to resolve their disputes with respondent no. 1 by arbitration, when there was no agreement – as contemplated under section 7 of the Act – on record before it. It is a well established rule of law that the scope of a reference to arbitration has to be decided on the basis of the terms of the arbitration agreement (see **Hindustan Petroleum Corporation Ltd v Pinkcity Motors,** (2003) 6 SCC 503). The issue, in the instant matter, however, is as to which document bears the relevant arbitral clause as contemplated under section 7 of the Act.

13. It was in this background that the arbitrator, as earlier observed, had held that the relevant agreement in the reference before him as contemplated by section 7 of the Act is the arbitral clause/s found in the purchase orders. On this basis, the arbitrator held that since respondents no. 2 to 5 are not party to the same, they cannot be bound by the arbitral clause/s therein; he thus directed that respondents no. 2 to 5 be deleted from the record. The learned ADJ, reversed this finding and held that the relevant agreement for the purpose of considering the scope of reference is the order of the Lok Adalat dated 6th September, 2009. Although the petitioner contended that this finding is itself in error of law, this court

does not deem it appropriate to interfere with the same in exercise of its revision / supervisory jurisdiction, being a possible interpretation, given the facts of the case.

14. However, the learned ADJ proceeded further to hold that since the respondents no. 2 to 5 were parties to the Suit, the reference by the order dated 6th September, 2009 is binding upon them as well. This, the petitioner submits, is in error of law and is contrary to the records. There is considerable force in this submission. It is evident from the records before the learned ADJ that the joint compromise application was executed on behalf of the defendants therein by a Mr. Swayam Prakash, who is admittedly the authorised representative of the petitioner. There is nothing on record to indicate that the respondents no. 2 to 5 had authorised the said Mr. Swayam Prakash to represent them before the arbitrator. In any case, the respondent no. 1 has neither contended nor produced any document to show anything to the contrary.

15. The Supreme Court, in the case of **Indowind Energy Ltd v Wescare (India) Ltd & Anr,** (2010) 5 SCC 306, had occasion to consider the issue of when an arbitral agreement can be said to exist between two persons. It held:

> 12. An analysis of sub-sections (2), (3) and (4) of Section 7 shows that an arbitration agreement will be considered to be in writing if it is contained in: (a) a document signed by the parties; or (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other, or (d) a contract between the parties making a reference to another document containing an arbitration clause indicating a mutual intention to incorporate the arbitration clause from such other document into the contract.
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> 13. It is fundamental that a provision for arbitration to constitute an arbitration agreement for the purpose of Section 7 should satisfy two conditions: (i) it should be between the parties to the dispute; and (ii) it should relate to or be applicable to the dispute.

(See **Yogi Agarwal v. Inspiration Clothes & U** [(2009) 1 SCC 372] .)

16. In the present case, the respondents no. 2 to 5 are not party to any agreement embodied in a document with the respondent no. 1 agreeing to refer their disputes to arbitration. Nor is it the case of the respondent no. 1 that there has been an exchange of statements of claims and defence in which it had alleged the existence of an arbitration agreement and the same has been accepted and not denied by the respondent no. 2 to 5 in their defence statement. It is also not the case of the respondent no. 1 that any exchange of letters, telex, telegrams, or other means of telecommunications referred to provide a record of any arbitration agreement between the parties. Thus all that remains to be seen is whether there is any document signed by the parties as provided in clause (a) of sub-section 4 of section 7 of the Act.

17. Admittedly, the respondents no. 2 to 5 are not party to the purchase orders. The respondent no. 1 has not let any evidence or even pleadings to contend that the respondents no. 2 to 5 had consented – before the Lok Adalat – that the matter be referred to arbitration. Given the same, the findings of the learned ADJ that the order of 6th September, 2009 of the Lok Adalat is binding upon the respondents no. 2 to 5 is in excess of jurisdiction and patently illegal – being contrary to the records. Consequently, the impugned order deserves to be and is accordingly set aside. For the above reason, the petition is allowed; there shall be no order as to costs.

ILR (2014) II DELHI 1138

OMP

NATIONAL HIGHWAYS AUTHORITY OF INDIA ....PETITIONER

VERSUS

PCL SUNCON (JV) ....RESPONDENT

(RAJIV SHAKDHER, J.)

OMP NO. : 627/2013 DATE OF DECISION: 08.01.2014.

Arbitration & Conciliation Act, 1996—Section 34—Arbitral Tribunal awarded Rs. 2,29,50,919/- on account of the fact that during execution of the work, certain items of the bill of quantities were omitted resulting in loss of overheads and profits to the respondent—The claim thus pertains to reimbursement sought on the account. Held, the contract between the parties required no interpretation as the plain language of the clauses signified intent of the parties—No compensation was to be paid so long as variations do not cross 15% of the contract price—Held, ignoring this intent of the parties and granting compensation for losses at a certain percentage point of the value of omitted item, is contrary to the plain intent of the parties. Held that, interpretation of provisions of contracts is within the exclusive domain of the arbitrator. Unless the interpretation is implausible or absurd, the Courts will not interdict a decision of the arbitrator. In other words, if only one interpretation is possible and the arbitrary tribunal chooses to ignore the same, the Court is not obliged to accept the interpretation given by the arbitral tribunal. The arbitral tribunal is not to ignore the law or misapply the law. The arbitrator cannot ignore the specific terms of the

contract. Scope of interpretation arises only if there is ambiguity in the terms of the contract. In absence of such a situation, there is no scope of interpretation. However, the route of interpretation is not available, when words are plain and unambiguous.

Impugned award set aside partially.

[Di Vi]

APPEARANCES:

FOR THE PETITIONER : Ms. Padma Priya and Ms. Meenakshi Sood, Advocates.

FOR THE RESPONDENT : Mr. Amit George, Advocate.

CASES REFERRED TO:

1. *National Highways Authority of India* vs. *ITD Cementation India Ltd.,* (2009) 3 Arb. L.R. 268 (Delhi).
2. *Steel Authority of India Ltd.* vs. *Gupta Brother Steel Tubes Ltd.,* (2009) 10 SCC 63.
3. *Great Western Railway & Midland Railway* vs. *Bristol Corporation* (1918) 87 LJ Ch. 414.
4. *I.R.C.* vs. *Raphael* (1935) A.C. 96].

RESULT: Petition partially allowed.

RAJIV SHAKDHER, J.

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short the Act) to assail the award dated 24.02.2013.

2. The petitioner has challenged the findings returned with respect to three claims. The fourth claim, which relates to cost of arbitration, is obviously not challenged because the arbitral tribunal has not awarded any amount in respect of the same to the respondent. The respondent is the original claimant before the arbitral tribunal. The petitioner herein evidently had raised no counter claim.

3. Insofar as claim No.1 is concerned, which pertains to dispute No.7, as between the parties, as told to me, was decided in favour of the respondent in view of the fact that it was covered by a judgment of the Division Bench of this Court dated 14.08.2013, passed in FAO(OS) No.366/2013 titled M/s National Highways Authority of India vs. M/s Gammon-Atlanta (JV). This aspect was recorded by me, in my order dated 30.09.2013.

4. Therefore, all that I am required to consider is: the petitioner's objection to claim No.2, which I am told pertains to dispute No.8; and claim Nos. 3(a), 3(b) and 3(c), which relate to: "past", "pendente lite" and "future interest".

5. Under claim No.2, the arbitral tribunal has awarded a sum of Rs.2,29,50,919/-. In respect of past period (which is the pre-reference period), interest has been awarded at the rate of 12% p.a. compounded monthly; as per the terms of clause 60.8 (b) of Conditions of Particular Application (COPA), whereas for pendente lite and the period post the date of the award, it has been granted at 12% simple.

6. With the aforesaid preface in place, let me first deal with the grievance of the petitioner vis-a-vis claim No.2.

6.1 This claim has arisen on account of the fact that during the execution of the work, certain items of the Bill of Quantities (BOQ) were omitted. According to the respondent, the omission of BOQ items resulted in loss of overheads and profits. The claim, thus, pertained to reimbursement sought on that account. Though the petitioner claims that the respondent was responsible for not executing the BOQ items in issue, from the material retrieved at site, the respondent takes a completely different stand, which is that no specific directions were issued in that behalf.

6.2 It is not in dispute, though, that the respondent vide letter dated 04.04.2008 called upon the engineer appointed to issue, the necessary variation order, under clause 52.1 of the General Conditions of the Contract (GCC). The respondent sought a variation order, valued at Rs.20,14,58,749/-.

6.3 The loss claimed towards overhead and loss of profit was a percentage point of the said value. The arbitral tribunal awarded 8% for loss of overheads and 10% qua loss of profit (including loss of profit on overhead charges). The cumulative figure awarded was Rs. 2,29,50,919/-.

6.4 In the context of the above, it requires to be noticed that it is also not in dispute that the engineer, vide letter dated 03.11.2008, indicated to the respondent, that no variation order could be issued at that stage, as the contract was in the process of execution. In other words, stand taken by the engineer was that the request made for issuance of a variation order at that point in time was pre-mature.

6.5 The respondent, appears, to have carried its grievance to the Dispute Resolution Board (in short the DRB) under sub-clause 67.1 of COPA. The DRB apparently came to the same conclusion; which is how, the matter got referred to the arbitral tribunal. Pertinently, though the petitioner took a preliminary objection with regard to the arbitral tribunal not having jurisdiction in the matter as no decision was rendered by the DRB, the arbitral tribunal rejected the petitioner's preliminary objection under Section 16 of the Act. The grievance vis-a-vis the rejection of the preliminary objection has not been pressed before me, on behalf of the petitioner.

SUBMISSIONS OF COUNSELS

7. It is, therefore, the case of the petitioner before me, which was put forth by Ms. Padma Priya, that claim no.2 has been wrongly awarded in favour of the respondent for the following reasons :-

7.1. The award qua claim no.2 is contrary to the specific terms of the contract and therefore, the arbitral tribunal exceeded the remit of its jurisdiction. The variations construed had to be valued by keeping in mind the specific clauses of the contract, these being: clauses 51.1, 52.1, 52.2 and 52.3.

7.2 It was the submission of Ms. Padma Priya that the variation contemplated under clause 51.1 could take place on various accounts

such as increase or decrease in the quantity of any work included in the contract or even omission of any such work. In the instant case, according to Ms. Padma Priya, the variation being in the nature of an omission, the valuation could be made either in terms of clause 52.1 or 52.2, bearing in mind though, the cap or the limitations provided in clause 52.3.

7.3. Ms. Padma Priya, though candidly conceded that the provisions of clause 52.2 of the GCC had not got triggered in the present case in view of the fact that the item omitted did not fulfil the conditions prescribed in the proviso to the said clause. The proviso, clearly, prescribed that no change in the rate or price of any item in the contract could be considered unless such item(s) account(s) for an amount, which is more than 2% of the contract price and that the actual quantity of the work executed under the item(s) exceed(s) or fall(s) short of the quantity set out in the BOQ by more than 25%.

7.4 It was Ms. Padma Priya's contention that the valuation of variation thus, under clause 52.1, would have to adhere to the restrictions or the limiting conditions prescribed in clause 52.3 of the GCC. For this purpose, Ms. Padma Priya drew my attention to clause 52.3 of the GCC, which categorically provides that only such additions or deductions of the contract price will be made, which are in excess of 15% of the contract price.

8. As against this, Mr. George, the learned counsel for the respondent, stated that the valuation of the omitted items had to be carried out "independently" in terms of clause 52.1 of the GCC, without regard to the provisions of clauses 52.2 and 52.3 of the GCC. It was Mr. George's contention that what the respondent had sought was valuation of omitted items and not re-fixation of rates of the BOQ items. In other words, to put it simply, it was his contention that the valuation of the omitted work / varied work had to be carried out under clause 52.1. It was, also, his contention that clause 52.2 provided for re-fixation of rates and prices of BOQ items provided the conditions contained in the proviso, as indicated above, are fulfilled. This clause i.e., 52.2, according to Mr. George, was not applicable.

8.1 It was his submission that therefore, re-fixation of rates and prices of the BOQ items under clause 52.2 or valuation of variation under clause 52.1 were independent of each other, and therefore, their overall effect on the contract price could have no bearing on the valuation of varied work under sub clause 52.1.

8.2 Mr. George submitted that the BOQ item in issue i.e., Item no.3.01 (b) was not made operable even after a Taking-Over-Certificate was issued. He, therefore, denied the submissions made by the petitioner in that behalf.

8.3 In support of his submissions, the learned counsel for the respondent relied upon the judgment of this court in the case of **National Highways Authority of India Vs. ITD Cementation India Ltd.,** (2009) 3 Arb. L.R. 268 (Delhi) and that of the Supreme Court in the case of **Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd.,** (2009) 10 SCC 63. It was Mr. George's contention that the issue involved was one which related to interpretation of the contract and therefore, was not amenable to correction even if the arbitrator committed an error in that behalf.

REASONS

9. Having heard the learned counsel for the parties, what clearly emerges is as follows :-

9.1. The scope for interference by a court in a matter of this kind is limited. The judgments cited by the learned counsel for the respondent enunciate a principle which one cannot quibble with. The principle briefly summarised is as follows :-

9.2 Interpretation of provisions of the contract is within the exclusive domain of the arbitrator. Unless the interpretation is implausible or absurd, the courts will not interdict a decision of the arbitrator. In other words, if only one interpretation is possible and the arbitral tribunal chooses to ignore the same, the court is not obliged to accept the interpretation given by the arbitral tribunal. The arbitral tribunal is not to ignore the law or mis-apply the law. The arbitrator, cannot, ignore the specific terms of

the contract as he is a creature of the agreement obtaining between the parties (see **National Highways Authority of India Vs. ITD Cementation India Ltd.**).

10. The question really is : which side of the line does this case fall. Is this a case of interpretation of the terms of the contract or, is this a case of, the arbitrator, ignoring the specific terms of the contract. If I may add to the principle enunciated above, in my view, the scope of interpretation arises only if there is ambiguity in the terms of the contract. In other words, where there is a scope for at least two, very possible, but diametrically opposite views. In such circumstances, the court would not superimpose its view on the view taken by the arbitral tribunal, just because it does not concur with the view of the arbitral tribunal even if it is a possible view. In the absence of such a situation, there is no scope for interpretation as, plain meaning of the words should enable the court to reach a conclusion, as to what would be the intent of parties at the time when they entered into a contract.

10.1 The object is to get to the true intent of the parties. However, the route of interpretation is not available, when words are plain and unambiguous. In ascertaining the true intent of the parties, the court is required to look at the words used in the contract. The word intent is often used to mean "motive", "purpose", "desire" or even "state of mind" and not as intention expressed by the words used in the contract. To attempt to discover intention of parties contrary to the meaning conveyed by words employed in the contract cannot be termed as interpretation but is a recipe for confusion. [See **Great Western Railway & Midland Railway vs Bristol Corporation** (1918) 87 LJ Ch. 414 and **I.R.C. vs Raphael** (1935) A.C. 96]. Therefore, in my view, the judgment of the Supreme Court in **Steel Authority of India Ltd.'s** case does not lay down any different principle.

11. In the present situation, therefore, in order to get to the intent of the parties, it may be necessary to extract the relevant provisions of the contract. For the sake of convenience, the same are extracted hereinafter to the extent relevant for the instant case :-

"Variations	51.1	The Engineer shall make any variation of the form, quality or quantity of the Works or any part thereof that may, in his opinion, be necessary and for that purpose, or if for any other reason it shall, in his opinion, be appropriate, he shall have the authority to instruct the Contractor to do and the Contractor shall do any of the following : a). increase or decrease the quantity of any work included in the contract. b). omit any such work (but not if the omitted work is to be carried out by the Employer or by another contractor). (Emphasis supplied). c). change the character or quality or kind of any such work d). change the levels, lines, position and dimensions of any part of the works. e). execute additional work of any kind necessary for the completion of the works, or f). change any specified sequence or timing of construction of any part of the Works. No such variation shall in any way vitiate or invalidate the contract, but the effect, if any, of all such variations shall be valued in accordance with clause 52. Provided, that where the issue of an instruction to vary the works is necessitated by some default of or breach of contract by the contractor or for which he is responsible, any additional cost attributable to such default shall be borne by the contractor. (Emphasis supplied)
Valuation of variations	52.1	All variations referred to in Clause 51 and any additions to the Contract Price which are required to be determined in accordance with Clause 52 (for the purposes of this Clause referred to as

		"varied work") shall be valued at the rates and prices set out in the Contract if, in the opinion of the Engineer, the same shall be applicable. If the Contract does not contain any rates or prices applicable to the varied work, the rates and prices in the Contract shall be used as the basis for valuation so far as may be reasonable, failing which, after due consultation by the Engineer with the Employer and the Contractor, suitable rates or prices shall be agreed upon between the Engineer and the Contractor. In the event of disagreement the Engineer shall fix such rates or prices as are, in his opinion, appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisional rates or prices to enable on-account payments to be included in certificates issued in accordance with Clause 60.
Power of Engineer to Fix Rates	52.2	Provided that if the nature or amount of any varied work relative to the nature or amount of the whole of the works or to any part thereof, is such that, in the opinion of the Engineer, the rate or price contained in the Contract for any item, of the Works is by reason of such varied work, rendered inappropriate or inapplicable, then, after due consultation by the Engineer with the Employer and the Contractor, a suitable rate or price shall be agreed upon between the Engineer and the Contractor. In the event of disagreement the Engineer shall fix such other rate or price as is, in his opinion, appropriate and shall notify the Contractor accordingly, with a copy to the Employer. Until such time as rates or prices are agreed or fixed, the Engineer shall determine provisional rates or prices to enable on-account payments to be included in

		certificates issued in accordance with Clause 60. Provided also that no varied work instructed to be done by the Engineer pursuant to Clause 51 shall be valued under Sub-Clause 52.1 or under this Sub-Clause unless, within 14 days of the date of such instruction and other than in the case of omitted work, before the commencement of the varied work, notice shall have been given either: (a)By the Contractor to the Engineer of his intention to claim extra payment or a varied rate or price, or (b)By the Engineer to the Contractor of his intention to vary a rate or price. ***Provided further that no change in the rate or price for any item contained in the contract shall be considered unless such item accounts for an amount more than 2 percent of the Contract Price, and the actual quantity of work executed under the item exceeds or falls short of the quantity set out in the Bill of Quantities by more than 25 percent.***
Variations Exceeding 15 percent	52.3	If on the issue of the Taking-Over Certificate for the whole of the Works, it is found that as a result of: (a) all varied work valued under Sub-Clauses 52.1 and 52.2, and (b) all adjustments upon measurement of the estimated quantities set out Bill of Quantities, excluding Provisional Sums, day works and adjusted price made under Clause 70. But not form any other cause, there have been additions to or deductions Contract Price which taken together are in excess of 15 per cent of

	the Contract, Price (which for the purposes of this Sub-Clause shall Contract Price, excluding Provisional Sums and allowance for daywork then and in such event (subject to any action already taken under Sub-Clause of this Clause), after due consultation by the Engineer Employer and the Contractor, there shall be added to or deducted Contract Price such further sum as may be agreed between the Contractor, Engineer or, failing agreement, determined by the Engineer having regard Contractor's Site and general overhead costs of the Contract. The Engineer notify the Contractor of any determination made under this Sub-Clause copy to the Employer. Such sum shall be based only on the amount by additions or deductions shall be in excess of 15 per cent of the Effective Price." (Emphasis is mine)

12. The counsels before me do not dispute that variations are envisaged under clause 51.1. Some variations are "instructed variations" by the engineer concerned and some relate to variations which are not instructed. (see **National Highways Authority of India Vs. ITD Cementation India Ltd.**). We are here dealing with omitted items which, both counsels agree fall within the scope of clause 51.1. What one is required to find out is the manner in which the variation is to be valued. It the submission of the counsel for the respondent that valuation can be made only under clause 52.1 and, dehors, the limitation expressed in clause 52.3. The learned counsel for the petitioner argues against this submission. Both counsels in their submissions agreed that the pre-requisites provided in clause 52.2 were not fulfilled, for it to be triggered. The conditionalities prescribed being: that the value of the varied item (omitted item in this case) did not exceed 2% of the contract price and that the actual quantity of the varied item neither exceeded nor fell short of more than 25% of the BOQ.

12.1 The counsels, therefore, in nutshell disagreed on the application of the provisions of clause 52.3.

13. In my view, the plain reading of clause 52.3 would show that it begins with sub clause (a) which refers to both clauses 52.1 and 52.2. Therefore, any adjustment to the contract price which is made by varying the valuation either under clauses 52.1 or 52.2 would have to be governed by the limitation prescribed under clause 52.3. Clause 52.3 clearly provides that unless valuation leads to addition or deduction in the contract price in excess of 15%, it shall not be given effect to. It is not the case of the respondent that the variation was in excess of 15% of the contract value. The arbitral tribunal's decision to the contrary, is in my opinion, completely contrary to the plain wording of the clause 52.3. In these circumstances, the decision of the arbitral tribunal, on that score, will have to be set aside. The rationale of the arbitral tribunal appears to be that valuation has to be carried out "only" under clause 52.1 dehors the provisions of clause 52.3. In my view, this conclusion is contrary to the plain provisions of clause 52.3 which takes into its fold the valuation of variations made both under clauses 52.1 and 52.2. The reliance of the learned counsel for the respondent on the decision of this court in **National Highways Authority of India Vs. ITD Cementation India Ltd.** on facts, will have no applicability as that case dealt with issue of extension of rebate qua instructed variations, that is, variations carried out at the instruction of the engineer. It was NHAI's contention that the rebate ought to be available on all works executed by ITD Cementation India Ltd. (the respondent in that case), including on variation and additional structures. The tribunal disagreed and therefore, the matter reached the High Court.

13.1 A Single Judge of this Court upheld the view taken by the arbitral tribunal, inter alia, on the ground that it was a matter which related to interpretation of the contract, and since, it was a plausible view, no interference was called for by the court. The court was not called upon to rule on the applicability of clause 52.3. Since there was ambiguity on the aspect of extensions of rebate to instructed variation(s), the court thought it fit not to trench upon the wisdom of the arbitral tribunal. The use of interpretative tools to ascertain the intent of parties to the contract, in the given fact situation, was thus clearly justifiable.

13.2 However, in the instant case, as indicated above, no

interpretation is required. The plain language of the clauses in issue signifies the intent of the parties. The intent is this: Like every other contract parties have right to vary a contract, during the course of its execution. The variations could take several forms, such as, increase or decrease in work or even omissions and additions. However, as long as, such variations do not cross a particular bandwidth, which is, 15% of the contract price, no compensation is to be paid. To ignore this intent of parties and to grant compensation for losses apparently suffered by the respondent on account of overheads and profits, at a certain percentage point of the value of omitted item is, in my view, contrary to the plain intent of the parties.

14. As far as claim nos. 3(a), 3(b) and 3(c) are concerned, one cannot find fault with the award under these heads except to the extent that grant of interest under claim no.2 will get excluded in view of my finding hereinabove, that the award of money under claim no.2 was unwarranted.

14.1 There are two objections taken qua claim nos.3(a), 3(b) and 3(c). First, that the interest is compounded monthly at the rate of 12%, for the pre-reference period. Second, that the rate of 12% itself is excessive.

14.2 In so far as the first objection is concerned, no fault can be found as clause 60.8 (b) of COPA allows for compounding on a monthly basis. As regards the second objection, one can safely say that, interest rates have varied between 9% and 12% in the recent times. The statutory rate for the period post the date of award, if nothing is explicitly said by the arbitral tribunal, is: 18% p.a. The arbitral tribunal in fixing rate of 12% p.a., has kept in mind the yardstick of prime lending rate plus 2%. Since that worked out to a higher figure, it was scaled down to 12%.

14.3 Thus, having regard to these facts, it would be best if, I were not to interfere with discretion employed by the arbitral tribunal. Especially, in the circumstance that: it is a commercial transaction; there is no apparent impecuniosity of the petitioner revealed before the arbitral tribunal or thereafter; and the rate fixed does not seem to be unconscionably

excessive, in the facts and circumstances of the instant case. The challenge qua these claims is rejected.

15. For the foregoing reasons, the impugned award is set aside to the extent it allowed claim no.2 and granted interest thereon to the respondent.

16. The petition is disposed of in the above terms. The parties, however, shall bear their own costs.

ILR (2014) II DELHI 1151
CS (OS)

SURESHTA MALHOTRA ....PLAINTIFF

VERSUS

URMILA RANI CHADHA & ORS. ....DEFENDANTS

(G.S. SISTANI, J.)

CS (OS) NO. : 1760/2011 DATE OF DECISION: 08.01.2014

Code of Civil Procedure, 1908—O. VII Rule 11(a), (b) & (c). Held, while deciding an application U/O.7 R. 11 CPC, Court is not required to take into consideration the defence set up by the defendant in his written statement—The question whether plaint discloses any cause of action, is to be decided from the averments of plaint itself. Strength and weakness of the case of plaintiff cannot be weighed for deciding such application. Assertions in the plaint must be assumed to be correct and Court cannot take into consideration whether the plaintiff may ultimately succeed or not.

[Di Vi]

APPEARANCES:

FOR THE PLAINTIFF : Mr. M. Tarique Siddiqui, Advocate.

FOR THE DEFENDANT : Mr. Lalit Gupta, Mr. Payal Gupta and Mr. P. Gautham, Advs. for defendants no.1 and 2 along with defendants in person. Mr. Tushar Roy, Proxy Adv. for Mr. Sanjay Agarwal, Adv. for defendant no.3. Mr. S.S. Jauhar, Adv. for defendant no.5.

CASE REFERRED TO:

1. *Mayar [H.K.] Ltd. & Ors.* vs. *Owners & Parties, Vessel M.V. Fortune Express & Ors.* AIR 2006 SC 1828.

RESULT: Application Dismissed.

G.S. SISTANI, J. (ORAL)

I.A. 15350/2013.

By the present application filed under Order VII Rule 11(a) (b) and (c) CPC defendant no.5 pays that the plaint be rejected.

Plaintiff has filed the present suit for declaration, mandatory and permanent injunction against the defendants seeking a declaration, inter alia, that the plaintiff is the absolute owner of second floor and terrace of the property bearing No.E-65, Greater Kailash Enclave, Part-I, New Delhi. A declaration is also sought declaring the Agreement to Sell dated 5.5.2010 entered into between the plaintiff and defendant no.4, for which the earnest money was paid by defendant no.5, as null and void and unenforceable.

The main thrust of the arguments of learned counsel for the applicant/ defendant no.5 is that late Sh.Rajinder Nath Chaddha, father of plaintiff and defendants no.1 and 2 had left behind a Registered Will dated 7.2.1996. As per the said Will, the property was bequeathed to his wife. Based on the Will his wife entered into a Collaboration Agreement with defendant

no.4, as per which the builder was entitled to basement, second floor, third floor and terrace of the property in question together with stilt parking, except two parkings, which were to fall into the share of the owner, besides the ground floor and the first floor. It is further the contention of counsel for the applicant that since upon the death of late Sh.Rajinder Nath Chaddha his wife became the absolute owner she had full right over the property in question. Portion of the Will dated 7.2.1996, which is sought to be relied upon by counsel for the applicant, reads as under:

> "I have only two daughters namely Mrs.Sureshta Malhotra and Ms.Shashi Vohra both of them married and well placed. My wife is also alive and her name is Smt.Urmila Rani Chadha. I want to make this Will regarding my house in the following manner:-
>
> > So long as I am alive I will remain owner of the said house. In case I die before my wife, my wife will be the absolute owner of the said house. She will have full rights to live in it and to collect the rent from the tenant if any."

In view of the above submission and based on the Will it is submitted by counsel for defendant no.5 that there is no cause of action for filing the present suit.

Counsel for the plaintiff has opposed this application. It is contend by counsel for the plaintiff that the Will of late Sh.Rajinder Nath Chaddha is not to be read in isolation and upon reading of the Will as a whole, it is clear that only a life interest was created in favour of the wife and thereafter the property was to be distributed as per the wishes of the Testator, which is duly detailed in the Will. With regard to the deficiency of the court fee, it is denied that the plaintiff has paid insufficient court fee. Learned counsel for the plaintiff further submits that the present suit has been filed for declaration, mandatory and permanent injunction against the defendants. The value of the suit property for the purpose of pecuniary jurisdiction of this court and for the purpose of declaration of ownership of the suit property is fixed at Rs.21,00,000/-; for the purpose of other two declaration is fixed at Rs.200/-, each; for the purpose of mandatory

and permanent injunction is fixed at Rs.200/- each and, thus, the required court fees has been paid. Counsel further submits that as per section 7(iv)(c) of the Court Fees Act, 1870, for a declaratory decree, the amount of the court fees payable is according to the amount at which the relief sought is valued in the plaint. In the present suit, the relief for declaration has been valued at Rs.21,00,000/- and, accordingly, required court fee of Rs.22,840/- has been paid.

I have heard learned counsel for the parties and considered their rival submissions.

Order VII Rule 11 CPC reads as under:

"11. Rejection of plaint. - The plaint shall be rejected in the following cases:—

(a) where it does not disclose a cause of action;

(b) where the relief claim is under valued, and the plaintiff, on being required by the Court to so correct the valuation within a time to be fixed by the Courts, fails to do so.

(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

[(e) where it is not filed in duplicate;

[(f) where the plaintiff fails to comply with the provisions of rule 9:]]

[Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not

be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff."

If on reading of the plaint meaningfully it is found that the plaint is manifestly vexatious, meritless and does not disclose a clear right to sue, the plaint must be rejected. Also if there is no cause of action, the plaint must be rejected. A reading of Order VII Rule 11 CPC makes it abundantly clear that while deciding an application under Order VII Rule 11 CPC, the court is not required to take into consideration the defence set up by the defendant in his written statement. The question whether plaint discloses any cause of action, is to be decided by looking into the averments contained in the plaint itself. Further at the time of consideration of the application under order 7 Rule 11 the CPC, the Court must not weigh the strength and weaknesses in the case of the plaintiff. The assertions made in the plaint must be assumed to be correct and the Court must not take into consideration the allegations made by the defendant in the written statement. While deciding the application the Court cannot keep into consideration whether the plaintiff may ultimately succeed or not. The Court is not to go into the correctness or falsity of the allegation. It will be useful to reproduce the observations of the Supreme Court as reported in **Mayar [H.K.] Ltd. & Ors. Vs. Owners & Parties, Vessel M.V. Fortune Express & Ors.** AIR 2006 SC 1828:

"11. From the aforesaid, it is apparent that the plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint. The Court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the Court exercising the powers under Order VII, Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirely taking those averments to be correct. A cause of

action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, willful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, mere fact that in the option of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint. In the present case, the averments made in the plaint, as has been noticed by us, do disclose the cause of action and, therefore, the High Court has rightly said that the powers under Order VII, Rule 11 of the Code cannot be exercised for rejection of the suit filed by the plaintiff-appellants."

The applicant has sought rejection of the plaint, primarily on the ground that as per the Will of late Sh.Rajinder Nath Chadha the property was bequeathed exclusively to his wife, who entered into a Collaboration Agreement and, thus, the plaint should be rejected. The portion of the Will, relied upon by learned counsel for the applicant, has been extracted hereinabove, but a complete reading of the Will would show that only a life interest was created in favour of his wife. In fact, the testator had desired that the property be distributed amongst his children in the following manner:

"After the death of me and my wife the property will be distributed as under:-

(i) Ground Floor : I want that after me and my wife this portion may be given to Abhishek Vohra son of Mrs.Shashi Vohra wife of Mr. Vinod Vohra. I treat Mr.Abhishek Vohra as my son. Since birth he is living with me and I have lots of love for him.

(ii) First Floor : I want that this portion may be given to my younger daughter Mrs.Shashi Vohra wife of Mr.Vinod Vohra. She has already built this floor, out of her own savings, sale of jewellery and her husband's income.

(iii) Second Floor : (Terrace of first floor) I want that this portion may be given to my elder daughter Smt.Sureshta Malhotra wife of Mr.Surender Malhotra. She will built this floor by her own means.

(iv) Third Floor and onwards all the floors may be distributed equally between my both the daughters i.e. Mrs.Sureshta Malhotra and Smt.Shashi Vohra.

(v) Stair Case adjoining E-64 should remain common for all the floors.

(vi) All takes and expense will be beared by my daughters of their concerned portions (Portion they own).

Presently my half portion on ground floor is on rent. After my death my wife is authorised to collect the rent and to sign the Rent Agreement. After my wife's death all the rights regarding rent and rent agreement will be shifted to my younger daughter Mrs.Shashi Vohra wife of Mr.Vinod Vohra."

The matter of interpretation of the Will would also be the subject matter of the present suit and, at this stage, it is not a ground to dismiss the suit.

In the present case, it cannot be said that the plaint does not disclose any cause of action, even otherwise the complete reading of the Will would show that late Sh.Rajinder Nath Chadha had given life interest to his wife and the wife could not enter into any Collaboration Agreement with respect to the property. As far as objection with regard to Court fee is concerned, leave, as prayed, is granted to the defendant to raise the same at the time of framing of issues and at the time of final hearing of the suit. Accordingly, application stands dismissed in view of above. It is made clear that the above observation made is not on the merits of the matter and the same is only for the purpose of deciding the present application.

CS(OS) 1760/2011

Let amended written statement be taken on record. Pleadings be completed within two weeks from today. Parties will file documents within two weeks.

List the matter before Joint Registrar on 14.4.2014 for admission/ denial of documents.

List the matter before Court on 21.5.2014 for framing of issues. Parties will bring suggested issues to Court on the next date of hearing.

At this stage, it is prayed by counsel for the parties that this matter may be listed before Delhi High Court Mediation and Conciliation Centre.

As prayed, list this matter before Delhi High Court Mediation and Conciliation Centre on 30.01.2014 at 4:00 pm. It is made clear that merely because the matter is being referred to Delhi High Court Mediation and Conciliation Centre, the schedule for completion of pleadings will not be disturbed.

ILR (2014) II DELHI 1159
CS (OS)

ABHISHEK VOHRA ....PLAINTIFF

VERSUS

SURESHTA MALHOTRA & ORS. ....DEFENDANT

(G.S. SISTANI, J.)

CS (OS) NO. : 3012/2011 DATE OF DECISION: 08.01.2014

Code of Civil Procedure, 1908—O.VII Rule 11(a), (b) & (c). Held, While deciding an application U/o.7 R. 11 CPC, Court is not required to take into consideration the defence set up by the defendant in his written statement. The question whether plaint discloses any cause of action, is to be decided from the averments of plaint itself. Strength and weakness of the case of plaintiff cannot be weighed for deciding such application. Assertions in the plaint must be assumed to be correct and Court cannot take into consideration whether the plaintiff may ultimately succeed or not.

[Di Vi]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Tushar Roy, Proxy Adv. for Mr. Sanjay Agarwal, Adv.

FOR THE DEFENDANT : Mr. M. Tarique Siddiqui, Adv. for defendant no.1. Mr. Lalit Gupta, Mr. Payal Gupta and Mr. P. Gautham, Advs. for defendants no.2 and 3 along with defendants in person. Mr. S.S. Jauhar, Adv. for defendant no.4.

CASE REFERRED TO:

1. *Mayar [H.K.] Ltd. & Ors.* vs. *Owners & Parties, Vessel M.V. Fortune Express & Ors.* AIR 2006 SC 1828.

RESULT: Application Dismissed.

G.S. SISTANI, J. (ORAL)

I.A. 15387/2013.

By the present application filed under Order VII Rule 11(a) (b) and (c) CPC defendant no.5 pays that the plaint be rejected.

Plaintiff has filed the present suit for declaration, mandatory and permanent injunction against the defendants seeking a declaration, inter alia, that the plaintiff is the absolute owner of second floor and terrace of the property bearing No.E-65, Greater Kailash Enclave, Part-I, New Delhi. A declaration is also sought declaring the Agreement to Sell dated 5.5.2010 entered into between the plaintiff and defendant no.4, for which the earnest money was paid by defendant no.5, as null and void and unenforceable.

The main thrust of the arguments of learned counsel for the applicant/defendant no.5 is that late Sh.Rajinder Nath Chaddha, father of plaintiff and defendants no.1 and 2 had left behind a Registered Will dated 7.2.1996. As per the said Will, the property was bequeathed to his wife. Based on the Will his wife entered into a Collaboration Agreement with defendant no.4, as per which the builder was entitled to basement, second floor, third floor and terrace of the property in question together with stilt parking, except two parkings, which were to fall into the share of the owner, besides the ground floor and the first floor. It is further the contention of counsel for the applicant that since upon the death of late Sh.Rajinder Nath Chaddha his wife became the absolute owner she had full right over the property in question. Portion of the Will dated 7.2.1996, which is sought to be relied upon by counsel for the applicant, reads as under:

> "I have only two daughters namely Mrs.Sureshta Malhotra and Ms.Shashi Vohra both of them married and well placed. My wife is also alive and her name is Smt.Urmila Rani Chadha. I want to

make this Will regarding my house in the following manner:-

> So long as I am alive I will remain owner of the said house. In case I die before my wife, my wife will be the absolute owner of the said house. She will have full rights to live in it and to collect the rent from the tenant if any."

In view of the above submission and based on the Will it is submitted by counsel for defendant no.5 that there is no cause of action for filing the present suit.

Counsel for the plaintiff has opposed this application. It is contend by counsel for the plaintiff that the Will of late Sh.Rajinder Nath Chaddha is not to be read in isolation and upon reading of the Will as a whole, it is clear that only a life interest was created in favour of the wife and thereafter the property was to be distributed as per the wishes of the Testator, which is duly detailed in the Will. With regard to the deficiency of the court fee, it is denied that the plaintiff has paid insufficient court fee. Learned counsel for the plaintiff further submits that the present suit has been filed for declaration, mandatory and permanent injunction against the defendants. The value of the suit property for the purpose of pecuniary jurisdiction of this court and for the purpose of declaration of ownership of the suit property is fixed at Rs.21,00,000/-; for the purpose of other two declaration is fixed at Rs.200/-, each; for the purpose of mandatory and permanent injunction is fixed at Rs.200/- each and, thus, the required court fees has been paid. Counsel further submits that as per section 7(iv)(c) of the Court Fees Act, 1870, for a declaratory decree, the amount of the court fees payable is according to the amount at which the relief sought is valued in the plaint. In the present suit, the relief for declaration has been valued at Rs.21,00,000/- and, accordingly, required court fee of Rs.22,840/- has been paid. I have heard learned counsel for the parties and considered their rival submissions.

Order VII Rule 11 CPC reads as under:

"11. Rejection of plaint. - The plaint shall be rejected in the following cases:—

(a) where it does not disclose a cause of action;

(b) where the relief claim is under valued, and the plaintiff, on being required by the Court to so correct the valuation within a time to be fixed by the Courts, fails to do so.

(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

[(e) where it is not filed in duplicate;

[(f) where the plaintiff fails to comply with the provisions of rule 9:]]

[Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff."

If on reading of the plaint meaningfully it is found that the plaint is manifestly vexatious, meritless and does not disclose a clear right to sue, the plaint must be rejected. Also if there is no cause of action, the plaint must be rejected. A reading of Order VII Rule 11 CPC makes it abundantly clear that while deciding an application under Order VII Rule 11 CPC, the court is not required to take into consideration the defence set up by the defendant in his written statement. The question whether plaint discloses any cause of action, is to be decided by looking into the averments contained in the plaint itself. Further at the time of consideration of the application under order 7 Rule 11 the CPC, the Court must not weigh the strength and weaknesses in the case of the plaintiff. The assertions made in the plaint must be assumed to be correct and the Court must not take into consideration the allegations made by the defendant in the written statement. While deciding the application the Court cannot keep into consideration whether the plaintiff may ultimately

succeed or not. The Court is not to go into the correctness or falsity of the allegation. It will be useful to reproduce the observations of the Supreme Court as reported in **Mayar [H.K.] Ltd. & Ors. Vs. Owners & Parties, Vessel M.V. Fortune Express & Ors.** AIR 2006 SC 1828:

> "11. From the aforesaid, it is apparent that the plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint. The Court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the Court exercising the powers under Order VII, Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirely taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, willful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, mere fact that in the option of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint. In the present case, the averments made in the plaint, as has been noticed by us, do disclose the cause of action and, therefore, the High Court has rightly said that the powers under Order VII, Rule 11 of the Code cannot be exercised for rejection of the suit filed by the plaintiff-appellants."

The applicant has sought rejection of the plaint, primarily on the ground that as per the Will of late Sh.Rajinder Nath Chadha the property was bequeathed exclusively to his wife, who entered into a Collaboration Agreement and, thus, the plaint should be rejected. The portion of the Will, relied upon by learned counsel for the applicant, has been extracted hereinabove, but a complete reading of the Will would show that only a life interest was created in favour of his wife. In fact, the testator had desired that the property be distributed amongst his children in the following manner:

"After the death of me and my wife the property will be distributed as under:-

(i) Ground Floor : I want that after me and my wife this portion may be given to Abhishek Vohra son of Mrs.Shashi Vohra wife of Mr. Vinod Vohra. I treat Mr.Abhishek Vohra as my son. Since birth he is living with me and I have lots of love for him.

(ii) First Floor : I want that this portion may be given to my younger daughter Mrs.Shashi Vohra wife of Mr.Vinod Vohra. She has already built this floor, out of her own savings, sale of jewellery and her husband's income.

(iii) Second Floor : (Terrace of first floor) I want that this portion may be given to my elder daughter Smt.Sureshta Malhotra wife of Mr.Surender Malhotra. She will built this floor by her own means.

(iv) Third Floor and onwards all the floors may be distributed equally between my both the daughters i.e. Mrs.Sureshta Malhotra and Smt.Shashi Vohra.

(v) Stair Case adjoining E-64 should remain common for all the floors.

(vi) All takes and expense will be beared by my daughters of their concerned portions (Portion they own).

Presently my half portion on ground floor is on rent. After my death my wife is authorised to collect the rent and to sign the Rent Agreement. After my wife's death all the rights regarding rent and rent agreement will be shifted to my younger daughter Mrs.Shashi Vohra wife of Mr.Vinod Vohra."

The matter of interpretation of the Will would also be the subject matter of the present suit and, at this stage, it is not a ground to dismiss the suit.

In the present case, it cannot be said that the plaint does not disclose any cause of action, even otherwise the complete reading of the Will would show that late Sh.Rajinder Nath Chadha had given life interest

to his wife and the wife could not enter into any Collaboration Agreement with respect to the property. As far as objection with regard to Court fee is concerned, leave, as prayed, is granted to the defendant to raise the same at the time of framing of issues and at the time of final hearing of the suit.

Accordingly, application stands dismissed in view of above. It is made clear that the above observation made is not on the merits of the matter and the same is only for the purpose of deciding the present application.

CS(OS) 3012/2011

Let amended written statement be taken on record. Pleadings be completed within two weeks from today. Parties will file documents within two weeks.

List the matter before Joint Registrar on 14.4.2014 for admission/ denial of documents.

List the matter before Court on 21.5.2014 for framing of issues. Parties will bring suggested issues to Court on the next date of hearing.

At this stage, it is prayed by counsel for the parties that this matter may be listed before Delhi High Court Mediation and Conciliation Centre.

As prayed, list this matter before Delhi High Court Mediation and Conciliation Centre on 30.01.2014 at 4:00 pm. It is made clear that merely because the matter is being referred to Delhi High Court Mediation and Conciliation Centre, the schedule for completion of pleadings will not be disturbed.

ILR (2014) II DELHI 1166
OMP

XEROX INDIA LIMITED ....PETITIONER

VERSUS

COMPUTERS UNLIMITED AND ORS. ....RESPONDENTS

(RAJIV SHAKDHER, J.)

OMP NO. : 357/2013 DATE OF DECISION: 13.01.2014

Arbitration & Conciliation Act, 1996—Section 34—Cost of Rs. 6 Lakhs awarded by the Arbitrator which included expenses incurred towards fare, lodging, food and local travel—Proprietor of respondent no. 1 visited Delhi from Darjeeling on various occasions during arbitral sittings in the matter—Respondent no. 1 did not file any documents, such as, air or railway tickets, verifiable bills and invoices qua expenses incurred on lodging, food and local travel etc. Held in absence of such verifiable proof, one has to adopt measure which would appear to be reasonable, based on the arbitrator's own experience. Held—Amount of cost granted by arbitrator cannot be said to be excessive, by taking recourse to his experience, by Ld. Arbitrator.

[Di Vi]

APPEARANCES:

FOR THE PETITIONER : Mr. Rajat Joneja, Advocate.

FOR THE RESPONDENTS : Ms. Manjula Gupta, Advocate for R-1.

CASES REFERRED TO:

1. *Haji Ebrahim Kassam Cochinwalla* vs. *Northern India Oil Industries Ltd.* [AIR 1951 Cal 230 : 85 CLJ 176].

2. *Mediterranean & Eastern Export Co. Ltd.* vs. *Fortress Fabrics Ltd.* [(1948) 2 All ER 186.

RESULT: Petition partially allowed.

RAJIV SHAKDHER, J.

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short the Act) to lay challenge to an award dated 26.11.2012 passed by a sole arbitrator appointed by this court.

1.1. The arbitrator was appointed vide order dated 07.02.2007 in a petition filed under Section 11 (6) r/w. Section 11(8) of the Act by respondent no.1, which is the original claimant, in the present proceedings. Notably, by this order, not only was the arbitrator appointed, but his fee at the rate of Rs. 11,000/- per hearing, subject to a maximum of Rs. 1,10,000/-, was also fixed.

1.2. It appears that, thereafter an application was moved before this court which had consent of both parties, to allow parties to fix the fee in consultation with the arbitrator. This order was passed on 16.07.2008. I have adverted to this aspect in the opening part of my judgment itself, as much of the consternation displayed by the petitioner is with respect to costs awarded. I, therefore, propose to examine the tenability of the challenge, in some detail, in the latter part of my judgment.

2. Coming back to the facts of the case: the disputes between the parties arise out of a Sales Promotion Agency Agreement dated 20.08.1999 (in short the agreement) entered into between the parties herein. Under the said agreement, respondent no.1, a sole proprietorship concern namely M/s. Computer Unlimited was appointed as one of the sole promotion agents for selling the products of the petitioner which included various equipments and systems described in Annexure –A to the said agreement. For its efforts, respondent no.1 was to be paid service charges in relation to orders procured by it and accepted by the petitioner.

2.1. It may be noted that the relationship of a Sales Promotion Agent (in short SPA) obtained between the petitioner and respondent no.1 since 1993. Prior to the execution of the aforementioned agreement on 20.08.1999, the agreement had been renewed twice after the gap of

three years; which was the tenure of the agreement. The agreement under consideration was also required to run for a period of three years subject to its renewal. Unfortunately, for respondent no.1, the agreement was unilaterally terminated by the petitioner on 01.01.2002.

2.2. This gave rise to claims by respondent no.1 which, having not been settled, impelled respondent no.1 to take recourse to arbitration proceedings. 2.3. Before the arbitrator, parties filed their respective pleadings. Infact, the petitioner appears to have filed a sur-rejoinder as well. Respondent no.1 raised 26 claims. There were no counter claims raised by the petitioner.

2.4. Both the petitioner and respondent no.1 examined one witness each. On behalf of respondent no.1, its proprietor, Mr. Santanu Biswas (CW-1) tendered his evidence while on behalf of the petitioner, Mr. P.R. Ranganath (RW-1) tendered his evidence. Examination-in-chief was carried out by the two witnesses by furnishing their respective affidavits. Both witnesses were subjected to cross-examination by the opposite party.

2.5. It is pertinent to notice that with respect to costs awarded by the learned arbitrator, the petitioner quite curiously stressed the fact that respondent no.1's witness Mr. Santanu Biswas (CW-1) was cross-examined over 23 sittings spanning a period from 13.12.2008 to 24.07.2010, while the petitioner's witness Mr. P.R. Ranganath (RW-2) was cross-examined, in about 9 sittings, between 11.09.2010 and 15.12.2010. The impact of this submission will be dealt with by me, while dealing with the issue pertaining to the award of costs by the learned arbitrator.

3. The learned arbitrator, had struck, five issues between the parties. These being:

> "...(i). Whether the claimant had any relationship with the respondent?
>
> (ii). Whether the Sales Promotion Agreement dated 20.08.1999 was duly terminated in accordance with the law and if not so, with what effect?
>
> (iii). Whether the conduct of the respondent is above board and whether it discloses an unfair attempt to withhold legitimate

moneys payable to the claimant?

(iv). What claims is the claimant entitled to?

(v). Interest, Costs and Expenses..."

4. In so far as issue nos.(i) to (iii) are concerned, the learned arbitrator returned findings of fact against the petitioner.

4.1. As regards issue no.(iv) is concerned, the learned arbitrator allowed 15 of the 25 claims lodged by respondent no.1, all of which except one were fully allowed. To be noted, claim no.1 was bifurcated in two parts i.e., 1(a) and 1(b) out of which, only Claim 1(b), was allowed.

4.2. Claim no.26 was covered under issue no.(v), which was partially allowed. The claims which were fully allowed were claim nos.1(b), 9, 10, 11, 13, 16, 17(a), 18, 19, 20, 21, 23, 24 and 25. One claim i.e., claim no.7, was partially allowed. The remaining claims being: claim nos.1(a), 2, 3, 4, 5, 6, 8, 12, 14, 15 and 22 were rejected. Two parts of claim no.17 i.e., claim nos.17(b) and 17(c), were not considered.

4.3. The total value of the 25 claims lodged by respondent no.1 (excluding claim for costs and expenses) was a sum of Rs.21,79,938/-, out of which claims worth Rs.9,77,288/- were either rejected or not considered. The value of the claims allowed was thus: Rs.12,02,650/-.

4.4. Claim no.26 which, as indicated above, was covered by issue no.(v), included interest, costs and expenses.

5. It is important to note that apart from the objection taken by the petitioner with regard to the amount awarded qua interest, costs and expenses, the challenge in respect of the other claims was restricted to claim nos.9, 10, 11, 13 and 17. Since qua claim no. 17 only claim no.17(a) was allowed, the challenge, as would be obvious, would be restricted to the said part of the claim, as the other two sub-claims i.e., claim nos. 17(b) and 17(c), were not considered. In terms of value, these claims amount to a cumulative sum of Rs.7,01,528/-, which is nearly 58% of the total value of the claims allowed by the learned arbitrator.

6. With the aforesaid preface, let me also indicate the findings arrived at by the learned arbitrator in respect of issue nos.(i) to (iii).

6.1. In so far as issue no.(i) is concerned, the learned arbitrator clearly found that there existed a relationship between the parties herein, which was pivoted on the aforementioned agreement executed on 20.08.1999. The learned arbitrator found that the said agreement came into effect from 01.04.1999.

6.2. As regards issue no.2, the learned arbitrator found that the petitioner had terminated the agreement with respondent no.1 vide communication dated 01.01.2002. He also found that the petitioner purported to terminate the agreement in exercise of power conferred under clause 19.1 of the agreement, which obliged the petitioner to give 30 days. notice. It was found by the learned arbitrator that the said notice was not given and therefore, the termination was "null and void". The necessary consequences of this finding of the learned arbitrator were, which he recorded in the impugned award, that the agreement would have run its entire course from 01.04.1999 till 31.03.2002.

6.3. In so far as issue no.(iii) was concerned, the learned arbitrator recorded a finding of fact that despite several opportunities having been granted by him to produce the documents in the petitioner's power and possession, the said documents were not produced and therefore, he would have to record adverse findings against the petitioner. The discussion with regard to the same begins at paragraph 58 of the impugned award and ends at paragraph 92.

6.4. I must note though that with regard to the petitioner's conduct, there are several other paragraphs in the impugned award, in which the learned arbitrator has adversely commented upon the conduct of the petitioner in keeping back relevant documents. The reason why production of documents was necessary was, the unravelling of the fact that respondent no.1 being only a SPA (which procured orders for sale of products of the petitioner), the details with regard to despatch of the products, their installation, generation of invoice, and consequent, receipt of money were available with the petitioner. The fact that these documents were in possession of the petitioner got revealed during the deposition, of its own witness in cross-examination. The learned arbitrator adverts

to this aspect of the matter, in paragraph 61, at internal page 30 of the impugned award. The relevant extract reads as follows :-

> "...Ques. How did you prepare Ex.R/3?
>
> Ans. This was verified through our computer record and then prepared. We have all these customer accounts in the system, from which we can validate the date of sale, date of installation, and payment receipt date. These are the key parameters used for the Sales Commission Validation as per policy based upon which the amount shown in this report calculated. By customer's account, I mean the accounts of the customers who have been supplied and sold the machines/equipments of the company..." (emphasis is mine)

6.5. At this stage, I may also note the summation of the learned arbitrator, made in paragraphs 87 to 90 of the impugned award, qua the deliberate attempt made by the petitioner in keeping back records, with a view to deny what, according to the arbitrator, were just claims of respondent no.1. The relevant extracts read as follows :-

> "...87. After hearing both the parties and in view of the facts, circumstances and well settled judicial principles, the Arbitrator is of the opinion that the all the original documents pertaining to SPA including those relating to orders, sales and commission of SPAs are with the respondent company who has deliberately, intentionally and malafidely withheld the said documents from the Arbitrator, despite being repeatedly directed by the arbitrator to produce the same. The arguments made by the claimant have distinctive weight and that the Arbitrator agrees with the same.
>
> 88. The above detailed conduct of the respondent leaves no doubt in the Arbitrator's mind that the respondent has adopted a hide and seek approach with the Arbitration proceedings only with a view to delay making payments to the claimant. The present case is a classical case, where the respondent, being a huge company, has been relying upon its dilatory muscle power to prevent making legitimate payments to the claimant. There was nothing preventing the respondent from filing all the original documents. The Arbitrator gave various opportunities to the respondent to file all the original documents in its power and possession. However, the respondent chooses not to do so, for reasons best known to itself. Further, such original documents, if produced, would have demonstrated the bluff that the respondent company has been playing with the claimant and the arbitration proceedings, thereby abusing the process of law and making mockery of the present arbitration. The averment of the respondent that the documents are not traceable since the records pertaining to the case are very old, clearly is not tenable. The bluff of the respondent is further exposed by the cross examination dated 11.9.2010 at 1pm, of Mr. P.R. Ranganath (RW-1), which indicated that the affidavit filed by Mr. Manish Gupta dated1.09.2010 was incorrect and that the relevant documents used for the sales commission validation were with the Respondent company. The respondent has been playing hot and cold at the same time, so as to delay making legitimate payments to the claimant.
>
> 89. From the record, it is disclosed that the respondent is a big company, using computers and computer resources for all its operations. The relevant documents in question in the present matter, appear to be computer output, generated from computers and computer resources. There was nothing stopping the respondent company from filing electronic records as well as data and information in the electronic form, resident on its computers, computer systems, computer networks and computer resources, which had a bearing, nexus, association or connection of any kind whatsoever, with the transactions in issue in the present proceedings. However, the same was deliberately not done, for reasons best known to the respondent.
>
> 90. It is well settled law that an adverse presumption shall be drawn against the party in default to the effect that evidence which could be but is not produced would, if produced, have been unfavourable to the person who withholds it. The rule is contained in the well-known maxim: omnia praesumuntur contra spoliatorem. If a man wrongfully withholds evidence, every

presumption to his disadvantage consistent with the facts admitted or proved will be adopted. The Arbitrator hence draws an adverse inference against the respondent for its deliberate, intentional and malafide conduct of withholding and not filing all the documents in its power and possession in the present Arbitration proceedings..."

(emphasis is mine)

7. It is in the background of the aforesaid that one has to consider the objections of the petitioner with respect to claim nos.9, 10, 11, 13 and 17(a).

8. I may note, at this stage, on behalf of the petitioner arguments were advanced by Mr. Rajat Joneja, while on behalf of respondent no.1, submissions were made by Ms. Manjula Gupta.

9. I propose to discuss the abovementioned claims in seriatim. Before I do that, I must touch upon one aspect of the matter in respect of which a vigorous argument was raised by Mr. Joneja, which was that, the learned arbitrator contrary to any known procedure had allowed respondent no.1 to file additional documents alongwith an additional affidavit. For this purpose, my attention was drawn to a proceeding sheet of 21.03.2009. In my opinion, the objection is without merit. The learned arbitrator has dealt with the objection of the petitioner exhaustively in the proceedings held on 21.03.2009. Apart from the fact, that the arbitrator came to the conclusion that the proceedings before him were not fettered by the strict procedural rules of the Indian Evidence Act, 1872 or the Code of Civil Procedure, 1908 (CPC), he was of the view that having given an opportunity to both parties to file remaining documents vide his order dated 13.12.2008, no fault could be found with respondent no.1 having taken the said opportunity and the petitioner having failed to file any documents in response thereto. It is not as if the petitioner did not have an opportunity to rebut. It is just that, consistent with the petitioner's past conduct, it chose not to file a document lest details of the sales transactions, which got consummated with the help of respondent no.1, get revealed.

CLAIM No.9

10. Under claim no.9, respondent no.1 had sought release of Rs.1,48,800/- in respect of disputed / withheld claims. The claim consists of 20 different items in respect of orders which were procured by respondent no.1 against which wrongful deductions of commissions due on such orders were made by the petitioner. In addition to this, the claim includes monies wrongfully adjusted in respect of consumables and spares, which were directly sold by the petitioner to the customers. The wrongful deductions made on this account were subject matter of eight invoices which the petitioner had raised on the District Magistrate at Jalpaiguri, bearing invoice Nos. U2670 to U2677; all of which were dated 06.06.1995. The total amount adjusted against these eight invoices was a sum of Rs. 59,797/-. It appears that a statement of claims was submitted by respondent no.1 to the petitioner, the cumulative total of which, was Rs.1,48,800/-. The petitioner's officers on their part had sought supportive documentation only with regard to claims, which were mentioned under serial nos.1, 5, 7, 8, 9, 12 and 16. The total of these claims in respect of which documents were sought, amounted to Rs.49,452/-. Thus, qua the balance claims, which amounted to Rs.99,348/-, no documents were sought by the petitioner's officers for substantiating the said claims.

11. It was argued on behalf of the petitioner that since no documents were supplied for claims amounting to Rs.49,452/-, the entire amount could not have been awarded in favour of respondent no.1. I may only note that there is no articulation of this argument in precise terms in the written submissions though, at the bar, Mr. Joneja had made such an attempt.

12. On the other hand, Ms. Gupta submitted that the petitioner, firstly, did not pay monies even in respect of those claims qua which no documentation was sought, as obviously, as per the petitioner, as well, these were valid claims. 12.1. In so far as the claims in respect of which an objection was raised, which were 7 in number, 5 claims related to short payment. No explanation was given by the petitioner's witness (RW-1), with regard to short payments. That apart, respondent no.1 had supplied documents which indicated the machine serial number; the model

number, and the order control number (OCN), which were sufficient for the petitioner to examine the validity of the claims.

13. Having examined the documents as well as the contentions of the learned counsel for the parties, I am of the view that no fault can be found with the learned arbitrator in allowing the said claim in full. It is obvious that there was no dispute raised by the petitioner with regard to claims amounting to Rs.99,348/-, out of the total claims worth Rs.1,48,800/-. The dispute with regard to the balance claim in the sum of Rs.49,452/- was half-hearted, in the sense that, even though, respondent no.1 had supplied whatever information was available with it, the petitioner for some unknown reason, chose not to examine the same.

13.1. Furthermore, even out of the 7 items, which formed part of the disputed amount of Rs.49,452/-, 5 items related to short payment. This aspect was indicative of the fact that transactions had taken place. The dispute, if any, was with regard to the amount. Since, it was well within the power of the petitioner, to examine the validity of the documents supplied, it ought to have articulated its objection to the payment rather than questioning the consummation of the transaction itself. Though in the pleadings of the petitioner there is a reference to the fact that the claims are time barred, no such submission was made before me. As a matter of fact, no attempt was made to either plead or demonstrate that the claims were time barred. The burden of the petitioner's defence was that there was absence of supporting documents, an aspect which has been dealt with by the learned arbitrator in great detail in the impugned award by holding that the petitioner has been responsible for keeping back documents and that it is a fit case for drawing adverse inference; as noticed hereinabove. I find no merit in the objection raised by the petitioner. It is accordingly rejected.

CLAIM No.10

14. Against the aforementioned claim, respondent no.1 sought an amount equivalent to Rs.1,13,206/- for failure on the part of the petitioner to replace a xerox machine which respondent no.1 apparently had supplied to the petitioner's customer at the request of the Calcutta office of the petitioner. The learned arbitrator seems to have taken note of the documentary evidence filed in that behalf as well as the testimony of

CW-1 in cross-examination dated 02.05.2009 to come to the conclusion that respondent no.1 was entitled to a reimbursement in the sum of Rs.1,13,206/-. There, is once again, nothing articulated either in the petition, written submissions or even in the oral submissions, which would persuade me to hold that the claim was wrongly allowed. It appears that the petitioner set up a defence that a machine was supplied to an entity by the name of Delta Xerox, which was re-possessed on 31.12.2000 due to non payment of dues by the said customer.

14.1. Respondent no.1, on the other hand, had contended that the case set up by the petitioner that the machine was re-possessed was false. This according to respondent no.1, would have come to light, if relevant documents were filed by the petitioner. According to respondent no.1, the old machine of the petitioner, was bought, under a buy-back scheme and the cost of the new machine was, accordingly, adjusted by a sum of Rs.30,000/-. Since, the new machine, was supplied by respondent no.1 out of its "stock and sale account", at the say so of the petitioner's Calcutta office, the petitioner was required to either replace the machine or reimburse the cost. Since, the machine was not replaced, respondent no.1 laid a claim for the value of the machine, which was a sum of: Rs.1,13,206/-.

14.2. In my view, the objection of the petitioner, if at all, pertains to appreciation of evidence; the testimony of CW-1 in cross-examination was not rebutted, and therefore, I see no reason to overturn the finding returned qua claim no.10.

CLAIM No.11

15. In respect of this claim, the learned arbitrator has awarded a sum of Rs.1,31,438/- qua defective machinery supplied to respondent no.1. It appears that respondent no.1 maintained a stock and sale account with the petitioner, whereunder machines stocked by respondent no.1 were bought from the petitioner. It is from this account that respondent no.1 appears to have sold one machine to Beekay Auto Private Limited. The said machine being defective had to be replaced by the petitioner. Since no replacement had been made, respondent no.1 made a claim for money. It is the finding of the learned arbitrator that the petitioner has not disputed this claim of respondent no.1 either in its pleadings or in its

evidence by way of rebuttal. 15.1. With these findings on record, one cannot but concur with the view of the learned arbitrator that this claim has to be fully allowed. Mr. Joneja has failed to demonstrate that these findings are incorrect. Mere assertion that no supporting documents have been filed is not good enough once a specific stand was taken in the pleadings backed by the testimony of the witness, which has not been rebutted by the petitioner.

CLAIM No.13

16. Under this claim, respondent no.1 sought monetary compensation in respect of a trip to Austria which its proprietor had earned on achieving the targets set out by the petitioner. In respect of this claim as well, it appears that respondent no.1 has made assertions in the pleadings backed by the testimony of its witness CW-1. Evidently, the petitioner did not dispute the fact that on achieving targets as set out by it, the proprietor of respondent no.1 was eligible to take a trip to Austria. The stand of the proprietor of respondent no.1 that he was assured by the Sales Manager of the petitioner at the Eastern Region Dealers Conference held at Fort Radisson, Calcutta in January, 2001, that he would be compensated to the tune of Rs.40,000/- in lieu of trip to Austria, was not denied either by way of statement of defence or in the evidence led by way of rebuttal. In these circumstances, the arbitrator allowed the claim in favour of respondent no.1. This claim also turns on the appreciation of material placed before the learned arbitrator. Mr. Joneja has not placed before me any evidentiary material which would demonstrate that the petitioner had as a matter of fact challenged the assertions of respondent no.1 made in regard to the said claim. In my view, no interference is called for with respect to the said claim.

CLAIM No.17(a)

17. Claim no.17(a) pertains to payment of commissions for third and fourth quarters of the year 2000. Under this head, respondent no.1 had made a claim for a sum of Rs.2,68,084/-. It appears that the petitioner asked for being supplied with the machine serial number qua a machine listed at serial no.13 (which was valued at Rs.2,872/-), in the summation sheet (forming part of table 1 appended to the affidavit filed by its witness – CW1) submitted by respondent no.1, in that behalf.

Consequently, out of a total claim of Rs.2,68,084/-, the petitioner had no problem with regard to an amount equivalent to Rs.2,65,212/-. Despite this, the petitioner did not release the amounts with respect to those transactions qua which it did not require validation.

17.1. The argument advanced on behalf of the petitioner, once again, was, that no supporting documents had been furnished in support of the claim for commission. The learned arbitrator rejected the objection on behalf of the petitioner, while noting the fact that respondent no.1 had provided the machine serial number and the OCN in its affidavit of evidence even with regard to the residual amount of Rs.2,872/- qua which, the petitioner had raised an objection. The learned arbitrator also records the fact that the petitioner's witness RW-1 in his cross-examination had admitted the fact that no validation was sought in respect of the remaining amount payable towards commission, which was quantified at Rs.2,65,212/-.

17.2. Having regard to the above, I cannot but come to the conclusion that no interference is called for even in respect of this claim.

INTEREST, COSTS AND EXPENSES

18. This brings me to the last though, one of the most tenaciously fought claims, which is covered by the learned arbitrator under issue no.(v). This claim pertains to: the award of interest, costs and expenses, by the learned arbitrator. The learned arbitrator has awarded interest at the rate of 14% p.a. on all claims awarded in favour of respondent no.1 from 01.04.2002 till the date of award i.e., 26.11.2012. Thereafter, interest has been awarded at the rate of 18% p.a. till the date of payment; once again, on all claims awarded in favour of respondent no.1.

18.1. The total amount awarded towards costs and expenses is a sum of Rs.30,11,300/-. However, there appears to be a calculation error in the award as the sum total of various amounts awarded by the learned arbitrator, under the heading costs and expenses comes to Rs. 30,71,300/- (excluding a sum of Rs.3,07,500/- paid by respondent no.1 towards the petitioner's share of the arbitrator's fee) and not Rs. 30,11,300/-.

18.2. In so far as interest is concerned, the rationale provided by the learned arbitrator is : that in terms of clause 7.1 of the agreement

obtaining between the parties, the petitioner was required to pay interest at the rate of 14% p.a. on the security deposit. It is pertinent to note that during the course of arbitration proceedings, the petitioner had remitted a sum of Rs.50,000/- to respondent no.1, alongwith interest. In these circumstances, the learned arbitrator was of the view that though, the demand for interest, had been made by respondent no.1, at the rate of 18% p.a., 14% p.a. would be a reasonable rate of interest for the pre-reference period and pendente lite period. Given the fact that the petitioner had, according to the learned arbitrator, harassed respondent no.1 by deliberately delaying the release of the amounts payable to it; – he awarded interest at the rate of 18% p.a. for the period commencing from the date of the award till realization of payment.

18.3. In my view, no lacuna can be found with the reasoning of the learned arbitrator both for pre and post award period. While the former is based on a measure provided in the agreement obtaining between the parties, the latter is based on a rate provided in the Act itself. Given the conduct of the petitioner, which has been noted, quite extensively by the learned arbitrator, I do not propose to interdict the award on this score.

19. This brings me to the award of costs and expenses.

19.1. As noted by the learned arbitrator, he held 84 sittings in the matter till 23.07.2011. The learned arbitrator allowed expenses amounting to Rs.4,62,000/- at the rate of Rs.5,500/- per sitting for these 84 sittings. The rationale provided by the learned arbitrator was that: "various claims of respondent no.1 had been allowed".

19.2. A perusal of the record would show that when order dated 07.02.2007 was passed by this court in Arb. P. No.305/2006 whereby, Mr. Pavan Duggal was appointed as an arbitrator; the fee of the arbitrator was fixed at Rs.11,000/- per sitting subject to a maximum of Rs.1,10,000/-. The understanding was perhaps that the proceedings would be over in 10 sittings. Since, this proved to be an incorrect assumption, a joint application was moved by the parties being: IA No.7446/2008 in the disposed of petition i.e., Arb. P. No.305/2006, to seek modification of the direction issued earlier qua the fee payable to the learned arbitrator. This application was allowed vide order dated 16.07.2008 when, this

court ruled that the parties would fix the fee in consultation with the arbitrator. Consequently, the cap on the fee was removed. 19.3. Having regard to the fact that out of the total claims valued at Rs.21,79,938/-, claims worth Rs.12,02,650/- were allowed, which is, nearly 55% of the total claims (excluding the claim for interest, costs and expenses), respondent no.1 can be given if at all a reimbursement of 55% of fee paid to the arbitrator uptil this stage i.e., 23.07.2011. This being an amount of Rs.2,54,100/-; the breakup of which is as follows:-

(i). Rs.60,500/- (55% of Rs.1,10,000/-)

(ii). Rs.1,93,600/- [55% of Rs.3,52,000/- (Rs.4,62,000/- minus Rs.1,10,000/-)]

19.4. The arbitrator has awarded actual expenses towards costs and fee of advocates, Mr. A.K. Ganguli and Ms. Barnali Basak, amounting to Rs.35,000/- and Rs.25,000/-, respectively; totalling to Rs.60,000/-.

19.5. According to me, the principle adopted above, will have to be applied, which is that only 55% of a sum of Rs.60,000/- will be payable. The sum payable under this head will be Rs.33,000/-.

19.6. In so far as expenses incurred in the proceedings in the High Court are concerned, against a total claim of Rs.1,26,500/-, the learned arbitrator has awarded an amount of Rs.75,000/- while acknowledging the fact that no proof has been filed; however, based on his experience that expenses towards litigation in the High Court would at least result in incurring the costs referred to above, he has awarded the said sum.

19.7. Having regard to the fact that the cost of litigation in the High Court has appreciated considerably, I do not propose to modify the said amount awarded by the learned arbitrator.

19.8. In so far as expenses incurred towards drafting petitions, affidavits of evidence, supplementary affidavits, additional affidavits and reply to miscellaneous applications are concerned, the learned arbitrator has awarded a sum of Rs.1,00,000/- which again, I do not intend to interfere with as, it appears to be reasonable.

19.9. The next head, is the fee payable to Ms. Manjula Gupta, for appearance before the arbitrator. The learned arbitrator has awarded a

sum of Rs.3,55,300/- based on actual expenses. Similarly, for the appearance of senior advocate, Mr. Shambhu Prasad Singh, a sum of Rs.12,30,000/- has been awarded. In my view, costs under both the heads, would have to be scaled down to 55% as was the principle applied for the arbitrator's fee. Therefore, against a total sum of Rs.15,85,300/- being the fee paid to Ms. Gupta and Mr. Shambhu Prasad Singh, respondent no.1 will be reimbursed a sum of Rs. 8,71,915/-.

20. Against expenses incurred on stenography, typing, photocopy, postage and other miscellaneous expenses, the learned arbitrator has awarded a sum of Rs.21,000/- which again, I do not intend to interfere with.

20.1. As regards costs incurred by the proprietor of respondent no.1 on his various visits from Darjeeling to Delhi and back, the learned arbitrator has awarded a sum of Rs.6 Lakhs which includes expenses incurred towards fare, lodging, food and local travel. Notably, respondent no.1 had made a claim for a sum of Rs.9,58,847/- based on the fact that he made 40 trips to Delhi and that he was required to stay in Delhi for 300 nights. In addition to this, it was claimed that 90 nights were spent in transit. The Arbitrator notes that in respect of reimbursement of the said costs, no proof was filed even while recognizing the fact that the proprietor of respondent no.1 had litigated the matter for nearly 7 years. The learned arbitrator thus, recognizing the aforesaid circumstance, as also the fact that, the proprietor of respondent no.1, had to travel a distance of over 1000 kilometres, thought it fit to award a sum of Rs.6 Lakhs, towards expenses.

20.2. The difficulty with this claim is that, respondent no.1, has not filed any documents, such as, air or railway tickets, verifiable bills and invoices qua expenses incurred on lodging, food, and local travel etc. However much, one may recognize, that travelling and cost of living in the city of Delhi is not cheap, reimbursement of purported actual costs can only be made against some verifiable proof.

20.3. In the absence of such verifiable proof, one has to adopt a measure which would appear to be reasonable, based on the arbitrator's own experience. In the case of **Municipal Corporation of Delhi vs M/s. Jagan Nath Ashok Kumar & Anr.** (1987) 4 SCC 497 the Supreme

Court observed that the arbitrator can rely upon his own experience, as long his conclusions are backed by reason. The relevant observations are extracted hereinbelow:-

> "....5. It is familiar learning but requires emphasis that Section 1 of the Evidence Act, 1872 in its rigour is not intended to apply to proceedings before an arbitrator. P.B. Mukharji, J. as the learned Chief Justice then was, expressed the above view in **Haji Ebrahim Kassam Cochinwalla v. Northern India Oil Industries Ltd.** [AIR 1951 Cal 230 : 85 CLJ 176] and we are of the opinion that this represents the correct statement of law on this aspect. Lord Goddard, C.J. in **Mediterranean & Eastern Export Co. Ltd. v. Fortress Fabrics Ltd.** [(1948) 2 All ER 186, 188, 189] observed at pages 188-89 of the report as follows:
>
> "A man in the trade who is selected for his experience would be likely to know, and, indeed, would be expected to know, the fluctuations of the market and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do. In this case, according to the affidavit of the sellers, they did take the point before the arbitrator that the Southern African market has 'slumped'. Whether the buyers contested that statement does not appear, but an experienced arbitrator would know, or have the means of knowing, whether that was so or not and to what extent, and I see no reason why in principle he should be required to have evidence on this point any more than on any other question relating to a particular trade. It must be taken, I think, that in fixing the amount that he has, he has acted on his own knowledge and experience. The day has long gone by when the courts looked with jealousy on the jurisdiction of arbitrators. The modern tendency is, in my opinion, more especially in commercial arbitrations, to endeavour to uphold awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them. If an arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice the courts should be slow indeed to set aside his award..."

6. This in our opinion is an appropriate attitude...

...8. After all an arbitrator as a judge in the words of Benjamin N. Cardozo, has to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life..."

(emphasis is mine)

20.4. In this context, let me examine the tenability of the amount awarded by the learned arbitrator, only to satisfy the conscience of this court in view of the vehemence with which, this claim was opposed by Mr Joneja, on behalf of the petitioner.

20.5. Before me, the learned counsel for the petitioner did not dispute the fact that the proprietor of respondent no.1 had taken 40 trips to Delhi. It may well be argued that proof in this regard had to be tendered by respondent no.1. Having regard to the fact that 84 sittings were held by the learned arbitrator till 23.07.2011, it cannot be unreasonable to accept that the proprietor of respondent no.1 had visited Delhi, at least, on 40 occasions between 04.06.2007 i.e., when the arbitrator entered upon reference and 23.07.2011. If one were to make a pro-rata calculation of the amount awarded by the learned arbitrator, which is a sum of Rs.6 Lakhs under this head then, on each trip the proprietor of respondent no.1 would have spent, approximately, Rs.15,000/-. This sum would include to and fro fare, lodging, food and expenses incurred on local travel. Given the fact that the distance between Darjeeling and Delhi is nearly 1400 kilometres, the average to and fro train fare during 2007-2012 would not be less than Rs.4,000/-. Therefore, on fare itself, respondent no.1, would have, on a very conservative estimate spent, at least, Rs.1,60,000/- (i.e., Rs.4,000/- x 40 trips).

20.6. Though, it is asserted on behalf of proprietor of respondent no.1 that he spent 300 nights in the city, in addition to 90 nights in the transit, there is no proof with regard to the same. If one were to take the most conservative rate into account for lodging, food and local travel, a person would spend, at least, Rs.1,500/- a day. If one were to discount the 90 nights evidently spent by the proprietor of respondent no.1 in transit even then, the proprietor of respondent no.1 would have spent a

sum of Rs.4,50,000/-.

20.7. The sum total of the fare and lodging expenses would come to a figure of nearly Rs.6,10,000/-. Therefore, in my view, the arbitrator in awarding a sum of Rs.6 Lakhs, by taking recourse to his experience, has not granted an amount which can be said to be excessive.

20.8. Evidently, the learned arbitrator awarded some additional costs which, apparently were incurred after 04.08.2011 by respondent no.1. Affidavit in that regard was filed on 11.09.2012. A perusal of the award would show that a draft award had been made ready by the learned arbitrator on 03.09.2012. Since the petitioner had not paid arrears with respect to its share of the fee, the matter had to be fixed for hearing on 6 occasions i.e., on 11.09.2012, 17.09.2012, 22.09.2012, 15.10.2012, 29.10.2012 and finally on 26.11.2012.

20.9. Respondent no.1 thus utilized the dates of hearing given by the learned arbitrator to file additional affidavit, as indicated above, for claiming reimbursement of costs towards advocates. fees and qua costs incurred in respect of trips made by its proprietor. The amount awarded towards the senior advocate's and the instructing advocate's fees was a sum total of Rs.1,08,000/-, while the amount towards expenses incurred on trips made by the proprietor of respondent no.1 in the period after August, 2011 was a sum of Rs.60,000/-. To be precise, the amount was claimed for trips made during the following periods: 13.10.2011 to 24.10.2011; 18.04.2012 to 02.05.2012; 11.07.2012 to 16.07.2012; and 01.09.2012 to 11.09.2012. Thus, the total amount awarded was a sum of Rs.1,68,000/-.

21. In my view, in so far as senior advocate's and instructing advocate's fees is concerned, against a sum of Rs.1,08,000/-, respondent no.1 should be able to seek reimbursement of only Rs.59,400/- (being 55% of the total fees). With regard to expenses incurred by the proprietor of respondent no.1, on his visits to Delhi, I would award a sum of Rs.60,000/- which is also the amount awarded by the learned arbitrator, as the total amount based on the following calculations comes to a figure of Rs. 76,000/-.

(i). for 4 trips at the rate of Rs.4,000/-, a sum of Rs.16,000/- as to and fro fare

(ii). for lodging, food, and local travel at the rate of Rs. 1,500/- for a period of 40 days, a sum of Rs.60,000/-.

22. In addition to the above, in order to secure the award, respondent no.1 paid a sum of Rs.3,07,500/- being share of costs of the petitioner, which were paid by respondent no.1. This amount would have to be awarded in full to respondent no.1.

23. Therefore, the total amount that I would award to respondent no.1 towards costs and expenses will be a sum of Rs. 23,81,915/-, the break-up of which is as follows :-

S. No.	Particulars	Amount Awarded by arbitrator (Rs.)	Modified amount as awarded by directions contained hereinabove (Rs.)
1.	Share of the fee of the Arbitrator borne by respondent no.1	4,62,000/-	2,54,100/-
2.	Expenses incurred towards costs and fee of Mr A.K. Ganguli and Ms Barnali Basak, Advocates	60,000/-	33,000/-
3.	Expenses incurred in the proceedings in the High Court	75,000/-	75,000/-
4.	Expenses incurred towards drafting petitions, affidavits, applications, etc.	1,00,000/-	1,00,000/-
5.	Fee paid to Ms Manjula Gupta, Advocate and to Mr Shambhu Prasad Singh, Sr. Advocate for appearance before arbitrator	15,85,300/-	8,71,915/-
6.	Expenses incurred on stenography, typing, photocopy, postage, etc.	21,000/-	21,000/-
7.	Expenses incurred by proprietor of respondent no.1 on his visits from Darjeeling to Delhi and back	6,00,000/-	6,00,000/-
8.	Additional expenses incurred on account of Sr. Advocate's and instructing advocate's fees paid after 04.08.2011	1,08,000/-	59,400/-
9.	Additional expenses incurred by proprietor of respondent no.1 after 04.08.2011 on account of his visits to Delhi for the period spanning between 13.10.2011 and 11.9.2012 Sub Total: Rs. 30,71,300/- (Note: in the award the total is erroneously shown as Rs. 30,11,300/-)	60,000/-	60,000/-
10.	Refund of amount paid by respondent no.1 on account of the petitioner's share of the fee paid to the arbitrator	3,07,500/-	3,07,500/-
	Grand Total:	**33,78,800/-**	**23,81,915/-**

23.1. Consequently, against a total sum of Rs. 33,78,800/- awarded by the learned arbitrator, the total amount under this head shall stand modified to Rs. 23,81,915/-, in view of the directions issued hereinabove.

24. In view of the discussion above, the challenge laid by the petitioner with respect to claim nos.9, 10, 11, 13 and 17(a) is rejected. The rate of interest awarded by the learned arbitrator for pre-reference period, pendente lite period and, post the date of the award till its payment is sustained. The award is modified to the extent indicated above only qua costs and expenses.

25. Petition is disposed of in the aforesaid terms with a direction that in so far as the present proceedings are concerned, parties shall bear their own expenses.

ILR (2014) II DELHI 1187
FAO (OS)

NATIONAL HIGHWAYS AUTHORITY OF INDIA ....PETITIONER

VERSUS

LANCO INFRATECH LTD. ....RESPONDENT

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

FAO (OS) NO. : 34/2006 DATE OF DECISION: 07.03.2014

Arbitration and Conciliation Act, 1996—Section 28(3), 33, 34, 37—Appellant challenged order of learned Single judge dismissing OMP of appellant under Section 34 of Act as not disclosing any ground warranting interference with award of Arbitral Tribunal—Plea taken, award was in excess of contract that came into existence upon award of tender by appellant to respondent for four laning of part of National Highway 31 in State of West Bengal—Award fell into error in holding that clause 507.2.2. of MoRTH specifications permitted using aggregate based on shingles—Arbitral tribunal had misapplied contra proferentem principle in facts of case—Per contra plea taken, interpretation placed on clause 507.2.2. of MoRTH specifications by arbitral tribunal is not only a plausible interpretation, it is only interpretation—Limited jurisdiction under Section 34 and Section 37 of Act does not permit Court of decide present appeal—Held—Arbitral tribunal has considered terms of MoRTH specifications and also considered fact that provisions of 507.2.2 of MoRTH specifications to specify word shingle while clause 1004 read with clause 1007 thereof does not, and consequently held that same indicates that shingle being retained in clause 507.2.2 is not erratum—This is a plausible interpretation of contract, it is apparent that it follows principle enunciated in maxim expression uninus est exclusion alterius (Expression of one is exclusion of other) a well established rule of interpretation qua deeds and other instruments—So long as interpretation placed by arbitral tribunal upon a contract is plausible, this Court shall not interfere with same—It is a well established principle of construction of contract that if terms employed by one party are unclear, interpretation against that party will be preferred—Given that no argument as to error in law has been pursued, interpretation placed on contract is a matter within jurisdiction of arbitral tribunal, and thus, even if error exists, this is error of fact within jurisdiction, which cannot be re-appreciated by Court under sections 34 or 37 of Act—This Court finds no reasons to interfere with impugned order.

Important Issue Involved: So long as the interpretation placed by the arbitral tribunal upon a contract is plausible, this Court shall not interfere with the same.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONERS : Mr. Chetan Sharma, Sr. Adv. with Mr. Gupta, Advocate.

FOR THE RESPONDENT : Ms. Manisha Agrawal Narain, Adv.

RESULT: Dismissed.

NAJMI WAZIRI, J.

1. This appeal under section 37 of the Arbitration and Conciliation Act, 1996 ("Act") challenges the order of 24th November, 2005 ("impugned order"), of the learned Single judge dismissing OMP 431 of 2005 ("section 34 petition") as not disclosing any ground warranting interference under section 34 of the Act with the award of the Arbitral Tribunal dated 20th August, 2005, as modified by the order dated 3rd October, 2005 ("Award"). The appellant primarily contends that the award was in excess of the contract that came into existence upon the award of tender by the appellant to the respondent for the project of four-laning of KM 476.150 to KM 500.000 of Dhalkola to Islampore sub-section 2 of National Highway 31 in the State of West Bengal.

2. In the impugned order, the learned Single Judge, while reiterating the dicta of the Supreme Court in **Oil and Natural Gas Corporation Ltd. v Saw Pipes Ltd.,**[1] held that the Court, when exercising jurisdiction under section 34 of the Act, ought to not sit in appeal over the findings of the arbitral tribunal. It was reiterated that the Court ought to not reappraise evidence or facts merely because the Court could have come to a different conclusion on the basis of the material available and that short of absurdity or patent illegality, a view of the arbitral tribunal, so long as it is a plausible view, ought to not be interfered with by the Court. The judgements of the Supreme Court in **Food Corporation of India v. Joginderpal Mohinderpal & Anr.,**[2] **Gujarat Water Supply and Sewerage Board v. Unique Erectors (Gujarat) (P) Ltd. & Anr.,**[3]

1. (2003) 5 SCC 705.
2. (1989) 2 SCC 347.
3. (1989) 1 SCC 532.

and **Sudarsan Trading Co. v. The Govt. of Kerala and Anr.,**[4] were cited in this regard.

3. Before an inquiry into the facts in the matter is embarked upon, it would be necessary to clarify that the impugned order is certainly not in error so far as the findings qua limited jurisdiction of the Court under section 34 of the Act is concerned. The issue that a Court exercising jurisdiction under section 34 of the Act has limited grounds on which an award may be interfered with is no longer res integra. A restatement of the law on this subject can be found in the decision of the Supreme Court in **Delhi Development Authority v R. S. Sharma and Co,**[5] wherein the Court, relying on the earlier dicta in **Grid Corporation of Orissa Ltd. v. Balasore Technical School,**[6] **Northern Railway v Sarvesh Chopra,**[7] **State of Rajasthan v. Nav Bharat Construction Co.,**[8] **Hindustan Zinc Ltd. v. Friends Coal Carbonisation,**[9] and Oil and **Natural Gas Corporation Ltd. v. Saw Pipes Ltd.,**[10] held:

> "21. From the above decisions, the following principles emerge:
>
> *(a) An award, which is*
>
> *(i) contrary to substantive provisions of law; or*
>
> *(ii) the provisions of the Arbitration and Conciliation Act, 1996; or*
>
> *(iii) against the terms of the respective contract; or*
>
> *(iv) patently illegal; or*
>
> *(v) prejudicial to the rights of the parties; is open to interference by the court under Section 34(2) of the Act.*

4. (1989) 2 SCC 38.
5. (2008) 13 SCC 80.
6. (2000) 9 SCC 552.
7. (2002) 4 SCC 45.
8. (2006) 1 SCC 86.
9. (2006) 4 SCC 445.
10. (2003) 5 SCC 705.

(b) The award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India."

4. Negatively stated, the Court exercising jurisdiction under section 34 of the Act has certain restrictions placed on it, such as: 4.1. It ought to not re-appreciate evidence merely to arrive at a different conclusion.[11]

4.2. If the interpretation of the contract by the arbitral tribunal – even if it leads to issues of law – is a plausible interpretation, Court ought to not interfere with it even if it would have come to a different interpretation.[12]

4.3. If in arriving at quantum of damages, the arbitral tribunal chose a particular formula, Court ought to not interfere with it simply because another formula could have been chosen, as long as the contract does not provide for any formula and the formula adopted by the arbitrator is an acceptable and reasonable one.[13]

4.4. If the Court is to set aside the award as being unfair or unreasonable, the award should be such as to shock the conscience of the court.[14]

11. *McDermott International Inc. v Burn Standard Co. Ltd. & Ors.,* (2006) 11 SCC 181; *Numaligarh Refinery Ltd. v Daelim Industrial Co. Ltd.,* (2007) 8 SCC 466; *P. R. Shah, Shares and Stock Brokers Pvt. Ltd. v B. H. H. Securities Private Ltd. & Ors.,* (2012) 1 SCC 594.

12. *Numaligarh Refinery Ltd. v Daelim Industrial Co. Ltd.,* (2007) 8 SCC 466; *Rashtriya Ispat Nigam Ltd. v Dewan Chand Ram Saran,* (2012) 5 SCC 306.

13. *McDermott International Inc. v Burn Standard Co. Ltd. & Ors.,* (2006) 11 SCC 181.

14. *J.G. Engineers Private Limited v Union of India & Anr.,* (2011) 5 SCC 758.

4.5. Even to hold an award as being opposed to public policy, the illegality must be patent and should go to the very root of the matter – it cannot be a frivolous or trivial illegality.[15]

5. Shorn of irrelevant details, the case of the appellant commences from the award of the tender in the aforementioned project to the respondent, whose bid was found successful. According to the appellant, the contract came into existence after the respondent was given sufficient opportunities to apprise itself of the particulars of the same and the requirements thereunder. The project, which the respondent was to undertake for the appellant, was to involve certain civil engineering works, which were to be undertaken on the basis of the specification (Third Edition) issued by the Ministry of Surface Transport, ("MoRTH specifications"). It is not in dispute that the amendments and modifications to the MoRTH specifications were made a part of the contract.

6. The work had indeed commenced; the respondent sought to complete the work using aggregates based on crushed stones sourced from the river banks of Balason/Matigara. This was opposed by the appellant, who directed that only aggregates from Pakur shall be used. Admittedly, neither the contract nor the tender documents provide for aggregates from Pakur being used. Aggregates from Pakur were used by the respondent as directed and the project work was undertaken under protest.

7. Pakur being admittedly further from the project site than Balason/ Matigara, disputes arose as to whether the extra lead involved in procuring the aggregates from Pakur was to be borne by the appellant or the respondent. When the matter was eventually referred to the arbitral tribunal, two claims were raised by the respondent while work was still under way – both in respect of the extra lead – one qua *bituminous work* and the other qua concrete work.

8. The respondent's claim contended that its bid was on the basis that aggregates based on crushed stones from Balason/Matigara may be used for the works. It had contended that it was only in view of the appellant's insistence that aggregates from Pakur were used for undertaking

15. *McDermott International Inc. v Burn Standard Co. Ltd. & Ors.,* (2006) 11 SCC 181; *J.G. Engineers Private Limited v Union of India & Anr.,* (2011) 5 SCC 758.

the works. It contended that the extra lead involved in procuring the aggregates from Pakur was a cost not contemplated in the bid and, not forming a part of the contract, was an expense that ought to be compensated for by the appellant, who insisted on its usage.

9. The appellant opposed the claims. It contended that its insistence was not to use aggregates from Pakur, but to not use aggregates from Balason/Matigara, which do not meet the MoRTH specifications. It contended that given the fact that the aggregates from Balason/Matigara would not conform to MoRTH specifications, the contention of the respondent that its bid was based on the assumption that aggregates from Balason/Matigara may be used is specious and fit to be disregarded. It contended that there is no basis for claiming extra lead, when the aggregates from Balason/Matigara could never be used without going against the terms of the contract.

10. Both parties were firstly at issue over whether clause 507.2.2 of the MoRTH specifications, as amended by the parties, could be read to include aggregates based on material sourced from river beds – which the aggregates from crush stones from Balason/Matigara were. While it is doubtless that even the material as specified in clause 507.2.2 were to meet further requirement to be regarded as suitable per the MoRTH specifications – which shall be shortly adverted to – the first of the disputes, essentially, was qua whether such aggregates could be used in the project. The respondent contended in the affirmative, the appellant in the negative. Similar was the issue qua clause 1004 read with clause 1007. The distinction being that clause 507.2.2 is qua *bituminous work* and clause 1004 read with clause 1007 being qua concrete work.

11. The parties were thereafter at issue over whether aggregates based on material sourced from Balason/Matigara were compliant with the physical requirements in Table 500-8. The respondent contended in the affirmative, arguing that the report from IIT Kharagpur sets out that the aggregates based on material sourced from Balason/Matigara would meet the physical requirements if lime is used as a filler. The appellant contended in the negative on three bases (a) that its own reports from other laboratories set out that the aggregates based on material sourced from Balason/Matigara do not meet the physical requirement; (b) that the

report from IIT Kharagpur allows lime to be used only as a filler, not as an anti-stripping agent; (c) that the findings in the report from IIT Kharagpur were not based on the AASHTO T-182 test, which was specified in the MoRTH specifications and ought to not be considered.

12. The three member arbitral tribunal passed a majority award in favour of the respondent's first claim and rejected the second claim. The reasoning of the tribunal, as can be ascertained from the Award, is as follows:

12.1. The dispute turns on whether the respondent is right in assuming that aggregates from Balason/Matigara could be used for *bituminous work* and concrete work.

12.2. Clause 507.2.2, even post amendment, retained the word shingles. Shingles are material sourced from riverbeds.

12.3. The appellant's contention that the word shingles is surplusage and ought to be disregarded cannot be accepted. The appellant's further contention that the intent of the amendment was to ensure that material sourced from riverbeds ought not to be used is not borne out from the contract. This is a fortiori since clause 1007 specifically deletes all references to material sourced from riverbeds.

12.4. It is a dispute involving interpretation of clause 507.2.2.

12.5. Applying the principle of interpretation of *contra proferentem*, the existence of the word shingles post amendment, must be interpreted to mean that material sourced from riverbeds may be used for *bituminous work*s, provided they meet the physical requirements in Table 500-8.

12.6. This is further supported by the existence of the provision in the MoRTH specification that allows usage of anti-stripping agents in hydrophyilic aggregates of approved quality and in suitable doses.

12.7. The report from IIT Kharagpur indicates that the aggregates based on material sourced from Balason/Matigara would meet the physical requirements specified in Table 500-8 if lime is used as a filler.

12.8. The report from IIT Kharagpur is based on the ASMT:D-3625 test, which is "more serious" than the specified AASHTO T-182

test.

12.9. Although lime is not specified as an anti-stripping agent, there is no provision forbidding its usage as an anti-stripping agent either. Further, MoRTH's manual for construction and supervision of *bituminous work* specifically mentions that hydrated lime may, on occasions, be used instead of propriety (sic) anti-stripping agent.

12.10. Thus, the respondent was justified in making the bid on the assumption that aggregates based on material sourced from Balason/ Matigara may be used for the *bituminous works*.

12.11. Thus, the respondent is entitled to the first claim.

12.12. Since clause 1004 read with clause 1007 removes all references to any material sourced from riverbeds, the use of the same was clearly prohibited.

12.13. Thus, the respondent was not justified in making the bid on the assumption that aggregates based on such material may be used.

12.14. Thus the respondent is not entitled to the said claim.

Since there is no dispute qua the basis of calculation, it would be unnecessary to relate the reasoning for the same herein. Furthermore, since there is no challenge to the dissenting award, the same need not be related here either.

13. The respondent sought a clarification of the Award under section 33 of the Act. It submitted that the operative portion of the Award has erroneously scored out the letters BC, after the letters DBM, both within parentheses, after the words "*bituminous works*". The respondent contended that the award was for all *bituminous works,* i.e., both Dense *Bituminous Macadam* and *Bituminous Concrete* and the letters BC, which stand for *Bituminous Concrete* ought to not have been scored out. This was opposed by the appellant on the ground that the claim was only for Dense *Bituminous Macadam* and hence the scoring out was warranted.

14. The appellant also appears to have sought a clarification in the Award under section 33 of the Act. It appears to have sought a clarification that in the part of the Award reproducing clause 507.2.2, the words

"...coarse aggregate shall consist of crushed stone shingle. They shall..." ought to read as "...coarse aggregate shall consist of crushed stone, / shingle. They shall..."

15. By their order of 3rd October, 2005, the tribunal amended the award and directed that *for Bituminous Works (BC) the additional expenditure incurred on transportation of aggregates from Pakur shall be worked out on the same principle as indicated in pages 19 and 20 of the award.* It further allowed the amendment sought for by the appellant.

16. The appellant preferred the section 34 petition challenging the award. The appellant contended inter alia:

16.1. That the amended clause 507.2.2 of the MoRTH specifications, in its letter and spirit, does not allow for aggregates based on material sourced from riverbeds being used.

16.2. That lime cannot function as an anti-stripping agent – which ideally should be fatty acids and amines with long hydrocarbon chains.

16.3. That the ASTM:D-3625 is not more serious than the AASHTO T-182 test and ought to not have been given preference.

16.4. That the amended clause 507.2.2 of the MoRTH specification does not contain the word crushed, and hence the word shingles would have no relevance.

16.5. That the respondent's contention that the bid is based on the assumption that aggregates based on material sourced from Balason/ Matigara is belied by its own documents.

16.6. That the claim for extra lead for material procured for *Bituminous Concrete works* was not even raised and the amendment to the Award, allowing the same, is clearly an excess of jurisdiction.

16.7. That the arbitral tribunal has failed to appreciate various documents submitted by the appellant in support of its case. Had the same been appreciated, the arbitral tribunal would have arrived at a different conclusion than the one arrived at.

17. The impugned order, as earlier recounted, dismissed the section 34 petition. By it, the learned Single Judge reasoned:

17.1. The objections raised by the appellant pertain to interpretation of the contract, which is in the dominion of the arbitrator.

17.2. The Court ought to not interfere with the interpretation of the contract as given by the arbitrator.

17.3. The grounds in the section 34 petition are, in effect, an appeal from the Award. The court exercising jurisdiction under section 34 of the Act cannot sit in appeal over the findings in the Award.

17.4. The grounds are merely regarding the tribunal's appreciation of material before it, which cannot be interfered with under section 34 of the Act.

17.5. The Award, as modified by the order of 3rd October, 2005, merely provides for the consequences arising out of the extra lead incurred by the respondent procuring aggregates from Pakur, on the basis of the tribunal's interpretation of the clauses of the contract. It cannot be said to be in excess of the contract.

18. Challenging the same, the appellant has filed the instant appeal. Since a large portion of the submissions pertained to clause 507.2.2 of the MoRTH specification, although irrelevant, it may be useful to set the same out below. The portions removed by the amendment are set out in bold:

> *"507.2.2. Coarse aggregates : The Coarse aggregates shall consist of crushed stone, crushed gravel/shingle or other stones. They shall be clean, strong, durable, of fairly cublical shape and free from disintegrated pieces, organic or other deleterious matter and adherent coating. The Aggregates shall preferably be hydrophobic and of low porosity. If the hydrophilic aggregates are to be used the bitumen shall be treated with anti stripping agents of approved quality in suitable doses. The aggregates shall satisfy the physical requirements set forth in Table 500-8.*
>
> *If crushed gravel/shingle is used, not less than 90% by weight of the gravel/shingle pieces retained on 4.75 mm sieve shall have at least two fractured faces. The portion of the total aggregate passing 4.75 mm sieve shall have a sand equivalent value of not*

> *less than 50 when tested in accordance with the requirement of IS:2720 (Part-37)."*

19. Senior Counsel Mr. Chetan Sharma, contended on behalf of the appellant that the Award fell into an error in holding that clause 507.2.2 of the MoRTH specifications permitted using aggregates based on shingles. He submitted that the terms of the contract do not admit of such an interpretation; that the word shingle is a mere surplusage and has no useful meaning in the provision; that it is hardly a plausible interpretation that the word shingle would have any meaning when it is immediately preceded by a stroke (the character "/"); that this is a clear indication that it was mere erratum that it subsisted in the clause post amendment. He further submitted that the interpretation placed upon clause 507.2.2 by the tribunal is implausible and ought to have been set aside by the learned Single Judge in exercise of his powers under section 34 read with section 28 (3) of the Act. In support of this contention, he cited the judgement of this Court in **R.S. Builders v. DDA & Anr.**[16]

20. He next contended that the arbitral tribunal had misapplied the *contra proferentem* principle in the facts of the case. He submitted that there was no circumstance warranting the application of the *contra proferentem* rule, as the respondent was – or was atleast deemed to be – fully aware of all the terms of the contract and had sufficient opportunities to seek clarification before it even bid for the tender. He contended that the *contra proferentem* rule ought to not have been used in the circumstances of the case, as it can hardly be said that the appellant was the proferens in the contract, which was a commercial contract signed by both parties. He submitted that in view of the same, the learned Single Judge ought to have set the Award aside. He relied on the decision of a learned Single Judge of this Court in **Tehri Hydro Development Corporation Ltd. v. Lanco Construction Ltd.**[17] in support of his submission.

21. Learned Counsel also contended that even assuming that the word shingle was not an error, and that shingles / material sourced from riverbeds were to be allowed, it still does not justify the respondent

16. 2008 (2) Arb. L. R. 361 (Delhi).

17. 2007 (3) Arb. L. R. 194 (Delhi).

making the bid on the assumption that material from Balasore/Matigara could be used. This, he contends, is in view of the fact that the material from Balasore/Matigara ought were not in compliance of the physical requirements as specified in Table 500-8 of the MoRTH specifications. He contended that the findings in the report from IIT Kharagpur ought to not be placed reliance on, since it is based on the ASTM:D-3625, while the proper test as per the contract is the AASHTO T-182 test. He submitted that this makes the instant dispute a fit case for exercise of the powers under section 34 of the Act to set aside the Award. He relied upon the judgement of this Court in **Delhi Development Authority v Sunder Lal Khatri and Sons**[18] to contend that insufficiency of reasons in the award is a ground for setting aside the award.

22. Learned Counsel also contended that the report from IIT Kharagpur only recommended lime being used as a filler. He submitted that a filler is different from an anti stripping agent. He submitted that the provisions of clause 507.2.2 of the MoRTH specifications allowed usage of an approved anti-stripping agent in case of hydrophilic substances, which hydrated lime is admittedly not. He submitted that the Award, which proceeds on the premise that as long as hydrated lime is not prohibited, its usage cannot be regarded as illegal, is patently and manifestly illegal. This illegality, he submits, goes to the very root of the matter and vitiates the entire award, which is premised on this illegality. He contends that the learned Single Judge ought to have set the Award aside in view of the same. He drew the attention of this Court to the judgement of the Supreme Court in **Hindustan Zinc Ltd. v. Friends Coal Carbonisation,**[19] to the issue that an award cannot be contrary to the terms of the contract.

23. He then submitted that the material on record before the arbitral tribunal clearly indicated that the contention of the respondent that its bid was based upon the assumption that aggregates based on material sourced from Balason/Matigara may be used is specious. He drew reference to the bid documents, specifically the document pertaining to methodology to submit that the methodology specified by the respondent is not one

18. 2009 1 Arb. L. R. 240 (Delhi) : 157 (2009) DLT 555.

19. (2006) 4 SCC 445.

that could be used in respect of anything other than crushed stones – which the material from Balason/Matigara was not. He submits that the Award clearly fell into an error in holding that the respondent's bid was based upon the assumption that aggregates based on material sourced from Balason/Matigara may be used. He contended that this was sufficient ground for the learned Single Judge to have set the Award aside. He relied on the judgement of this Court in **Oil and Natural Gas Corporation Ltd. v. Schlumberger Asia Services Ltd.**[20] in this regard.

24. Lastly, he contended that there is no material on record to show that a claim in respect of *Bituminous Concrete works* (which is governed by clause 512 of the MoRTH specifications but has the same requirement qua material as Dense *Bituminous Macadam* works – clause 507.2.2) had been raised or prosecuted by the respondent. He submitted that the application under section 33 of the Act is not one that could have been made by the respondent when the original statement of claim contained neither averments nor a claim for extra lead incurred in procuring aggregates from Pakur for *Bituminous Concrete works*. He submits that this falls squarely within the provisions of section 34(2)(a)(iv) of the Act and ought to have been set aside.

25. Counsel for the respondent opposed the appeal and contended that the learned Single Judge had rightly refused to interfere with the award. He contended that the interpretation placed on clause 507.2.2 of the MoRTH specification by the arbitral tribunal is not only a plausible interpretation, it is the only interpretation. He submitted that the mention of the word shingle therein, when read in conjunction with the lack of similar words in clause 1004 read with 1007 of the MoRTH specifications, is a clear indication of the intent of the appellant to allow the material sourced from riverbeds.

26. He contended that there is no basis for the section 34 petition or the present appeal. He submits that the limited jurisdiction under section 34 and section 37 of the Act does not permit the Court to decide the present appeal. He also contended that the arbitral tribunal has rightly come to the conclusion that the aggregates based on the material sourced from Balason/Matigara do comply with the physical requirements under

20. (2006) 3 Arb. L. R. 610.

Table 500-8 of the MoRTH specifications; he drew reference to the report from IIT Kharagpur in this regard.

27. The primary contention, as earlier stated, of the appellant is that the interpretation placed by the Award on clause 507.2.2 of the MoRTH specifications is incorrect. This court finds itself unable to agree with the contention. The arbitral tribunal has considered the terms of the MoRTH specifications and also considered the fact that the provisions of 507.2.2 of the MoRTH specifications do specify the word shingle while clause 1004 read with clause 1007 thereof does not, and consequently held that the same indicates that shingle being retained in clause 507.2.2 is not an erratum. This is a plausible interpretation of the contract; even if not mentioned, it is apparent that it follows the principle enunciated in the maxim expressio unius est exclusio alterius[21] – a well-established rule of interpretation qua deeds and other instruments.[22] The law as laid down by the Supreme Court in its various judgements enjoins this Court from interfering with the interpretation placed by the arbitral tribunal upon a contract, so long as it is plausible; this Court shall not interfere with the same.

28. The second contention qua the interpretation placed upon the contract was that the rule of *contra proferentem* ought to not have been applied in this matter as it was a commercial contract signed by the parties after all terms have been understood fully. Thus, it is contended that there is no mandate to construe the terms of the contract against the appellant. Indeed, it is a well established principle of construction of contract that if the terms employed by one party are unclear, an interpretation against that party will be preferred. This proposition of law appears in the award of the arbitral tribunal at paragraphs 2.6.5 to 2.7.3, and there is no dispute as to its validity.[23] Following from this proposition of law, the arbitral award stated that "[w]e will be justified in giving effect to the meaning of the word "shingles" more favourable to the

21. Latin: The expression of the one is the exclusion of the other.

22. *A. B. C. Laminarts Pvt. Ltd. & Anr. v A. P. Agencies, Salem,* (1989) 2 SCC 163; *Hanil Era Textiles Ltd. v Puromatic Filters (P) Ltd.,* (2004) 4 SCC 671; *Swastik Gases Pvt. Ltd. v Indian Oil Corporation Ltd.,* (2013) 9 SCC 32; *Max India Ltd. v General Binding Corporation,* 2009 (3) Arb. L. R. 162 (Delhi).

23. *Bank of India v K. Mohandas and Ors.,* (2009) 5 SCC 313.

contractor and accept his submission so far as the construction of the clause goes." The learned single judge declined to enter this debate as it related to the construction of the contract – a matter properly reserved within the domain of the arbitral tribunal. Given that no argument as to an error in law has been pursued, the interpretation placed on the contract is a matter within the jurisdiction of the arbitral tribunal, and thus, even if an error exists, this is an error of fact within jurisdiction, which cannot be re-appreciated by the Court under sections 34 or 37 of the Act.[24] The appellant, rather, invites the Court to question the inferences drawn from an application of this rule of law; such re-appreciation is impermissible.

29. The contention of the appellant qua the report from IIT Kharagpur is clearly an issue of appreciation of facts. As earlier observed, this Court is enjoined from re-appreciating evidence merely to arrive at a different conclusion from the arbitrator. It can hardly be said that the findings of the arbitrator are patently erroneous or without material to support the same. It has observed inter alia that the ASTM:D-3625 test is more serious than the AASHTO T-182 test, that lime's anti stripping properties have been discussed in MoRTH's manual for construction and supervision of bituminous work and that clause 507.2.2 itself provides for use of an anti-stripping agents in case of hydrophilic material, before coming to its conclusions qua the report from IIT Kharagpur. The learned Single Judge has rightly refused to interfere with the Award on this count and this Court shall follow suit.

30. Similarly, the contention that the respondent's bid was not based on the assumption that material from Balason/Matigara may be used has to be rejected. This Court will not re-appreciate evidence merely to come to a different conclusion than the arbitral tribunal.

31. This Court, once again, finds itself unconvinced by the contentions of the appellant on this ground. It has been contended that the claim has been only for Dense *Bituminous Macadam* works and the award, to the extent it awarded extra lead in respect of material procured for *Bituminous Concrete works*, deserves to be set aside with under section 34(2)(a)(iv). This Court is unimpressed with the contention. The

24. *Sudarshan Trading Co. v. Govt. of Kerala,* (1989) 2 SCC 38; *Oil and Natural Gas Corporation Ltd. v Saw Pipes Ltd,.* (2003) 5 SCC 705.

Award, in paragraph 2.6 et. seq., discusses *bituminous works*. That no discussion under clause 512 of the MoRTH specifications is made in the Award is understandable, inasmuch as the MoRTH specifications, in clause 512. itself refers to clause 507.2.2, which – as stated earlier – was the subject matter of discussion in the Award. The Award, discussing the first claim in paragraph 3.1 et. seq. discusses claims for DBM etc. (*Bituminous Works*). The wordings used in the said paragraphs, once again, is *bituminous works*, as opposed to Dense *Bituminous Macadam* as sought to be contended by the appellant herein. The Declaration about the future of the Award in paragraph 3.6 et. seq. also employs the words *Bituminous Works*. Even the MoRTH specifications provide for both Dense *Bituminous Macadam* works and *Bituminous Concrete works* under the same chapter.

32. Especial reliance was sought to be placed by the appellant upon the insertion of the figures and letters (DBM) in sub-paragraph (i) of the Final Award at paragraph 4.0 to contend that the Award has intentionally restricted itself to the claim made based on extra lead for Dense *Bituminous Macadam* works and that the scoring out sought to be clarified by the application under section 33 was rightly made. This Court finds itself, once again, unconvinced by this argument. It is not the case of the appellant that the term *Bituminous works* refers only to Dense *Bituminous Macadam* works, nor is such a contention borne out from the records. Should the appellant have wanted to so contend, it is reasonable to assume that the appellant ought to have sought the clarification under section 33 of the Act. Given the same, this Court finds no substance in this contention as would warrant interference with the impugned order.

33. For the above reasons, this Court finds no reasons to interfere with the impugned order. Consequently, the appeal is dismissed as being without merits. The parties are left to bear their own costs.

ILR (2014) II DELHI 1204
CS (OS)

DHARAMPAL SATYAPAL LTD. ....PLAINTIFF

VERSUS

SANMATI TRADING AND INVESTMENT LTD. AND ORS. …. DEFENDANT

(G.S. SISTANI, J.)

CS (OS) NO. : 320/2006 DATE OF DECISION: 18.03.2014

Code of Civil Procedure, 1908—Order 1 R. 10—Plaintiff filed a suit for specific performance to enforce an agreement to sell entered into with the defendant—Defendant informing that the suit property was sold before filing of the suit to proposed defendant—Application U/o. 1 R.10 CPC filed by the plaintiff to impaled buyer as proposed defendant. Held, since property was sold prior to filing of the suit the doctrine of the Lis - pendent would not be applicable.

Also held, that the claim of proposed defendant that Section 19(b) of Specific Relief Act would be applicable is a question of trial as it's a question of evidence whether proposed defendant had knowledge of the previous agreement or not and also whether he purchased the property benefice or mollified. The proposed defendant who is a subsequent purchaser and who is not claiming adverse title to the seller, therefore, is a necessary party irrespective or the fact whether he purchased the property with or without notice of the prior agreement, as he would be affected by the final outcome of the case between plaintiff and defendant.

RESULT: Application allowed.

G.S. SISTANI, J. (ORAL)

IA.No.6351/2008

1. Plaintiff has filed the present application under Order 1 Rule 10 read with Section 151 CPC for impleading Veejay Buildwell Pvt. Ltd., J-27, Jungpura Extn., New Delhi, as a party to the present suit.

2. The necessary facts to be noticed for disposal of this application are that the plaintiff entered into a Memorandum of Understanding on 17.6.2004 with the defendants for purchase of a residential property bearing No.3, Friends Colony (West), New Delhi ad measuring 4211 sq. yds. As per the plaint, the sale consideration was fixed at Rs.16.29 crores (Rs.21.0 crores as per the defendants). Plaintiff paid a sum of Rs.11.0 lacs to the defendants, towards the payment of sale consideration. Since the defendants failed to complete the transaction, the present suit for specific performance was filed. After filing of the written statement it was revealed that the suit property was sold on 10.06.2005 to the proposed defendant for a sale consideration of Rs.11.0 crores.

3. Mr.Dhingra, counsel for the plaintiff submits that the necessity of filing the present application has arisen as in paragraph 17 of the preliminary objections it has been revealed by the defendant no.1 that the subject property bearing No.3, Friends Colony (West), New Delhi, has been sold to one Veejay Buildwell Pvt. Ltd., J-27, Jungpura Extn., New Delhi by a registered Sale Deed on 10.6.2005. Mr.Dhingra, submits that the sale in question is mala fide, which is evident from the fact that the documents placed on record show that the sale deed has been executed for an amount far less than that agreed between the plaintiff and the defendants. Counsel further submits that the defendants had been served with a legal notice by the plaintiff seeking specific performance of the agreement dated 17.06.2004 on 6.5.2005, i.e., just a couple of days prior to the alleged sale transaction of the defendants with the proposed defendant. It is thus contended that the sale transaction is collusive, mischievous and is liable to be set aside.

4. Mr.Dhingra, counsel for the plaintiff submits that the proposed defendants [M/s.Veejay Buildwell Pvt. Ltd.] would be a proper and necessary party and their presence would be necessary for proper adjudication of the matter and in case they are not impleaded, any final order which may be passed in the present suit may prejudicially affect the rights of the proposed defendants as well, as they have purchased the suit property, despite a prior agreement to sell in favour of the plaintiff.

5. Mr.Rajesh Banati, counsel appearing for the proposed defendant (M/s.Veejay Buildwell Pvt. Ltd.) has opposed the present application. It is submitted that M/s.Veejay Buildwell Pvt. Ltd. is not a necessary and proper party and they are the bona fide purchasers and have nothing to do with the alleged transaction between the plaintiff and the defendants.

6. Counsel for the proposed defendant further submits that the doctrine of lis pendens would not be applicable in the present case, as the proposed defendant has not purchased the property during the pendency of the present suit. In support of his submission counsel for the proposed defendant has placed reliance on **Ram Kumar Tiwari and Ors. Vs. Deenanath and Ors.** reported at AIR 2002 Chhattisgarh 1 and more particularly on paragraph 12, which is reproduced below:

> "12. So far as the merits of the matter are concerned, in view of the fact that the applicants did not purchase the property during the pendency of the suit, the observations made by the learned Court below, that the objections filed by the present applicants were hit under the provisions of Section 52 of the Transfer of Property Act or by lis pendense, would become contrary to records. If the learned Court below had applied its mind to the facts of the case and the objections raised by the present applicants, it could read from the objections that they had purchased the property much before the institution of the suit and their vendor, so also they themselves were not joined as parties to the suit. If such was the objection, then application of Section 52 of the Transfer of Property Act was patently illegal. The order passed by the learned executing Court cannot be

allowed to stand. Not only it is contrary to law but the same is contrary to the facts. The order passed by the executing Court deserves to and is accordingly quashed. The parties are directed to appear before the executing Court on 8-5-2001. The executing Court shall grant proper opportunity to the respondent/decree-holder to file fresh objections/reply and shall proceed to decide the application filed by the applicants in accordance with law."

7. Counsel for the proposed defendant has also placed reliance on **Narayana Pillai Chandrasekharan Nair Vs. Kunju Amma Thankamma** reported at AIR 1990 Kerala, 177 and more particularly headnote „c. and paragraph 8, which are reproduced below:

"(C) Transfer of Property Act (1882), S.52 – Applicability -- Suit seeking specific performance of agreement – Execution and registration of sale deed with respect to property involved in suit on same day when suit was filed – Transfer pendente lite could not be presumed.

The burden is on the party relying on the effect of S.52 and pleading lis pendens to prove that his suit was instituted before the execution of the deed of transfer which he is impeaching. In the instant case execution and registration of sale deed and the presentation of the plaint were on the same day. So also, sale deed was registered only at 2:30 p.m. That does not mean that execution and presentation for registration were at that time. It must have been executed and presented for registration much earlier. Then only after the formalities and in the usual course it could have come up before the Sub Registrar at 2.30. There is no evidence regarding the time at which sale deed was executed. "Transferred or otherwise dealt with" the property appearing in S. 52, T.P. Act is not the admission of execution before the Sub.-Registrar or the registration by him. That is execution and transfer of possession and title as the case may be."

8. The contention that Ext. A6 is hit by the rule of lis pendens

embodied in S. 52 of the Transfer of Property Act does not appear to be correct. It is true that execution and registration of Ext. A6 and the presentation of the plaint were on the same day. So also, Ext. A6 shows that it was registered only at 2.30 p.m. That does not mean that execution and presentation for registration were at that time. It must have been executed and presented for registration much earlier. Then only after the formalities and in the usual course it could have come up before the Sub Registrar at 2.30. There is no evidence regarding time at which Ext. A6 was executed.

"Transferred or otherwise dealt with" the property appearing in S. 52, T.P. Act is not the admission of execution before the Sub. Registrar or the registration by him. That is execution and transfer of possession and title as the case may be. The burden is on the party relying on the effect of S. 52 and pleading lis pendens to prove that his suit was instituted before the execution of the deed of transfer which he is impeaching (**Hafiuddin v. Brijmohan** (1913) 21 Ind Cas 602 followed in **Mathan Philip v. Ithak.** 1959 Ker LT 301 : (AIR 1960 Ker 98).

8. Mr.Rajesh Benati, counsel for the proposed defendant has also placed reliance on a decision of a Division Bench of this Court **Mohan Overseas P. Ltd. Vs. Goyal Tin & General Industries** reported at 169 (2010) DLT 487, and more particularly on paragraph 12, which is reproduced below:

"The doctrine of lis pendens fortifies and strengthens this interpretation of the law which is to be found in Section 52 of the TP Act. It contemplates that during the pendency in any Court of any suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the suit property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order

which may be made thereto except under the authority of the Court and on such terms as it may impose. The impact of the doctrine of lis pendens has been analysed by the Supreme Court very recently in Guruswamy Nadar v. P. Lakshmi Ammal, AIR 2008 SC 2560 ; the field of operation and interaction of Section 19 of the SR Act and Section 52 of the TP Act have been discussed. Section 19 deals with the availability of the relief of specific performance against a person claiming subsequent title to the property; this relief being unavailable in instances where the subsequent purchaser has paid valuable consideration for the purchase without having any notice or knowledge of the earlier or original contract. Section 52 of the TP Act, it has already been seen, stipulates broadly that where a suit has already been filed in respect of a property it cannot be transferred or dealt with to the detriment of the Plaintiff. Thus, let us conceptualize a case where on 1stApril, 2009 A enters into an agreement to sell a house with B, and on the refusal or failure by A to complete the deal, B is constrained to initiate an action for specific performance against A on 1st May, 2009. Any endeavour of A to transfer the suit property after the latter date shall not defeat the rights of Plaintiff B, this being the doctrine of lis pendens. However, if A had sold for value the said property to C in the month of April, 2009 itself, then if C had no knowledge or notice of the agreement between A and B, A would not be able to enforce the relief of specific performance against C, as per Section 19 of the Specific Relief Act. Notice or knowledge should be actual; but it can also be constructively assumed as where the second purchaser fails even to ascertain who is in possession (See R.K. Mohammad Ubaidullah v. Hajee C. Abdul Wahab, AIR 2001 SC 1658). The two provisions, thus, operate in different fields albeit these may be located contiguous or close to each other. In Nadar the Defendant Lakshmi had contracted to sell her house for Rupees 30,000/- on 4.7.1974 but the entire price was not paid as per contract by 31.7.1974. Lakshmi thereafter sold the house to Nadar for Rupees 40,000/- on 5.5.1975, the dealings being bona fide, that is, NADAR who had been put in

possession had no notice of the previous agreement. The Apex Court held that since the second transaction of sale took place after the filing of the suit on 3.5.1975 predicated on the earlier sale agreement, the doctrine of lis pendens would take effect. In Nadar two points came to the fore - (a) that the pendency of a suit for specific performance will invariably act as a clog on property transactions and in unsustainable cases will therefore tantamount to an abuse of the legal process; (b) despite the operation of lis pendens, in a genuine case, the Defendant should be injuncted from creating third party rights in the interest of an innocent third party."

9. Counsel for the proposed defendant has also placed reliance on **Meer Singh Vs. Amar Singh** reported at 166 (2010) DLT 696.

10. Another argument raised by counsel for the proposed defendant is that section 19(b) of the Specific Relief Act would be applicable and the proposed defendant being a bona fide purchaser, who purchased the property in good faith and without any notice of the original MOU executed between the plaintiff and the defendants, would not be a proper and necessary party, therefore, no relief can be granted in favour of the plaintiff.

11. Per contra, counsel for the plaintiff in support of his submission that the proposed defendant is a necessary party, has relied upon a decision of the Apex Court in the case of **Thomson Press (India) Ltd. Vs. Nanak Builders and Investors Private Limited and Ors.** reported at (2013) 5 SCC 397. Reliance has also been placed on a decision rendered by a Division Bench of this Court in the case of **Samarjit Singh Chattha Vs. Fashion Flare & Ors.** [FAO (OS) No. 177 of 2012] reported at MANU/DE/1837/2012 and more particularly on paragraph 7 thereof, which is reproduced below:

"7. We may notice that the learned single Judge has analyzed the controversy in detail. On the factual matrix the learned single Judge has noted the crucial fact of sale of property to the appellant

by the original plaintiff even prior to the last date for performance of the obligations inter se the original plaintiff and the original defendants. The learned single Judge has rightly drawn support from the observations made in paragraph 7 of the judgement in **Kasturi Vs. Iyyamperumal & Ors.** Case (supra) to the following effect:

> 7. In our view, a bare reading of this provision namely, second part of Order 1 Rule 10 sub-rule (2) of the CPC would clearly show that the necessary parties in a suit for specific performance of a contract for sale are the parties to the contract or if they are dead their legal representatives as also a person who had purchased the contracted property from the vendor. In equity as well as in law, the contract constitutes rights and also regulates the liabilities of the parties. A purchaser is a necessary party as he would be affected if he had purchased with notice of the contract, but a person who claims adversely to the claim of a vendor is, however, not a necessary party. From the above, it is now clear that two tests are to be satisfied for determining the question who is a necessary party. Tests are - (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings (2) no effective decree can be passed in the absence of such party."
>
> (Emphasis Supplied)

It has, thus, been categorically held that where a person had purchased a contracted property from a vendor, he/she can be impleaded as a party as the purchaser is a necessary party being affected if he has purchased with notice of the contract, the exception being a person who claims adversely to the claim of the vendor where such party would not be a necessary party. The latter is not so in the facts of the present case. It is, once again, emphasized in paragraph 11 of the said judgement that the question to be decided in a suit for specific performance of the contract for sale is to the enforceability of the contract entered into between the parties to the contract."

12. I have heard counsel for the parties and considered their rival submissions. The following dates, which are admitted by the parties would have a necessary bearing on the final decision to this application, hence, the same are being noticed. Pursuant to an oral communication defendants had agreed to sell the suit property to the plaintiff for a sale consideration of Rs.16.29 crores. An amount of Rs.11.0 lacs was paid by the plaintiff to the defendant, which was acknowledged in the Memorandum of Understanding signed between the parties on 17.6.2004. On 6.2.2005, the plaintiff got issued a public notice inviting objections from the public at large with respect to the sale transaction. A legal notice was also issued to the defendant for completing the sale transaction on 6.5.2005; and thereafter the present suit was instituted on 21.1.2006. In the meanwhile the suit property was sold by the defendant to the proposed defendants in terms of a sale deed dated 10.6.2005.

13. The short submission of counsel for the plaintiff is that the final order which may be passed in the present suit is likely to have a bearing on the rights of the proposed defendant, and thus, the proposed defendant is a proper and necessary party.

14. The submission of Mr.Benati, counsel for the proposed defendant is that in view of section 19(b) of the Specific Relief Act, the proposed defendant is not a proper and necessary party, moreover since the property was not sold during the pendency of the suit, doctrine of lis pendens would also not apply to the proposed defendant. It is also the case of the proposed defendant that they are bona fide purchasers and they had no knowledge or notice with regard to an earlier Memorandum of Understanding between the plaintiff and the defendants.

15. At the outset, it may be noticed that it is not the case of the plaintiff that the doctrine of lis pendens would be applicable as admittedly the property has been sold prior to the filing of the suit, thus in my view

the judgments relied upon by counsel for the proposed defendant [**Ram Kumar Tiwari and Ors. Vs. Deenanath and Ors.** AIR 2002 Chhattisgarh 1 and **Narayana Pillai Chandrasekharan Nair Vs. Kunju Amma Thankamma** AIR 1990 Kerala, 177], would not be applicable, as both the aforesaid decisions pertain to the proceedings arising out of the execution and moreover relate to the doctrine of lis pendens.

16. Reliance on Section 19 (b) of the Specific Relief Act by counsel for the proposed defendant is also misplaced as Section 19(b) of the Act lays down two exceptions to the enforcement of specific performance against a person claiming title under a subsequent contract i.e. (i) against a person or transferee who has paid consideration in good faith and (ii) without notice of the original contract. As far as the submission of Mr.Benati, counsel for the proposed defendant pertaining to being covered under the exceptions laid down in section 19(b) of the Specific Relief Act is concerned, in my view this submission is pre mature for two reasons: firstly, at this stage it cannot be established beyond reasonable doubt that the payment was made by the proposed defendant in good faith as it is the case of the plaintiff that the property was sold in a mala fide manner to the proposed defendant and it was undervalued, as the MOU entered between the plaintiff and the defendants was for Rs.16.29 crores, whereas the property was sold to the proposed defendant at merely Rs.11.0 crores; and secondly the question as to whether the purchaser had knowledge of the previous agreement or not, is a question of evidence, which cannot be decided at this stage. Therefore, both the conditions/ exceptions under section 19 (b) that protect a subsequent purchaser from enforcement of specific performance against him are not prima facie made out at this stage. The effect of impleadment is something which is to be considered by the Court at the stage of final hearing of the suit.

17. The judgment of **Meer Singh** (Supra) relied upon by counsel for the proposed defendant pertains to a matter where an application under Order 1 Rule 10 CPC was filed by two persons, who claimed that the suit property was a co-parcenery property. Although the Single Judge came to the conclusion that being strangers to the transaction, they were not proper and necessary party, reliance was placed by the learned Single

Judge on the case of **Kasturi Vs. Iyyamperumal** reported at IV (2005) SLT 70, more specifically on para 13 of the decision, wherein incidentally the Supreme Court has distinguished and highlighted in bold that a purchaser is a necessary party, as he would be affected if he had purchased with or without notice of a contract, but a person who claims adversely to the claim of the vendor is, however, not a necessary party.

18. The distinction made by the Supreme Court in the aforesaid decision was that a person, who claims adversely to the claim of the vendor, is not a necessary party. In the instant case the proposed defendant is a subsequent purchaser who is not claiming title adverse to the seller and therefore is a necessary party irrespective of whether he purchased the property with or without notice of the prior agreement as he would be affected by the final outcome of the present case between the plaintiff and the defendants.

19. In **Thomson Press (India) Ltd.** (Supra), the Apex Court has observed as under:

> "30. In the light of the settled principles of law on the doctrine of lis pendens, we have to examine the provisions of Order 1 Rule 10 of the Code of Civil Procedure. Order 1 Rule 10 empowers the court to add any person as party at any stage of the proceedings if the person whose presence before the court is necessary or proper for effective adjudication of the issue involved in the suit. 31. Order 1 Rule 10 CPC reads as under:
>
> > **"10. Suit in name of wrong plaintiff.**—(1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the court thinks just.

(2) Court may strike out or add parties.—The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) Where defendant added, plaint to be amended.—Where a defendant is added, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendant.

(5) Subject to the provisions of the Indian Limitation Act, 1877 (15 of 1877), Section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons."

From the bare reading of the aforesaid provision, it is manifest that sub-rule (2) of Rule 10 gives a wider discretion to the court to meet every case or defect of a party and to proceed with a person who is either a necessary party or a proper party whose presence in the court is essential for effective determination of the issues involved in the suit.

32. Considering the aforesaid provisions, this Court in **Ramesh**

Hirachand Kundanmal v. Municipal Corpn. of Greater Bombay [(1992) 2 SCC 524] held as under: (SCC p. 531, para 14)

"14. It cannot be said that the main object of the rule is to prevent multiplicity of actions though it may incidentally have that effect. But that appears to be a desirable consequence of the rule rather than its main objective. The person to be joined must be one whose presence is necessary as a party. What makes a person a necessary party is not merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. The line has been drawn on a wider construction of the rule between the direct interest or the legal interest and commercial interest. It is, therefore, necessary that the person must be directly or legally interested in the action in the answer i.e. he can say that the litigation may lead to a result which will affect him legally that is by curtailing his legal rights. It is difficult to say that the rule contemplates joining as a defendant a person whose only object is to prosecute his own cause of action. Similar provision was considered in Amon v. Raphael Tuck & Sons Ltd. [(1956) 1 QB 357 : (1956) 2 WLR 372 : (1956) 1 All ER 273] , wherein after quoting the observations of Wynn-Parry, J. in Dollfus Mieg et Compagnie SA v. Bank of England [(1950) 2 All ER 605] , that the true test lies not so much in an analysis of what are the constituents of the applicants' rights, but rather in what would be the result on the

subject-matter of the action if those rights could be established, Devlin, J. has stated: (Amon case [(1956) 1 QB 357 : (1956) 2 WLR 372 : (1956) 1 All ER 273] , QB p. 371),,

… the test is: "May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights?"."

20. Applying the law laid down by the Apex Court in the case of **Thomson Press (India) Ltd.** (Supra) to the facts of the present case, it may be noticed that it is the case of the plaintiff that the property was sold by the defendant in a clandestine manner, at a price less than the agreed price with the plaintiff, with a view to defeat the legitimate claim of the plaintiff. Applying the test laid down above, should the plaintiff succeed the result would have a direct bearing on the sale transaction between the proposed defendant and the defendant and thus the proposed defendant is a proper and necessary party to ensure that the proposed defendant is bound by the result in the suit and for the proper and effective determination of the issues raised. Consequently, the application is allowed. Veejay Buildwell Pvt. Ltd., J-27, Jungpura Extn., New Delhi, is impleaded as a party to the present suit.

21. Application stands disposed of.

CS(OS) 320/2006 & IA.No.3276/2011 (u/O.6 R.17 CPC)

22. Let a complete set of paper book be supplied to the newly impleaded defendant. The written statement will be filed by the proposed defendant within 30 days. Replication be filed within 30 days thereafter.

23. List on 21.5.2014 for addressing arguments on the application [IA.No.3276/2011 (u/O.6 R.17 CPC)].

ILR (2014) II DELHI 1218

CRL. A.

SHYAMBIR ....APPELLANT

VERSUS

STATE GOVT. OF NCT OF DELHI ....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 310/2012 DATE OF DECISION: 20.03.2014

Indian Penal Code, 1860—Section 392/397—Conviction—Appeal against. Held, no ulterior motive assigned to the witnesses, who had no prior acquaintance with appellant, to falsely implicate him. Non-examination of the person who was instrumental in apprehending the appellant is of no consequence as the appellant identified without hesitation by material witnesses who had direct confrontation with the appellant in the bus. Acquittal of co-accused due to lack of evidence and lapses on the part of investigation is inconsequential to give benefit to appellant. Appellant did not give any plausible explanation qua incriminating circumstances against him. Appellant did not give any reasonable explanation about this presence with a knife inside the bus at the relevant time. He was arrested soon after the incident, therefore, TIP was not necessary.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Pramod Kr. Dubey with Mr. Shiv Pande, Advocates.

FOR THE RESPONDENT : Mr. Lovkesh Sawhny, APP. SI Manjeet Kumar, PS South Campus.

RESULT: Appeal Dismissed.

S.P. GARG, J.

1. Challenge in this appeal is to a judgment dated 05.10.2011 in Sessions Case No.95/11 arising out of FIR No.56/10 registered at Police Station Dhaula Kuan by which the appellant-Shyambir was held guilty for committing offence under Section 392 read with Section 397 IPC. By an order on sentence dated 10.10.2011, he was awarded RI for five years with fine 5,000/-under Section 392 IPC and RI for seven years under Section 397 IPC. Both the substantive sentences were to operate concurrently.

2. Allegations against the appellant were that on 27.03.2010 at about 11.30 a.m. at or near Arjun Vihar Bus Stand, Dhaula Kaun, he and his associates Jaswant and Sanjay @ Ajay in furtherance of common intention committed robbery and deprived Nirmla Devi of her gold chain and gold ear-tops while she was travelling in a private bus. The appellant was apprehended at some distance after chase and crime weapon i.e. knife was recovered from his possession. His associates Jaswant and Sanjay @ Ajay succeeded to flee the spot. Subsequently, they were arrested and some recoveries were effected. Statements of witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was submitted in the court against all of them; they were duly charged; and brought to trial. It is relevant to note that Sanjay @ Ajay expired during trial and proceedings against him were dropped as 'abated'. In 313 statements, the contesting accused persons denied their complicity in the crime and pleaded false implication. The trial court by the impugned judgment convicted Shyambir for the offences mentioned previously while Jaswant was acquitted of all the charges. It is apt to note that the State did not challenge his acquittal. Being aggrieved by the impugned judgment, the appellant has preferred the appeal.

3. I have heard the learned counsel for the parties and have examined the file. Appellant's counsel urged that the trial court did not appreciate the evidence in its proper and true perspective. The appellant was convicted with the aid of Section 397 IPC only. However, acquittal of co-accused Jaswant shows that he did not share common intention with him. No recovery of the stolen articles was effected from his possession. The investigating officer did not move any application for holding Test Identification Proceedings. The military-man who had apprehended the appellant was not examined and produced. Learned APP for the State urged that the complainant, her husband and nephew identified the appellant as one of the assailants who committed robbery and there are no sound reasons to interfere in the impugned judgment which is based upon fair appraisal of the evidence.

4. The police machinery came into motion when information was conveyed and recorded by Daily Dairy (DD) No.15A (Ex.PW-2/C) at police station Dhaula Kuan about the apprehension of a snatcher. The investigation was assigned to ASI Ramesh Chand (PW-8) who went to the spot and lodged First Information Report after recording complainant-Nirmla Devi's statement (Ex.PW-1/A). In her complainant, Nirmla Devi gave detailed account of the incident as to how and under what circumstances she was robbed of her golden chain and ear-rings by the assailants in the bus while using a knife. She also disclosed that two of the assailants were successful to flee on a motor-cycle and the appellant was apprehended by a military-man. She also disclosed about the recovery of knife from his possession. While appearing in the court, she proved the version given to the police at the first instance without any deviation. She identified Shyambir as one of the assailants and attributed specific role to him. She deposed that accused Sanjay touched her gold chain which she was wearing and snatched it. When she tried to raise alarm, Shyambir (the appellant) took out a knife and threatened her not to raise voice. Sanjay while running away removed her golden ear-tops. Thereafter, Sanjay and Shyambir got down from the bus from the back gate and the third assailant asked the driver to continue to drive the bus. She further deposed that Shyambir was apprehend near the spot along with a knife. Her statement (Ex.PW-1/A) was recorded by the police on arrival. She

identified knife (Ex.P1) as crime weapon. She was cross-examined by the accused. However, no material discrepancies could be extracted to disbelieve her statement. All material facts deposed by the witness remained unchallenged and uncontroverted. She suffered injuries and was medically examined by Dr.Mukesh Nandan (CW-1) by MLC (Ex.CW1/A), where the nature of injuries was opined as 'simple'. The accused did not deny his apprehension at the spot with a knife and the role attributed to him.

5. PW-3 (Jagdish Prasad-her husband) and PW-6 (Vinay Kumar Tiwari) who were travelling in the said bus, fully corroborated her version without any deviation. They also identified Shyambir as one of the assailants who used knife to extend threats while his associates robbed the complainant of her valuable articles. They also proved his apprehension with a knife soon after the occurrence at the spot. Again, their cross-examination did not yield any fruitful result to benefit the appellant. No ulterior motive was assigned to any of these witnesses, who had no prior acquaintance with the appellant, to falsely implicate and identify him. Non-examination of military-man, who was instrumental in apprehending the appellant, is of no consequence as he has been identified without any hesitation by the material witnesses who had direct confrontation with him inside the bus. Acquittal of co-accused Jaswant due to lack of evidence and lapses on the part of investigation is inconsequential to give benefit of doubt to the appellant who has been recognized as one of the assailants and who had facilitated the commission of robbery by co-accused. Knife (Ex.P1) recovered from the accused was a buttandar knife; a prohibited weapon under the Arms Act. Its sketch (Ex.PW-3/A) reveals its size and dimension. Apparently, it was a 'deadly' weapon used while committing robbery. The accused did not give plausible explanation to the incriminating circumstances appearing against him. He did not give reasonable explanation about his presence with a knife inside the bus at the relevant time. Since the appellant was arrested soon after the incident at the spot, there was no necessity to conduct Test Identification Proceedings. The testimony of the prosecution witnesses is consistent and they have corroborated each other on all material facts. There is nothing to disbelieve and discard their clinching evidence in the absence of any prior animosity or ill-will. The conviction of the appellant under

Section 392 with the aid of Section 397 IPC cannot be faulted and is affirmed. The sentence order cannot be modified as minimum sentence prescribed under Section 397 IPC is seven years. However, default sentence awarded by the trial court for non-payment of fine can be modified to some extent considering the poor economic condition of the appellant.

6. In the light of the above discussion, while maintaining the conviction under Section 392 read with Section 397 IPC, the sentence order is modified to the extent that default sentence for non-payment of fine of Rs. 5,000/- will be fifteen days instead of three months. Other terms and conditions of the sentence order are left undisturbed.

7. The appeal stands disposed of in the above terms. Trial Court record along with a copy of this order be sent back forthwith.