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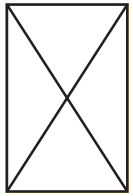

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(CONTAINS GENERAL INDEX)

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installed therein came to the share of Shri Anil Kumar Manik who is now the sole proprietor of the appellant. It is further the case of the appellant that the Company in liquidation was incorporated on 3rd August, 2005 with authorized share capital of Rs. 5 Lacs only and for which the appellant contributed Rs. 2 lac. It is yet further the case of the appellant that on 7th September, 2005 a Memorandum of Understanding/Agreement was executed between the appellant and the Company in liquidation. Whereunder the appellant agreed to sell and transfer all fixed assets including industrial plot at Sector 29, Part-II, HUDA, Panipat and the outstanding liabilities of the bankers Punjab National Bank and the machines etc. to the Company in liquidation—The factory premises, plant, machinery sale whereof in liquidation proceedings of the Company is now sought to be restrained, since 7th September, 2005, has been in possession of and in use of the Company in liquidation. The argument aforesaid though prima facie attractive, has no merit. The learned single Judge in the order impugned before us has noticed that during the liquidation proceedings, Serious Fraud Investigation Office (SFIO) was set-up to took into the affairs of the Company in liquidation; The learned Single Judge further found that the appellant had in moving the Company Application No. 362/2012 also suppressed material facts once again tried to mislead Court. Accordingly, Company Application No. 326/2012 was dismissed—Even otherwise, the present case is a fit case for piercing of the corporate veil. From what has been recorded in detail by the learned Company Judge and as found, it is apparent that the appellant is using the cloak of the Company for defrauding the creditors of the Company. The appellant as aforesaid was a substantial shareholder in active management of the affairs of the Company. The appellant let others deal with the Company by representing that the factory premises, Plant, machinery etc. belonged to the Company. The appellant cannot now, when such other persons are enforcing their claims against the Company, be heard to contend otherwise.

Mahabir Industries v. *H.M. Dyeing Ltd.*..... *30*

CONSTITUTION OF INDIA, 1950—Article 21; Civil Procedure Code, 1908—Section 36, 51—Indian Evidence Act, 1872 Section 114: Whether a person can be physically compelled to give a blood sample for DNA profiling in compliance with a civil court order in a penalty action and it the same is permissible how is the court to mould its order and what would be the modalities for drawing the involuntary sample—Held-yes the Single Judge is entitled to take police assistance and use of reasonable force for compliance of order in case of continuous defiance of the order. Compelled extraction of blood samples in the course of medical examination dose not amount to conduct that shocks the conscience and the use of force as may be reasonably necessary is mandated by law and hence, meets the threshold of procedure established by law. Further, Human Right Law justifies carrying out of compulsory mandatory medical examination which may be bodily invasive and that the right to privacy is not an absolute right and can be reasonably curtailed. Judgment of the Court can never be challenged under article 14 or 21. Appeal allowed.

Rohit Shekhar v. *Narayan Dutt Tiwari & Anr.*..... *181*

— Article 226, Disciplinary proceedings—Misconduct imputed against petitioner constable was that he was found under influence of Iiquor while on duty on a particular date and did not turn up for duty on certain particular dates and on certain dates found sleeping under influence of Iiquor and thereafter deserted the unit without permission—Inquiry officer held charges proved—Disciplinary authority awarded punishment of removal from service—Appeal dismissed—Writ petition challenging the punishment and dismissal of appeal—Perusal of original record of the inquiry found to reveal that petitioner participated in the inquiry and his plea that the inquiry was not conducted in accordance writ rules and he was given adequate opportunity was not made out—Held, the respondents produced sufficient proof to establish that petitioner was found under influence of alcohol and absent from duty—Further held, the court under writ jurisdiction dose not have to go into correctness or the truth of the charges and cannot sit in appeal on the findings of disciplinary authority and cannot assume

from other sources" and therefore, assessee was entitled to deduction under Section 80-1A (4)(ii)—Tribunal reversed findings of CIT (Appeals) and agreed with Assessing Officer, so appellant agitated said issue by way of appeal—Held:- For determining income derived by an undertaking or enterprise, we have to compute total income of assessee from business referred in sub-section (4) to Section 801A—Words used in Section 80-1A (1) and (2A) are "profit and gains of eligible business"—On basis of same logic and reasoning, we have to first find out profit and gains of business from specified activities—Case remanded back to Tribunal to examine balance sheets and account of assessee to decide question.

Essel Shyam Communication Ltd. v. *Commissioner of Income Tax* *306*

INDIAN CONTRACT ACT, 1872—Section 202—Whether a power of attorney given for consideration would stand extinguished on the death of the executant of the power of attorney—Held—No. The object of giving validity to a power of attorney given for consideration even after death of the executants is to ensure that entitlement under such power of attorney remains because the same is not a regular or a routine power of attorney but the same had elements of a commercial transaction which cannot be allowed to be frustrated on account of death of the executant of the power of attorney. Appeal dismissed.

Ramesh Chand v. *Suresh Chand & Anr.* *48*

— Section 74—Measure of damages—Brief Facts—Defendant invited tenders for licence of an air conditioned restaurant space measuring 5426 sq. ft. (approximately) located at Palika Parking Complex, Connaught Place, New Delhi—Since the first highest tenderer failed to complete the formalities, therefore, after forfeiting the earnest money amount of such tenderer, the plaintiff was offered the restaurant on licence of the defendant—As per the terms and conditions of auction, Plaintiff deposited Rs. 50,000/- as earnest money, and Rs. 20 lacs being two months advance licence fee—Plaintiff failed to comply the formalities of the contract—Filed suit for

recovery contending that defendant was guilty of concealment of facts—Defendant relying on the terms and conditions of the tender to show that what was offered was "as is where is basis" and the plaintiff was in fact duty bound to inspect the premises and not raise any objection on any ground thereafter—Plaintiff has committed breach by not completing the formalities and because of which the contract of license could not be entered into between the parties—On that basis it was argued that in terms of Clause 2 of the terms and conditions of the allotment, the defendant had only a right to forfeit the earnest amount of 50,000/- and no right to forfeit any other/more amount. Held:— Liquidated damages are the subject matter of Section 74 Which deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty—Measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for—Even if there is a clause of forfeiture of an amount in addition to the earnest money deposited, such a clause entitling forfeiture of what is part price paid as advance, is hit by the bar of Section 74 of the Contract Act, 1872—Merely because there is a provision in the contract for forfeiture of part of the price in addition to earnest money, that clause cannot be given effect to unless the defendant pleads and proves losses caused to him on account of breach by the plaintiff—Section 74 of the Contract Act prescribes the upper limit of damages which can be imposed, and the Court is empowered subject to loss being proved, only to award reasonable compensation, the upper limit being the liquidated amount specified in the contract. Once parties specifically in the terms and conditions provided that in case of the eventuality of non-completion of the formalities only the forfeiture of earnest money can take place, nothing further can be claimed by the defendant—When the defendant illegally retains the amount of the plaintiff, defendant is liable to pay compensation to the plaintiff, whatever name it be called, interest or otherwise—Suit of the plaintiff will stand

of the High Court and proceedings before two different Additional Chief Metropolitan Magistrates (ACMMs, for short). The audio recordings of the proceedings before the ACMMs, revealed that appellant had not maintained dignity and decorum in the Court and the language used by him was condemnable. Thereafter, the order refers to and quotes the order dated 20th March, 2009 passed by the Arbitration Tribunal consisting of one retired Judge of the Supreme Court and two retired judges of this Court, who had tendered their resignation—A writ mandamus means a command that can be issued is favour of a person who establishes an inherent legal right in his case—Clause 8 of the Letters Patent Act, therefore, merely means that a litigant in person is not barred and prohibited from appearing in person and does not in any manner conflict with the inherent power/rights of the Court—Right to appear and address the Court under Section 32 of the Advocates Acts can be withdrawn subsequently. This right, even if granted, does not mean that it is permanent. Order granting permission can be always recalled for valid and just grounds—There is some controversy and dispute whether the learned single Judge had rejected the prayer for dasti copy of the impugned order. It appears that no such request was made when the order was dictated, but was made subsequently. The contention of the learned counsel for the appellant is that the request was rejected. However, the impugned order itself records that a copy of the order be given dasti to the appellant. In such cases, the order should be given to the party, his counsel or his family member. It should be also given before the order is implemented as the party concerned has right to file and challenge the order in appeal and ask for stay. It is stated that the order was made available to the appellant only at 10 p.m. at night. We agree with the appellant that the order should have been given immediately—As noticed, there are number of proceedings/cases pending both in the High Court and in District Courts. Issue of this nature and whether or not Deepak Khosla is entitled to appear as a self represented litigant or for others, if taken up for consideration in different forums/ courts, would lead to and cause it's own problems and

difficulties. Apart from the possibility of conflicting orders, there would be delay, confusion and judicial time will be spent in several courts dealing with an identical/similar question/ issue. It is therefore, advisable that this aspect be considered and decided before one Bench in the High Court rather than in different benches/courts. Further, this question should be decided first and immediately before Deepak Khosla can be permitted to appear and is given an audience. Keeping these aspect in mind, we feel that it will be appropriate that the entire aspect and issue is decided by the learned single Judge as expeditiously as possible and till the decision is taken, there should be stay of further proceedings in different matters before the High Court and in District Court. This direction will not apply and prevent Deepak Khosla for filing any writ petition under Article 226 or moving an application for bail/ anticipatory bail. This will also not apply to any proceedings pending before the Supreme Court or Courts outside Delhi

MOTOR VEHICLE ACT, 1988—Appeal filed before High Court for enhancement of compensation awarded in fovour of petitioner who suffered injuries in a motor accident—Plea taken, compensation towards loss of leave was awarded to appellant on basis of minimum wages for a period of nine months although it was established that he was a meter reader in DESU and was earning a salary of Rs. 2,226.15 per month—Compensation was awarded towards permanent disability and loss of amenities in life—Held:- It is established that appellant had remained on medical leave for 383 days and was getting a salary of Rs. 2,226,15 per month-compensation for loss of leave to be enhanced from Rs. 4,500/- to Rs. 28,000/- Appellant's testimony that there was shortening of his right leg and that it is not in proper shape was not challenged in cross examination—His testimony that even after 12 years of accident he was unable to walk properly was not disputed in cross examination—Disability certificate issued by a Doctor shows that appellant suffered shortening of his right leg and foot—His permanent disability was assessed as 40%—

is a label mark, the word ORZID contain therein is also worthy of protection.

United Biotech Pvt. Ltd. v. *Orchid Chemicals & Pharmaceuticals Ltd. & Ors.* *325*

TRADE AND MERCHANDISE MARKS ACT, 1958—Petitioner claims to be in the business of manufacture and sale of pharmaceutical drugs formulations. The case of the petitioner is that it is producing and marketing various drugs with the suffix "BION". The respondent is also in the same trade. The respondent advertised for registration of the mark "RECIBION" on 03.10.1989. It claims user since 01.04.1987. When the petitioner noticed the said advertisement, the petitioner filed an application to raise objections. The petitioner claims that it had got registered various marks such as BETABION, POLYBION CEBION etc. with the Registrar of Trade Marks which were pharmaceutical preparations. It is claimed by the petitioner that the trade mark sought to be registered by the respondent i.e. RECIBION in respect of a medicinal and pharmaceutical preparation is deceptively similar to its mark "CEBION" which also contains the suffix "BION", with which the petitioner's products are identified—The objection of the petitioner was rejected by the Assistant Registrar of Trade Marks vide order date 28.06.2001. The Registrar held that the mark RECIBION cannot be said to be either visually or phonetically similar to the petitioner's marks "CEBION"—The petitioner's appeal was also rejected by the IPAB by the impugned order—Learned counsel submits that there is phonetic similarity between "RECEBION" and CEBION" in as much, as the letter 'R' is often slurred. Learned counsel further submits that in matters of deceptive similarity in relation to drugs, this Court has held that the test of confusion has to be applied very strictly—On the other hand, the submission of learned counsel for the respondent is that the petitioner is not the original user of the mark "BION"—He submits that Cipla had advertised "Calcibion" as early as in 1949, and claimed user since 25.08.1942. Learned counsel further submits that scores of other drugs are being

sold in the market with suffix "BION" such as Mecobion, Rumbion, Embion. Pantabion, Lycobion etc.—Leaned counsel further submits that, in fact, the petitioner has not It is clear that there is no deceptive similarity between the marks in question. For all the above stated reasons, namely, the use of various marks in the market containing the terms 'BION' common to both the marks in question, the absence of visual and phonetic similarity between the marks, the fact of the Respondent's product with mark in question being a prescribed drug and the undisputed non-use of the mark 'CEBION' by the petitioner over the years, no infirmity found in the impugned order.

Merck Kgaa v. *Galaxy Hompro and Anr.* *1*

TRANSFER OF PROPERTY ACT, 1882—Section 48—Respondents filed suit for specific performance of agreement to sell executed by appellant in their favour and consequent decree for possession and damages—Suit decreed by Ld. Single Judge—Aggrieved, appellant preferred appeal urging equitable mortgage of the suit premises had existed in favour of Punjab National Bank prior to execution of agreement to sell which was thus, hit by Section 48 of the Act and could not be enforced over claim of Bank—Held:- Prior mortgage or encumbrance cannot deprive the vendee of a right to decree for specific performance and that such mortgage only become a liability or encumbrance on the property which the subsequent purchaser has to satisfy.

Jageshwar Parshad Sharma v. *Raghunath Rai & Ors.* *205*

ILR (2012) V DELHI 1
W.P. (C)

MERCK KGAA ….PETITIONER

VERSUS

GALAXY HOMPRO AND ANR. ….RESPONDENTS

(VIPIN SANGHI, J.)

W.P. (C) NO. : 2503/2010 DATE OF DECISION: 13.03.2012

Trade and Merchandise Marks Act, 1958—Petitioner claims to be in the business of manufacture and sale of pharmaceutical drugs formulations. The case of the petitioner is that it is producing and marketing various drugs with the suffix "BION". The respondent is also in the same trade. The respondent advertised for registration of the mark "RECIBION" on 03.10.1989. It claims user since 01.04.1987. When the petitioner noticed the said advertisement, the petitioner filed an application to raise objections. The petitioner claims that it had got registered various marks such as BETABION, POLYBION CEBION etc. with the Registrar of Trade Marks which were pharmaceutical preparations. It is claimed by the petitioner that the trade mark sought to be registered by the respondent i.e. RECIBION in respect of a medicinal and pharmaceutical preparation is deceptively similar to its mark "CEBION" which also contains the suffix "BION", with which the petitioner's products are identified—The objection of the petitioner was rejected by the Assistant Registrar of Trade Marks vide order date 28.06.2001. The Registrar held that the mark RECIBION cannot be said to be either visually or phonetically similar to the petitioner's marks "CEBION"—The petitioner's appeal was also rejected by the IPAB by the impugned order—Learned counsel

submits that there is phonetic similarity between "RECEBION" and CEBION" in as much, as the letter 'R' is often slurred. Learned counsel further submits that in matters of deceptive similarity in relation to drugs, this Court has held that the test of confusion has to be applied very strictly—On the other hand, the submission of learned counsel for the respondent is that the petitioner is not the original user of the mark "BION"—He submits that Cipla had advertised "Calcibion" as early as in 1949, and claimed user since 25.08.1942. Learned counsel further submits that scores of other drugs are being sold in the market with suffix "BION" such as Mecobion, Rumbion, Embion. Pantabion, Lycobion etc.—Leaned counsel further submits that, in fact, the petitioner has not It is clear that there is no deceptive similarity between the marks in question. For all the above stated reasons, namely, the use of various marks in the market containing the terms 'BION' common to both the marks in question, the absence of visual and phonetic similarity between the marks, the fact of the Respondent's product with mark in question being a prescribed drug and the undisputed non-use of the mark 'CEBION' by the petitioner over the years, no infirmity found in the impugned order.

Important Issue Involved: Merely because a part of the mark, the prefix or suffix, may be common, because it is common to the trade or it is public juris, is no ground to claim that the two marks are deceptively similar. In that situation, the other parts of the marks have to be compared so as to see whether the marks in question as a whole can be held to be deceptively similar. The law confers on the proprietor the exclusive right to the use of the trademark as a whole, and not a part of it. The whole marks have to be compared to decide whether there is deceptive similarity between them.

[Ch Sh]

APPEARANCES:

FOR THE PETITIONER : Mr. Arvind Nayar, Mr. Sushant Kumar Mr. Abhinav Lihia & Mr. Surjeet Singh Advocate.

FOR THE RESPONDENT : Mr. Rajesh Chadha, Advocate.

CASES REFERRED TO:

1. *Schering Corporation & Ors.* vs. *Getwell Life Sciences India Private Limited* in FAO (OS) 314/2008.
2. *Wyeth Holdings Corporation* vs. *Burnet Pharmaceuticals P. Ltd.,* 2008 (36) PTC 478 (Bom).
3. *Schering Corporation & Ors.* vs. *Getwell Life Sciences India Pvt. Ltd.,* 2008 (37) PTC 487 (Del).
4. *Kalindi Medicure Pvt. Ltd.* vs. *Intas pharmaceuticals Ltd. and Anr.,* 2007 (34) PTC 18 (Del.).
5. *Astrazeneca UK Limited and Anr.* vs. *Orchid Chemicals and Pharmaceuticals Ltd.,* 2007 (34) PTC 469 (Del).
6. *Cadila Health Care Ltd.* vs. *Cadila Pharmaceuticals Ltd.,* (2001) 5 SCC 73.
7. *Panacea Biotec Ltd.* vs. *Recon Ltd.:* 1996 PTC (16) 561.
8. *American Home Products Corporation* vs. *Mac Laboratories Pvt. Ltd. & Anr.,* AIR 1986 SC 137.
9. *Miss. Johan A. Wolfing* vs. *Chemical Industrial & pharmaceutical Laboratories Ltd. & Anr.,* AIR 1984 Bom281.
10. *Corn Products Refining Co.* vs. *Shangrila Food Products Ltd.:* AIR 1960 SC 142.

RESULT: Dismissed.

VIPIN SANGHI, J. (Oral)

C.M. No. 4285/2011

By this application, the petitioner seeks correction of the word 'RECEBION', typed in this petition, instead of the word 'RECIBION'.

Learned counsel for the respondents does not oppose the application. Accordingly, the same is allowed. The expression 'RECEBION' used in this writ petition shall be read as 'RECIBION'.

The application stands disposed of.

W.P. (C) 2503/2010

1. In this writ petition under Article 226 of the Constitution of India, the petitioner assails the order dated 12.06.2009 passed by the Intellectual Property Appellate Board (IPAB) bearing order No. 94/2009 whereby the petitioner's appeal against the order dated 28.06.2001 passed by the Assistant Registrar of Trade Marks, disallowing the petitioner's opposition No. DEL-8313, and allowing the respondent's application No. 517814 for registration of Trademark in Class 5 under the provisions of the Trade and Merchandise Marks Act, 1958, has been dismissed.

2. The petitioner claims to be in the business of manufacture and sale of pharmaceutical drugs formulations. The case of the petitioner is that it is producing and marketing various drugs with the suffix 'BION'. The respondent is also in the same trade. The respondent advertised for registration of the mark 'RECIBION' on 03.10.1989. It claims user since 01.04.1987. When the petitioner noticed the said advertisement, the petitioner filed an application to raise objections. The petitioner claims that it had got registered various marks such as BETABION, POLYBION, CEBION etc. with the Registrar of Trade Marks which were pharmaceutical preparations. It is claimed by the petitioner that the trade mark sought to be registered by the respondent i.e., RECIBION in respect of a medicinal and pharmaceutical preparation is deceptively similar to its mark 'CEBION' which also contains the suffix 'BION', with which the petitioner's products are identified.

3. The objection of the petitioner was rejected by the Assistant Registrar of Trade Marks vide order dated 28.06.2001. The Registrar held that the mark RECIBION cannot be said to be either visually or phonetically similar to the petitioner's marks 'CEBION'.

4. The petitioner's appeal has also been rejected by the IPAB by the impugned order.

5. The submission of learned counsel for the petitioner, firstly, is that the manner in which the IPAB proceeded to deal with the matter is

fundamentally wrong. He submits that the IPAB has resorted to dissecting/breaking up of the marks in question. It has been held that the suffix 'BION' has been widely used not only by the petitioner but by various others in respect of the medicinal preparations and formulations and the prefix 'RECI' used by the respondent is different from the prefix 'CE' used by the petitioner. Learned counsel further submits that there is phonetic similarity between 'RECEBION' and 'CEBION' in as much, as, the letter 'R' is often slurred. Learned counsel further submits that in matters of deceptive similarity in relation to drugs, this Court has held that the test of confusion has to be applied very strictly. Reliance is placed in this regard on the decision in **Cadila Laboratories vs. Dabur India Limited:** 1997 (17) PTC 417. Learned counsel for the petitioner has also placed reliance on **Corn Products Refining Co. vs. Shangrila Food Products Ltd.:** AIR 1960 SC 142; **Wockhardt Towers vs. American Home Products Corporation:** 2009 (41) PTC 724; **Torrent Pharmaceuticals Ltd. vs. The Wellcome Foundation Ltd.:** 2002 (24) PTC 580 (Guj.).

6. On the other hand, the submission of learned counsel for the respondent is that the petitioner is not the original user of the mark 'BION'. He submits that Cipla had advertised 'Calcibion' as early as in 1949, and claimed user since 25.08.1942. Reference in this regard has been made to the copy of the advertisement published in 1945. Learned counsel further submits that scores of other drugs are being sold in the market with the suffix 'BION' such as Mecobion, Rumbion, Embion, Pantabion, Lycobion etc. Learned counsel further submits that, in fact, the petitioner has not been using the mark 'CEBION', with which the petitioner claims phonetic similarity vis-a-vis the respondent's trade mark 'RECIBION', for a long period and the petitioner has not produced in the proceedings before the Registrar or even before the IPAB, even a single invoice to show the sale of 'CEBION' in the last 4-5 years. Learned counsel submits that the respondent has already moved an application for rectification of the petitioner's mark CEBION which is also pending. It is also submitted by learned counsel for the respondent that the respondent's drug 'RECIBION' is a schedule C-I drug under the Drugs and Cosmetics Act, 1940, which means that the said drug cannot be sold over the counter except on the prescription of a qualified medical doctor. He further submits that the said drug is a syrup of vitamin B-Complex and other vitamins. Reliance is placed on **Schering Corporation & Ors. vs. Getwell Life Sciences India Pvt. Ltd.,** 2008 (37) PTC 487 (Del), **Kalindi Medicure Pvt. Ltd. vs. Intas pharmaceuticals Ltd. and Anr.,** 2007 (34) PTC 18 (Del.) and **Panacea Biotec Ltd. vs. Recon Ltd.:** 1996 PTC (16) 561.

7. Having heard learned counsel for the parties and considered their respective submissions, in my view there is no error in the impugned order. I find no merit in the present writ petition.

8. The submission of the petitioner, as regards dissecting/breaking-up of the marks in question, seems to be paradoxical. On the one hand, the Petitioner questions the breaking-up of the marks into their respective prefix's and suffix's, as resorted to by the IPAB in the impugned order while deciding the question of deceptive similarity, and on the other hand, the Petitioner raises the claim of deceptive similarity on account of the latter half (i.e. the suffix) of the marks being similar, i.e., 'BION'. The petitioner's entire case is based on its claim that it has various drugs with registered Trademarks which have 'BION' at the suffix, including 'CEBION'. In my considered opinion the Petitioner cannot be allowed to blow hot and cold at the same time.

9. The reasoning adopted and methodology resorted to by the IPAB, in deciding the question of deceptive similarity of the two marks, namely 'CEBION' (of the Petitioner) and 'RECIBION' (of the Respondent), is in line with the dictum laid down by various Courts.

10. The Supreme Court in **Corn Products** (Supra), while deciding the question of similarity between two marks, took note of a situation where a series of marks, which are in use in the market, contain common element or elements. It made reference to In re: Harrods' application, 52 R.P.C. 65, wherein it was observed:

> "Now it is a well recognised principle, that has to be taken into account in considering the possibility of confusion arising between any two trademarks, that where those two marks contain a common element which is also contained in a number of other marks in use in the same market such a common occurrence in the market tends to cause purchasers to pay more attention to the other features of the respective marks and to distinguish between them by those features. This principle clearly requires that the marks comprising the common element shall be in fairly

extensive use and, as I have mentioned, in use in the market in which the marks under consideration are being or will be used."

11. In the case before the Supreme Court, the respondent applied for registration of the mark 'Gluvita' used with reference to 'biscuits' manufactured by it. The appellant, who had been using the registered mark 'Glucovita' with reference to glucose with vitamins, opposed the application. In the absence of any evidence being led by the parties as to the use of marks in the market containing the common element, the Supreme Court after considering the structural and phonetic similarity of the two marks, which was likely to cause confusion, allowed the opposition of the Appellant.

12. In **Cadila Laboratories Ltd.** (Supra), this Court, while considering the case of infringement of the plaintiff's registered trademark 'MEXATE' by the defendant's trademark 'ZEXATE' in respect of the same type of cancer medicine, observed as under:

> **"According to the decisions laid down by the various Courts, the importance of the prefix of the word should be taken due weightage and importance in case where the suffix is common. Where the suffix of the word is common, regard must be had to the earlier portion of the word which distinguishes the one from the other. Where the suffix is common, the earlier portion of the word is the natural, necessary and, in fact, the actual mark of distinction.** It is also held in **Miss. Johan A. Wolfing v. Chemical Industrial & pharmaceutical Laboratories Ltd. & Anr.,** AIR 1984 Bom281 and **American Home Products Corporation v. Mac Laboratories Pvt. Ltd. & Anr.,** AIR 1986 SC 137, that the marks are different and not similar medicines considering the prefix. In the present case, competing trade marks 'Mexate' and 'zexate' have different and distinguished prefix, one having syllable 'M' and the other having 'Z'. There is no possibility of 'Mexate' being pronounced and/or read as 'Zexate' under any circumstances. **As has been settled, while ascertaining two rival marks, as to whether they are deceptively similar or not, it is not permissible to dissect the words of the two marks. It is also held that the meticulous comparison of words, letter by letter and syllable by syllable, is not necessary and phonetic or visual similarity of the marks must be considered. The two marks Fleboline' and 'Bionoboline' was held to be not similar by the Bombay High Court in Johan A. Wolfing. v. Chemical Industrial & Pharmaceutical Laboratories Ltd. & Another (Supra) as the terminology 'boline' cannot be an exclusive monopoly of the respondents and that the cumulative effect of the two words did not produce the same impression. Even phonetically the two marks were held to be not closely similar. In the present case, since the two marks are different as the opening syllables of both the rival marks are completely different and distinct and the two drugs are Schedule 'H' drugs of a specialised nature which could only be purchased on showing a prescription from a cancer specialist, the two competing trade marks appear to be prima facie entirely different and dissimilar."** (Emphasis supplied).

13. In **Astrazeneca UK Limited and Anr. Vs. Orchid Chemicals and Pharmaceuticals Ltd.,** 2007 (34) PTC 469 (Del), this Court was considering the question of infringement of the registered trademark 'MEROMER' by the impugned trademark 'MERONEM'. Both the products referred to 'Meropenem', a molecule used in the treatment of bacterial infections. It was observed that the common feature in both the competing marks, i.e., 'MERO' was only descriptive and publici juris and, therefore, the customers would tend to ignore the common feature and would pay more attention to the uncommon features, namely, 'MER' and 'NEM', which were clearly dissimilar. The relevant observations made, are as under:

> **"Admittedly, 'Mero', which is common to both the competing marks, is taken by both the appellants/plaintiffs and the respondent/ defendant from the drug 'Meropenem', taking the prefix 'Mero' which is used as a prefix in both the competing marks. Both the appellants/plaintiffs and the respondent/defendant are marketing the same molecule 'Meropenem'. Neither the appellants/plaintiffs nor the respondent/defendant can raise any claim for exclusive user of the aforesaid word 'Meropenem'. Along with the aforesaid generic/common prefix, 'Mero', the appellants/plaintiffs have used the syllables 'nem', whereas, the respondent/defendant**

has used the syllable 'mer'. It is true that the aforesaid words/ trade names cannot be deciphered or considered separately, but must be taken as a whole. **But even if they are taken as a whole, the prefix 'Mero' used with suffix in the two competing names, distinguishes and differentiates the two products.** When they are taken as a whole, the aforesaid two trademarks cannot be said to be either phonetically or visually or in any manner deceptively similar to each other." (Emphasis supplied).

14. This Court, again, in **Schering Corporation** (Supra), was posed with a question of infringement on account of deceptive similarity. The Plaintiff claimed infringement of its registered mark 'TEMODAL' and 'TEMODAR' by the Defendant's mark 'TEMOGET'. This Court placing reliance on its decision in **Astrazeneca** (Supra), amongst various others, held as under:

> "Comparing the plaintiffs' trademark 'TEMODAL' and 'TEMODAR' with the defendant's trademark 'TEMOGET', it is apparent that the marks are not identical. There is also no phonetic or visual similarity between the marks. I have already noted above that the term 'TEMO' cannot be exclusively used by the plaintiffs in view of the fact that it is publici Jurisdiction being a clipped abbreviation of the generic word Temozolomide. There is no doubt in my mind, at this prima facie stage, that the suffix 'GET' is entirely different and distinct from the suffixes 'DAL' and 'DAR' of the plaintiffs' trademarks. There is also no doubt that there is no phonetic or visual similarity between the defendant's mark and the plaintiffs' marks taken as a whole as would be prone to deceive consumers. It is also relevant to point out that Temozolomide is a Schedule 'H' drug which can only be sold in retail on the prescription of a registered medical practitioner. While this condition is not by itself sufficient to establish a case of no deception, it is an important factor particularly when the pharmaceutical product is a highly specialized drug and is used for the specific treatment of a type of brain cancer." (Emphasis supplied).

This decision has been upheld by the Division Bench of this Court in **Schering Corporation & Ors vs. Getwell Life Sciences India Private**

Limited in FAO (OS) 314/2008.

15. In **Wockhardt Towers** (Supra), registration of the mark 'AZICIN' was opposed on account of infringement of the registered trademark 'ANACIN' on the ground of deceptive similarity. The Registrar of Trade Marks while dealing with the said opposition, referred to the decision of the Supreme Court in **Corn Products** (Supra), and held as under:

> **"As the applicants have not filed any evidence so as to prove that the so-called marks in the series, alleged to have common suffix 'CIN' have been used in the market, they are not allowed to seek any relief from the presence of such marks in the series, if on record and/or to challenge the existence of the opponents' registration and as such, the arguments addressed by the applicants to this have no bearing. Thus, considering the question of deceptive similarity having in view the settled principles that the two marks are to be compared as a whole and bearing in the mind, the structure of the marks visually and phonetically and the idea conveyed as well as an average intelligence and imperfect recollection of an unwary customer, the trademark 'AZICIN' is considered deceptively similar to the opponents trademark 'ANACIN'. However, it is needless to state that the opponents mark consisted of an invented word and it would not be open to the applicants to break the marks in parts and compare a part of one mark with other of another trade mark against the settled principles of law and thus, the objection raised on under Section 11 (1) of the Act is sustained."** (Emphasis supplied).

16. In the present case, the suffix 'BION' is common to both the marks in question. It is in use in various other marks of not only the Petitioner, but also other traders in the market. In view of such common occurrence of the suffix 'BION' in the market, the IPAB proceeded to hold that the purchasers would pay more attention to the other features of the respective marks, namely, the Prefix's 'CE' and 'RECI'.

17. The petitioner cannot claim to enjoy protection of a part (namely 'BION') of his registered mark. Merely because a part of the mark, the prefix or suffix, may be common, because it is common to the trade or

it is public juris, is no ground to claim that the two marks are deceptively similar. In that situation, the other parts of the marks have to be compared so as to see whether the marks in question as a whole can be held to be deceptively similar. The law confers on the proprietor the exclusive right to the use of the trademark as a whole, and not a part of it. The whole marks have to be compared to decide whether there is deceptive similarity between them.

18. Considering the marks as a whole, there is no phonetic or visual similarity between them, so as to cause confusion. In **Corn products** (Supra), the Supreme Court while considering the aspect of visual and phonetic similarity observed as under:

> "We think that the view taken by Desai, J., is right. It is well known that the question whether the two marks are likely to give rise to confusion or not is a question of first impression. It is for the court to decide that question. English cases proceeding on the English way of pronouncing an English word by Englishmen, which it may be stated is not always the same, may not be of much assistance in our country in deciding questions of phonetic similarity. It cannot be overlooked that the word is an English word which to the mass of the Indian people is a foreign word. It is well recognised that in deciding a question of similarity between two marks, the marks have to be considered as a whole... Again, in deciding the question of similarity between the two marks we have to approach it from the point of view of a man of average intelligence and of imperfect recollection. To such a man the overall structural and phonetic similarity and the similarity of the idea in the two marks is reasonable likely to cause a confusion between them."

19. In **Wyeth Holdings Corporation vs. Burnet Pharmaceuticals P. Ltd,** 2008 (36) PTC 478 (Bom), while considering whether the mark 'FOLV' of the defendant was deceptively similar to the mark 'FOLVITE' of the plaintiff, the Registrar of Trade Marks held that the two competing marks have to be considered as a whole. The structure of the mark visually and phonetically must be borne in mind.

The image that the court must have is that of the quintessential common man. It was held:

> "When the Judge looks at phonetics, the sound which accompanies the pronunciation of the mark is the sound of the mark to an ordinary purchaser bereft of the niceties of language."

20. Approaching the problem at hand from the point of view of a man of average intelligence and imperfect recollection and keeping in view the pronunciation of an ordinary purchaser bereft of the niceties of the English language, it cannot by any means whatsoever be held that the marks in question are structurally and phonetically similar and would, thereby, cause confusion. There is a marked difference in the prefix of both the marks in question, not only in terms of their appearance but also in terms of their pronunciation, which would differentiate the respective words when taken and spoken as a whole, i.e., one word.

21. It is also relevant to point out that the medicinal product, to which the respondent's mark pertains, is a Schedule C-1 drug which can only be sold on the prescription of a registered medical practitioner. Although this condition by itself is not sufficient to establish a case of no deceptive similarity, but this condition coupled with the aforementioned reasons leads to the conclusion that there is no deceptive similarity between the two marks, namely, 'CEBION' and 'RECIBION'.

22. It is also pertinent to note that to the respondent's submission, that the petitioner has not shown actual use of its mark CEBION in the past few years by producing even a single invoice, the petitioner has no answer. This is also an important and germane consideration. Therefore, even if the mark of the respondent had been somewhat deceptively similar to that used by the petitioner at some earlier point of time, that would not have sufficed as the petitioner does not appear to be using the mark CEBION for a number of years.

23. The judgment of the Gujarat High Court in **Torrent Pharmaceuticals Ltd.** (Supra), relied upon by the petitioner would not render much assistance to its submissions. The said case did not involve the question of use of marks in the market containing the common element of the marks in question. The Court, while dealing with the question of deceptive similarity between two marks 'TROVIREX' and 'ZOVIREX', concurred with the finding of the Registrar of trade marks that there existed the highest degree of resemblance, visually and phonetically, between the two marks. The Court further observed that the probability of confusion and deception was more since the trade

marks were used in relation to the pharmaceutical products i.e. similar goods.

24. Because the competing marks pertain to medicinal products would not, by itself, be sufficient to establish deceptive similarity. There are several factors that have to be kept in mind while deciding deceptive similarity. These factors were laid down by the Supreme Court in **Cadila Health Care Ltd. vs. Cadila Pharmaceuticals Ltd.,** (2001) 5 SCC 73, as under:

> "a) The nature of the marks i.e. whether the marks are word marks or label marks or composite marks, i.e. both words and label works.
>
> b) The degree of resembleness between the marks, phonetically similar and hence similar in idea.
>
> c) The nature of the goods in respect of which they are used as trade marks.
>
> d) The similarity in the nature, character and performance of the goods of the rival traders.
>
> e) The class of purchasers who are likely to buy the goods bearing the marks they require, on their education and intelligence and a degree of care they are likely to exercise in purchasing and/or using the goods.
>
> f) The mode of purchasing the goods or placing orders for the goods, and
>
> g) Any other surrounding circumstances which may be relevant in the extent of dissimilarity between the competing marks."

25. On consideration of the various factors set out by the Supreme Court, as aforesaid, it is clear that there is no deceptive similarity between the marks in question. For all the above stated reasons, namely, the use of various marks in the market containing the term 'BION' common to both the marks in question, the absence of visual and phonetic similarity between the marks, the fact of the respondent's product with mark in question being a prescribed drug and the undisputed non-use of the mark 'CEBION' by the petitioner over the years, I find no infirmity in the impugned order.

26. Accordingly, the present petition is dismissed, and the parties are left to bear their respective costs.

ILR (2012) V DELHI 14
RFA

VIDEOCON INTERNATIONAL LTD. ….APPELLANT

VERSUS

CITY PALACE ELECTRONICS PVT. LTD. ….RESPONDENT

(VALMIKI J. MEHTA, J.)

RFA NO. : 286/2004 DATE OF DECISION: 21.03.2012

Limitation Act, 1963—Article 1 Recovery of money for electronic goods supplied—Transactions were of 1999-suit filed in 2003 plaintiff claimed that defendant maintained a "running account"—Thus extending the period of limitation. Held—No proof that part payment for goods supplied made—No extension of limitation—A running account is open mutual and current-there must be shifting balances or reciprocal demands—In this case legal relationship is single as no shifting balance is there hence Art. 1 of Limitation Act is inapplicable—Existence of sub relationships or certain debits and credits because of certain schemes or cash discounts between parties will not mean fulfillment of requirement of reciprocal demand-Such schemes are not independent contracts but arise out of single contractual relationship—Thus no extension of limitation—Suit is time barred.

In my opinion, in the present case also the legal relationship is single i.e. only of a seller and a buyer between the appellant/plaintiff and the respondent/defendant respectively.

There is no dispute that in the statement of account there are no shifting balances and therefore there is no account falling under Article 1 of the Limitation Act, 1963 on this basis. So far as 'reciprocal demands' is concerned, because in the relationship of the appellant/plaintiff as a seller and the respondent/defendant as a buyer there are also sub-relationships or certain debits and credit because of the appellant/plaintiff floating some schemes or giving cash discounts or giving incentives or giving bonus, will not mean that there is an independent relationship in the nature of the one as envisaged in the judgment in the cases of **Hindustan Forest Company** (supra) and **Shillong Banking Corporation** (supra). The schemes, cash discounts, bonus schemes etc are terms of single contractual relationship of seller-plaintiff/appellant and buyer-defendant/respondent. Such facets are not independent contracts to create 'reciprocal obligation' on other independent relationships. As per the ratio in the case of **Hindustan Forest Company** (supra), these schemes etc were not 'detached from rest of the contract' and thus it cannot be said that there were reciprocal demands. Once there is only a single relationship and there are no shifting balances it cannot be said that account in question maintained by the appellant/plaintiff was an open, mutual and current account. **(Para 9)**

Important Issue Involved: The requirement of reciprocal demands involves transactions on each side creating independent obligations on the other and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations. It is further clear that goods as well as money may be sent by way of payment.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. L.K. Sinha, Advocate.

FOR THE RESPONDENT : Mr. Mukesh Anand, Advocate.

CASES REFERRED TO:

1. *G. Gopal Chettiar* vs. *Shammuga Nadar & Bros,* AIR 1967 Mad, 369.
2. *Kesharichand Jaisukhal* vs. *The Shillong Banking Corporation* AIR 1965 SC 1711.
3. *Hindustan Forest Company* vs. *Lal Chand* MANU/SC/0147/1959 : [1960]1SCR563.
4. *Monotosh K. Chatterjee* vs. *Central Calcutta Bank Ltd.* [1953] 91 C.L.J. 16.
5. *Hasanali Kurjibhai* vs. *Ratilal Nyalchand Chitalia & Anr,* AIR 1953 SAU 141.
6. *Tea Financing Syndicate Ltd.* vs. *Chandrakamal Bezbaruah* I.L.R. (1930) Cal. 649.

RESULT: Petition dismissed.

VALMIKI J. MEHTA, J. (ORAL)

1. The challenge by means of this Regular First Appeal (RFA) filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 30.1.2004 dismissing the suit filed by the appellant/plaintiff for recovery of moneys on the ground of non-payment for the electronic goods supplied.

2. The main issue in this appeal, and which is the only issue argued before me, is the issue as to limitation. The trial Court framed issue No.2 in this regard. While dealing with this issue, the trial Court has held the suit to be barred by limitation as it was held that limitation begins from each of the bills and from each of the bills was of three years prior to the filing of the suit. The relevant paragraphs of the impugned judgment are paras 11 to 21 and the same read as under:-

"11. **Finding on issue No.2**

Issue No.2 was whether the present suit is barred by period of limitation. Onus of this issue was on the plaintiff. Case of the defendant is that transaction between the parties had taken place in the year 1999 and present suit has been filed on 23.10.03 i.e. after three years, therefore, same is barred by period of limitation.

12. On the other hand, case of the plaintiff is that transaction between the parties was continuing account and said transaction between the parties had taken place in February, 2000, therefore, limitation will have to be counted from the end of 2000 and since the present suit has been filed on 23.10.03, it is well within limitation.

13. In his testimony, PW-1 has proved invoices against which supplies were made to the defendant which have been proved as Ex.PW1/4 to 1/9. Statement of accounts has been proved as Ex.PW1/20. Plaintiff is deposed to have supplied the copies of documents to the defendant and acknowledgment of the receipt of documents has been proved as Ex.PW1/212. In his cross examination PW1 has admitted that for the last time goods were supplied to the defendant in February, 2000. However, he did not recollect the amount of the bill which was sent to the defendant. He has also admitted that the bill has not been placed on record. He even admitted that the fact had goods were supplied last to the defendant in February, 2000 had not been mentioned in the plaint. He even admitted that plaintiff had sent the goods as per individual bill. So far as accounts are concerned, he has not produced the original account book containing the entries as mentioned in statement of account Ex.PW1/20. Even the Accountant who had prepared these entries has not been examined. He has denied that defendant had made payment against bill of February, 2000. On the other hand, it has been stated that defendants had made payments in a running account towards discharge of running pecuniar liabilities.

14. On the other hand, DW-1 in his testimony has stated that transaction between the parties had taken place in 1999 and defendant used to make payment against each and every invoice individually. It is also deposed that no amount is outstanding and that defendant had never made on account payment and all the payments were made individually against each and every invoice. In his cross examination he has stated that he cannot say whether Ex.PW1/4 to 1/14 bear the stamp of defendant as he was not directly involved in the transaction of purchase. He also stated that he cannot recognize the signature made on behalf of defendant company on Ex.DW1/PB and he cannot recollect the exact date

as to when the last purchase order was placed with plaintiff company. He has also stated that he cannot tell as to when the cheque bearing No.141451 in the sum of Rs. was credited in statement of account for the period commencing from 1.10.91 to 31.3.00 as detailed in Ex.PW1/20. He has denied that a sum of Rs. 12,78,819/- was due towards him.

15. It has been argued on behalf of plaintiff that defendant was maintaining a running account with plaintiff and statement of account has been proved on record. It is also argued that no counter statement of account has been filed by the defendant. It is argued that form Ex.PW1/3 is signed by the defendant but the invoices and statement of account relate to period of liabilities. It is argued that last cheque was issued by the defendant on 6.3.00 as a party payment in running liabilities, therefore, limitation stood extended from that very date.

16. On the other hand, ld. counsel for the defendant has argued that no running account was being maintained by the defendant with plaintiff and whenever purchase order was placed with plaintiff, he used to supply the goods and he has made payment against each and every invoice individually. Therefore each and every invoice is an independent transaction between the parties. It is also argued that invoices pertain to year 1999 and amount claimed by the plaintiff for these invoices come to the same amount as claimed by him in the suit. It is argued that present suit has been filed on 23.10.03, therefore, suit is barred by limitation. It is argued that so far as payment of March, 2000 is concerned, it was against bill which has not been placed on record by the plaintiff.

17. It will be seen that plaintiff claims extension of period of limitation on the ground that defendant was maintaining a running account for goods supplied to him and for the last time goods were supplied to him in February, 2000. No bill regarding goods supplied to the defendant in February, 2000 has been placed on record. Though plaintiff claims that goods were dispatched to the defendant in February, 2000 but this has not been pleaded in the plaint. When this fact has not been pleaded in the plaint, plaintiff cannot be allowed to prove the same. It is argued that

defendant made payment on 6.3.00 as part payment towards his running liabilities. However, no such cheque has been produced or proved on record. Under limitation Act if the plaintiff wants the benefit of extension of limitation on the ground that part payment was made by the defendant on 6.3.00, then such payment should be represented in writing and signed by the defendant. No such cheque has been produced on record to prove the part payment in writing and signed by the defendant. Therefore, it does not stand proved on record that defendant had made part payment in accordance in running account or period of limitation stood extended w.e.f. 6.3.00.

18. Now coming to invoices Ex.PW1/4 to 1/19, it is clear that all these invoices pertain to the year 1999. No bill for the year 2000 has been placed on record. Therefore, what the plaintiff has been able to prove is that it supplied goods to the defendant till the year 1999 and not thereafter.

19. Ld. counsel for the plaintiff has relied upon authorities reported as **Hasanali Kurjibhai v. Ratilal Nyalchand Chitalia & Anr,** AIR 1953 SAU 141, **G. Gopal Chettiar v. Shammuga Nadar & Bros,** AIR 1967 Mad, 369 and has argued that in case of running account, according to provisions of Limitation Act, period of limitation will run from the end of the year in which goods were last supplied. In the present suit, since the goods wee supplied in February 2000, therefore, limitation will start form the end of December, 2000.

20. I am unable to accept this contention. First of all plaintiff has failed to prove part payment under the signature of defendant (i.e. Payment of 6.3.00), therefore, limitation cannot be deemed to have been extended on account of part payment. So far as liability of running account is concerned, even presuming for the sake of argument that there was running account between the parties, nevertheless in the present case, plaintiff has not been able to prove that goods were last supplied in February, 2000. Since plaintiff failed to prove the part payment limitation cannot run from the end of year 2000. All the invoices placed on record pertain to year 1999, therefore, at the most limitation will start from the end of 1999 and in that eventuality also suit is time

barred inasmuch as it was filed on 23.10.03. Therefore, on this count also suit appears to be time barred. Ld counsel for the defendant has given summary of payment made against each and every invoice which is as follows:-

Sr. No.	Bill No.	Bill Date	Amount (Dr.)	Paid on	Amount (Cr.)
1.	IDRE-00001	10.4.99	79,400	15.4.99	79,400
2.	IDRE-00002	10.9.99	1,07,120	15.4.99	1,07,120
3.	IDRE-00012	13.4.99	1,19,100	24.5.99	1,19,100
4.	IDRE-00036	13.4.99	1,12,500	23.4.99	1,23,500
5.	IDRE-00045	15.4.99	79,400	28.4.99	79,400
6.	IDRE-00047	15.4.99	41,560	28.4.99	41,560
7.	IDRE-00011	22.4.99	1,16,430	10.5.99	1,16,430
8.	IDRE-00094	24.4.99	66,960	24.5.99	63,960
9.	IDRE-00041	26.4.99	1,16,850	26.5.99	1,16,850
10.	IDRE-00096	26.4.99	31,160	14.5.99	31,160
11.	IDRE-00115	30.4.99	1,16.850	26.5.99	1,16,850
12.	IDRE-00132	10.5.99	77,900	26.5.99	77,900
13.	IDVD-00024	14.5.99	67,120	25.5.99	67,120
14.	TDT-15.5.99	52,450	29.5.99	52,450	00040
15.	CSCT-00001	17.5.99	1,64,990	31.5.99	1,64,590
16.	IDRE-00162	17.5.99	93,900	26.6.99	93,000
17.	IDRE-00165	21.5.99	1,16,850	26.5.99	1,16,850
18.	IDRE-00174	24.5.99	40,200		
19.	IDDO-00113	27.5.99	4,240		
20.	IDRE-00191	28.5.99	21,180		
21.	IDRM-00207	29.5.99	10,900	31.5.99	80,760
22.	IDRM-00194	29.5.99	77,900	3.7.99	77,900
23.	IDTO-00085	31.5.99	90,900	26.6.99	90,900
24.	IDWM-00250	31.5.99	77,900	3.7.99	77,900
25.	IRDE-00212	8.6.99	40,200	26.6.99	40,200

26.	IDWM-00279	9.6.99	1,16,850	3.7.99	1,16,850
27.	IDWM-00280	11.6.99	77,900	3.7.99	77,900
28.	IDWM-00477	12.7.99	79,900	31.8.99	77,900

21. From the details of payment as enumerated above, it is clear that at no occasion, defendant made part payment towards any of the invoices. Payment against all the invoices was made individually. It clearly shows that defendant was not maintaining running account but payments were being made as per individual order placed and goods supplied by the plaintiff. Even PW-1 in his cross examination has admitted that plaintiff had sent goods as per individual bill. I, therefore, come to the conclusion that it is not the case where plaintiff has been able to prove that defendant was maintaining the running account. In view of reasons given above, this issue is also decided in favour of the defendant and against the plaintiff."

(underlining added)

3. A reading of the aforesaid paragraphs shows that the transactions between the parties were of the year 1999 and the suit was filed on 4.3.2003 i.e. after three years of the last bill issued against the respondent/defendant. The invoices which were proved on record were Ex.PW1/4 to Ex.PW1/19 and the statement of account which was proved on record, was Ex.PW1/20. In the cross-examination PW-1 admitted that for the last time the goods were supplied to the defendant in February, 2000. The trial Court has also given a finding that there was no payment made by the respondent/defendant as alleged by the appellant/plaintiff on 6.3.2000, inasmuch as this was denied by the respondent/defendant and no proof was filed of any such payment inasmuch as the alleged cheque by which payment was made on 6.3.2000 was not produced or proved on record. The trial Court in para 18 of the impugned judgment notes that for the year 2000, no invoice/bill in fact has been placed on record. The trial Court in para 20 of the impugned judgment has specifically noted that payments which were made by the respondent/defendant were against each bill. In fact, the payment was against each bill inasmuch as the appellant/plaintiff used to take in advance entire leaves of cheques from the respondent/defendant/buyer and on the dispatch of goods the cheques were filled in for value of the goods dispatched and deposited

in the bank. Para 20 is reproduced above and which shows the cheques amounts corresponding with the amounts of invoices.

4. I may note that the trial Court has assumed the account being a running account i.e. account being open, mutual and current under Article 1 of the Limitation Act, 1963 and has proceeded accordingly as is clear from para 20 of the judgment and held the suit to be barred even on that basis. Subsequently in para 21, the trial Court has also held that the account between the parties was not a running account and it has been held that the payment was qua each bill, and thus limitation commenced with respect to each bill. Since I have held that the account does not fall under Article 1 of the Limitation Act, 1963, I am not required to go into the facts as to what would be the limitation if there was a bill of February, 2000.

5. The basic thrust of the argument on behalf of the appellant before me was that the statement of account in question as maintained by the appellant/plaintiff in its books of account was an open, mutual and current account and hence the suit was filed within limitation. Though even if the account was an open, mutual and current account the suit would still have been time barred as stated in the just preceding para, let us examine whether the account-Ex.PW1/20, is an account falling under Article 1 of the Limitation Act, 1963. It is argued on behalf of the appellant that no doubt the relationship between the appellant/plaintiff and respondent/defendant was only of a seller and buyer respectively, however, in view of various schemes which were floated by the appellant/plaintiff, and under which schemes the respondent/defendant claimed benefits also, the appellant was also a debtor. It is argued that there were, as per the schemes, issues of cash discounts as also issues of bonus/incentives, and therefore, on account of such claims of the respondent/defendant towards the schemes, bonus and incentives, there arises reciprocal demands and therefore the account is an open, mutual and current account. Reliance is placed upon the judgments of the Supreme Court reported as **Hindustan Forest Company Vs. Lal Chand & Ors.** AIR 1959 SC 1349 and **Kesharichand Jaisukhal Vs. The Shillong Banking Corporation** AIR 1965 SC 1711.

6. The relevant paragraphs of the judgment in the case of **Hindustan Forest Company** (supra) are paras 7 to 10 and the same read as under:-

"7. The question what is a mutual account, has been considered

by the courts frequently and the test to determine it is well settled. The case of the **Tea Financing Syndicate Ltd. v. Chandrakamal Bezbaruah** I.L.R (1930) Cal. 649, may be referred to. There a company had been advancing monies by way of loans to the proprietor of a tea estate and the proprietor had been sending tea to the company for sale and realisation of the price. In a suit brought by the company against the proprietor of the tea estate for recovery of the balance of the advances made after giving credit for the price realised from the sale of tea, the question arose as to whether the case was one of reciprocal demands resulting in the account between the parties being mutual so as to be governed by art. 85 of the Indian Limitation Act. Rankin, C.J., laid down at p. 668 the test to be applied for deciding the question in these words :

"There can, I think, be no doubt that the requirement of reciprocal demands involves, as all the Indian cases have decided following Halloway, A.C.J., transactions on each side creating independent obligations on the other and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations. It is further clear that goods as well as money may be sent by way of payment. We have therefore to see whether under the deed the tea, sent by the defendant to the plaintiff for sale, was sent merely by way of discharge of the defendant's debt or whether it was sent in the course of dealings designed to create a credit to the defendant as the owner of the tea sold, which credit when brought into the account would operate by way of set-off to reduce the defendant's liability."

8. The observation of Rankin, C.J., has never been dissented from in our courts and we think it lays down the law correctly. The learned Judges of the appellate bench of the High Court also appear to have applied the same test as that laid down by Rankin, C.J. They however came to the conclusion that the account between the parties was mutual for the following reasons :

"The point then reduces itself to the fact that the defendant company had advanced a certain amounts of money to the plaintiffs for the supply of grains. This excludes the question of

monthly payments being made to the plaintiffs. The plaintiffs having received a certain amount of money, they became debtors to the defendant company to this extent, and when the supplies exceeded Rs. 13,000 the defendant company became debtors to the plaintiff and later on when again the plaintiff's supplies exceeded the amount paid to them, the defendants again became the debtors. This would show that there were reciprocity of dealings and transactions on each side creating independent obligations on the other."

9. The reasoning is clearly erroneous. On the facts stated by the learned Judges there was no reciprocity of dealings; there were no independent obligations. What in fact had happened was that the sellers had undertaken to make delivery of goods and the buyer had agreed to pay for them and had in part made the payment in advance. There can be no question that in so far as the payments had been made after the goods had been delivered, they had been made towards the price due. Such payments were in discharge of the obligation created in the buyer by the deliveries made to it to pay the price of the goods delivered and did not create any obligation on the sellers in favour of the buyer. The learned Judges do not appear to have taken a contrary view of the result of these payments.

10. The learned Judges however held that the payment of Rs. 13,000 by the buyer in advance before delivery had started, made the sellers the debtor of the buyer and had created an obligation on the sellers in favour of the buyer. This apparently was the reason which led them to the view that there were reciprocal demands and that the transactions had created independent obligations on each of the parties. This view is unfounded. The sum of Rs. 13,000 had been paid as and by way of advance payment of price of goods to be delivered. **It was paid in discharge of obligations to arise under the contract. It was paid under the terms of the contract which was to buy goods and pay for them. It did not itself create any obligation on the sellers in favour of the buyer; it was not intended to be and did not amount to an independent transaction detached from the rest of the contract.** The sellers were under an obligation to deliver the goods but that obligation

arose from the contract and not from the payment of the advance alone. If the sellers had failed to deliver goods, they would have been liable to refund the monies advanced on account of the price and might also have been liable in damages but such liability would then have arisen from the contract and not from the fact of the advances having been made. Apart from such failure, the buyer could not recover the monies paid in advance. No question has, however been raised as to any default on the part of the sellers to deliver goods. This case therefore involved no reciprocity of demands. Article 115 of the Jammu and Kashmir Limitation Act cannot be applied to the suit." (emphasis supplied by me)

7. The relevant paragraphs of the judgment in the case of **Shillong Banking Corporation** (supra) are paras 10 to 13 of the judgment, authored by Bachawat, J. on behalf of the majority. These paras read as under:-

"10. The next point in issue is whether the proceedings are governed by Art. 85 of the Indian Limitation Act, 1908, and if so, whether the suit is bared by limitation. The argument before us proceeded on the footing that an application under s. 45(D) of the Banking Companies Act is governed by the Indian Limitation Act, and we must decide this case on that footing. But we express no opinion one way or the other on the question of the applicability of the Indian Limitation Act to an application under s. 45(D). Now, Art. 85 of the Indian Limitation Act, 1908 provides that the period of limitation for the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties is three years from the close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account. It is not disputed that the account between the parties was at all times an open and current one. The dispute is whether it was mutual during the relevant period.

11. Now in the leading case of **Hirada Basappa v. Gadigi Muddappa** [1871] VI Madras High Court Reports. 142, 144]. Holloway, Acting C.J. observed :

"To be mutual there must be transactions on each side creating

independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations."

12. These observations were followed and applied in **Tea Financing Syndicate Ltd. v. Chandrakamal Bezbaruah** I. L.R [1931] 58 Cal. 642 and **Monotosh K. Chatterjee v. Central Calcutta Bank Ltd.** [1953] 91 C.L.J. 16, and the first mentioned Calcutta case was approved by this Court in **Hindustan Forest Company v. Lal Chand** MANU/SC/0147/1959 : [1960]1SCR563 . Holloway, Acting C.J. laid down the test of mutuality on a construction of s. 8 of Act XIV of 1859, though that section did not contain the words "where there have been reciprocal demands, between the parties". The addition of those words in the corresponding Art. 87 of Act IX of 1871, Art. 85 of Act XV of 1877 and Art. 85 of the Act of 1908 adopts and emphasises the test of mutuality laid down in the Madras case.

13. In the instant case, there were mutual dealings between the parties. The respondent Bank gave loans on overdrafts, and the appellant made deposits. The loans by the respondent created obligations on the appellant to repay them. The respondent was under independent obligations to repay the amount of the cash deposits and to account for the cheques, hundis and drafts deposited for collection. There were thus transactions on each side creating independent obligations on the other, and both sets of transactions were entered in the same account. The deposits made by the appellant were not merely complete or partial discharges of its obligations to the respondent. There were shifting balances; on many occasions the balance was in favour of the appellant and on many other occasions, the balance was in favour of the respondent. There were reciprocal demands between the parties, and the account was mutual. This mutual account was fairly active up to June 25, 1947. It is not shown that the account ceased to be mutual thereafter. The parties contemplated the possibility of mutual dealings in future. The mutual account continued until December 29, 1950 when the last entry in the account was made. It is conceded on behalf of the appellant that if the account was mutual and continued to be so until December 29, 1950, the suit is not barred by limitation, having regard to

s. 45(O) of the Banking Companies Act. The Courts below, therefore, rightly answered issue No. 1 in the negative." (emphasis added by me)

8. A reading of the ratio of the aforesaid judgments of the Supreme Court in the case of **Hindustan Forest Company** (supra) and **Shillong Banking Corporation** (supra) shows that before an account can be said to be an open, mutual and current account, it is necessary that either there are shifting balances or there are reciprocal demands. In case, two parties are engaged in a single legal relationship, then there is required shifting balances i.e. sometimes one person has to take moneys from the other and on other occasions, the first person, in fact, has to pay moneys to the second person i.e. sometimes there is credit balance in favour of one person and sometimes there is credit balance in favour of another person. This is how the shifting balances have been defined. Reciprocal demands have been defined (and when there is no requirement of shifting balances) to mean when two persons do not have a single relationship but two separate relationships and consequently pursuant to those separate relationships independent obligations or reciprocal demands arise. The Supreme Court in the judgment of **Hindustan Forest Company** (supra) in para 7 has referred to the judgment in the case of **Tea Financing Syndicate Ltd. Vs. Chandrakamal Bezbaruah** I.L.R. (1930) Cal. 649 to explain the proposition of reciprocal demands. In the case of **Tea Financing Syndicate Ltd.** (supra) there was a loan given by one person to the second. The second person was also in fact selling tea to the first person. The Supreme Court said that if the tea, which was sold to the first person, was in discharge of the obligations for the loan then there would be a single legal relationship, however, if tea is supplied to the first person not for discharge of the loan obligation, only then there would be an independent legal relationship of a seller (2nd person) and a buyer (1st person) of tea. In such cases there arises reciprocal demands, and in such reciprocal demands there need not be shifting balances.

In the case of **Shillong Banking Corporation** (supra) also the customer and the bank had two separate legal relationships inasmuch as one was an independent overdraft account in which limits were availed of and another relationship was independent because the customer had deposits with the bank. It may be noted that these deposits were not pledged for repayment of the dues in the overdraft account. Therefore there were two legal relationships i.e. one where the customer was a

debtor of the bank on account of having taken overdraft facilities, and the second relationship was where the bank itself was the debtor of the customer because the bank had with it deposits of the customer. Accordingly, it was held that it was a case of reciprocal obligations.

9. In my opinion, in the present case also the legal relationship is single i.e. only of a seller and a buyer between the appellant/plaintiff and the respondent/defendant respectively. There is no dispute that in the statement of account there are no shifting balances and therefore there is no account falling under Article 1 of the Limitation Act, 1963 on this basis. So far as 'reciprocal demands' is concerned, because in the relationship of the appellant/plaintiff as a seller and the respondent/defendant as a buyer there are also sub-relationships or certain debits and credit because of the appellant/plaintiff floating some schemes or giving cash discounts or giving incentives or giving bonus, will not mean that there is an independent relationship in the nature of the one as envisaged in the judgment in the cases of **Hindustan Forest Company** (supra) and **Shillong Banking Corporation** (supra). The schemes, cash discounts, bonus schemes etc are terms of single contractual relationship of seller-plaintiff/ appellant and buyer-defendant/respondent. Such facets are not independent contracts to create 'reciprocal obligation' on other independent relationships. As per the ratio in the case of **Hindustan Forest Company** (supra), these schemes etc were not 'detached from rest of the contract' and thus it cannot be said that there were reciprocal demands. Once there is only a single relationship and there are no shifting balances it cannot be said that account in question maintained by the appellant/ plaintiff was an open, mutual and current account.

10. I may finally note that with regard to the entitlement on merits of the amount due as claimed by the appellant/plaintiff, the trial Court has noted that the appellant/plaintiff relied only on the statement of account, and which statement of account lacks credibility inasmuch as admittedly many payments which were made against different invoices were not reflected in the statement of account. The trial Court therefore held that there cannot be attached credibility in the statement of account, Ex.PW1/ 20. The relevant observations of the trial Court are contained in para 24 of the impugned judgment and the same reads as under:-

"24. In his cross examination PW-1 has specifically stated that he has not personally maintained the account book. The person

who maintained the book of account has not been examined in the court. There is no first hand evidence from the side of plaintiff that an amount of Rs. 12,78,819/- is due towards the defendant except the statement of account Ex.PW1/20. On the other hand PW-1 on the basis of this, statement of account claims that an amount of Rs. 12,78,819/- is due towards the defendant but DW-1, A.K. Chaturvedi has denied that any amount is due. From the perusal of statement of account and invoices ex. PW1/4 to PW1/19. It is clear that the payment has been made against number of invoices, therefore, veracity of the statement of account in itself is in question. Therefore, statement of account can not be relies upon as authentic proof that amount claimed by the plaintiff is due towards the defendant. On the other hand, PW-1 Shailender Mishra, has no first hand knowledge about the details of the transactions or about the accounts maintained by the plaintiff company. Therefore, on the basis of his statement it cannot be said that plaintiff has proved that amount as claimed by him is due towards the defendant. Therefore, I come to the conclusion that the amount claimed by plaintiff is not due towards the defendant. These issues are accordingly decided against the plaintiff and in favour of the defendant. Payments at Sr. No.1,2,3,5,6,9 and 11 are represented by ex.PW1/16, PW1/15, 13,11,10,17,19,6,8 and 5 respectively. It is therefore, clear that payments against all these invoices have been made by the defendant which has been included in the amount claimed by the plaintiff. Therefore, no reliance can be placed on the statement of the account of the plaintiff."

11. Before concluding, I must add that learned counsel for the respondent/defendant sought to urge before this Court that after the subject suit was dismissed, the appellant/plaintiff on the same cause of action in the present suit got an FIR registered under Section 156(3) Cr.P.C. in a Court in Jammu & Kashmir and the respondent/defendant was put to a lot of harassment because the respondent/defendant had to get the FIR subsequently quashed from the High Court of Jammu & Kashmir and therefore the conduct of the appellant/plaintiff be noted.

Since however, civil law does not permit taking note of conduct of a person for deciding the case, I would not like to make any observation with respect to the arguments which have been advanced on behalf of

the respondent/defendant in this regard.

12. In view of the above, I do not find that the trial Court has committed any illegality or perversity in holding that the suit filed by the appellant/plaintiff was barred by time. I agree with the trial Court, and I have also given my additional reasoning to show that there were neither shifting balances nor reciprocal demands, as is understood in law, for the account to be an open, mutual and current account.

13. In view of the above, the appeal being without any merit is accordingly dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.

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CO. APP.

MAHABIR INDUSTRIES ….APPELLANT

VERSUS

H.M. DYEING LTD. ….RESPONDENT

(A.K. SIKRI, ACJ. & RAJIV SAHAI ENDLAW, J.)

CO. APP. NO. : 27/2012 DATE OF DECISION: 22.03.2012

Company Law—Winding up—It is the case of the appellant that a partnership firm in the name and style of the appellant was constituted in January, 1998 with Shri Anil Kumar Manik as one of the partners; that the said partnership firm, between the years 1998 and 2003, acquired and set-up the factory at Panipat with financial assistance from Punjab National Bank; that on 10th May, 2005 the partnership firm was dissolved and its assets including the factory premises, Plant, machinery installed therein came to the share of Shri Anil Kumar Manik who is now the sole proprietor of

the appellant. It is further the case of the appellant that the Company in liquidation was incorporated on 3rd August, 2005 with authorized share capital of Rs. 5 Lacs only and for which the appellant contributed Rs. 2 lac. It is yet further the case of the appellant that on 7th September, 2005 a Memorandum of Understanding/ Agreement was executed between the appellant and the Company in liquidation. Whereunder the appellant agreed to sell and transfer all fixed assets including industrial plot at Sector 29, Part-II, HUDA, Panipat and the outstanding liabilities of the bankers Punjab National Bank and the machines etc. to the Company in liquidation—The factory premises, plant, machinery sale whereof in liquidation proceedings of the Company is now sought to be restrained, since 7th September, 2005, has been in possession of and in use of the Company in liquidation. The argument aforesaid though prima facie attractive, has no merit. The learned single Judge in the order impugned before us has noticed that during the liquidation proceedings, Serious Fraud Investigation Office (SFIO) was set-up to took into the affairs of the Company in liquidation; The learned Single Judge further found that the appellant had in moving the Company Application No. 362/2012 also suppressed material facts once again tried to mislead Court. Accordingly, Company Application No. 326/2012 was dismissed—Even otherwise, the present case is a fit case for piercing of the corporate veil. From what has been recorded in detail by the learned Company Judge and as found, it is apparent that the appellant is using the cloak of the Company for defrauding the creditors of the Company. The appellant as aforesaid was a substantial shareholder in active management of the affairs of the Company. The appellant let others deal with the Company by representing that the factory premises, Plant, machinery etc. belonged to the Company. The appellant cannot now, when such other

persons are enforcing their claims against the Company, be heard to contend otherwise.

Important Issue Involved: In appropriate case corporate veil can be pierced. A person when let others deal with the Company by representing that the factory premises, plant, machinery etc. belonged to the Company. The appellant cannot now, when other persons are enforcing their claims against the Company, be heard to contend otherwise.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Mr. R.K. Saini with Mr. Mayank Kumar, Advocate.

FOR THE RESPONDENT : Mr. Mayank Goel, Advocate.

CASES REERRED TO:

1. *Kapila Hingorani* vs. *State of Bihar* (2004) SCC (L&S) 586.
2. *Delhi Development Authority* vs. *Skiper Construction Company (P) Ltd.* (1996) 4 SCC 622.
3. *State of U.P.* vs. *Renusagar Power Company* AIR 1988 SC 1737).

RESULT: dismissed.

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the order dated 28th February, 2012 of the learned Company Judge dismissing Company Application No.362/2012 filed by the appellant. The said application was filed by the appellant in Company Petition No.159/2006 filed by ICICI Bank Ltd. for winding up of M/s H.M. Dyeing Ltd. and in which proceedings order of winding up had been made. Company Application No.362/2012 was filed to restrain sale of machinery and for release of the plant, machinery and building at the factory premises at Panipat, to the appellant.

2. It is the case of the appellant that a partnership firm in the name

and style of the appellant was constituted in January, 1998 with Shri Anil Kumar Manik as one of the partners; that the said partnership firm, between the years 1998 and 2003, acquired and set-up the factory aforesaid at Panipat with financial assistance from Punjab National Bank; that on 10th May, 2005 the partnership firm was dissolved and its assets including the factory premises, plant, machinery installed therein came to the share of **Shri Anil Kumar Manik** (supra) who is now the sole proprietor of the appellant. It is further the case of the appellant that the Company in liquidation was incorporated on 3rd August, 2005 with authorized share capital of Rs. 5 lacs only and of which the appellant contributed Rs. 2 lac. It is yet further the case of the appellant that on 7th September, 2005 a Memorandum of Understanding/Agreement was executed between the appellant and the Company in liquidation, whereunder the appellant agreed to sell and transfer all fixed assets including industrial plot (supra) at Sector 29, Part-II, HUDA, Panipat and the outstanding liabilities of the bankers Punjab National Bank and the machines etc. to the Company in liquidation.

3. The counsel for the appellant before us has also fairly admitted that the factory premises, plant, machinery sale whereof in liquidation proceedings of the Company is now sought to be restrained, since 7th September, 2005, has been in possession of and in use of the Company in liquidation.

4. The argument however of the counsel for the appellant is that since the document dated 7th September, 2005 (supra) is not a document of transfer of title and further since the consideration thereunder has not been received by the appellant, the factory premises aforesaid with **machinery**, at Panipat cannot be said to be belonging to the Company in liquidation to be sold in the liquidation proceedings.

5. The argument aforesaid though *prima facie* attractive, has no merit. The learned Single Judge in the order impugned before us has noticed that during the liquidation proceedings, Serious Fraud Investigation Office (SFIO) was set-up to look into the affairs of the Company in liquidation; that the SFIO has submitted its final report *inter alia* to the effect that -

> "the Company in liquidation had taken over the business and assets of the appellant; that Shri Anil Kumar Manik who claims to be the sole proprietor of the appellant was one of the promoter

> Directors of the Company in liquidation; that the Company in liquidation had been carrying on its business from the factory premises aforesaid; that the said Shri Anil Kumar Manik was in-charge of the day-to-day management of the Company in liquidation and used to visit the factory daily and used to sign the cheques for payments/withdrawals; that the said Shri Anil Kumar Manik had illegally and unlawfully withdrawn cash from the bank accounts of the Company after the winding up of the Company; that he was unable to give any explanation therefor; that he was thus guilty of siphoning off funds of the Company in liquidation and liable for punishment under Sections 405, 406, 409, 418, 421 & 422 of the Indian Penal Code, 1860; that he had as a ex Director also failed to handover the assets of the Company to the financial liquidator."

The learned Single Judge further found that the appellant had in moving the Company Application No.362/2012 also suppressed material facts and once again tried to mislead the Court. Accordingly Company Application No.326/2012 was dismissed.

6. As far as the argument of the counsel for the appellant of the appellant having not received the consideration under the document dated 7th September, 2005 is concerned, the same records "that the total deal has been made at a lump sum price of Rs. 80.00 lacs (Rupees Eighty Lacs only)";

> "that the net assets value of the proprietory firm as on today works out at Rs. 15 lacs only which shall be converted into the paid up capital of the Company"; "that the outstanding liabilities i.e only MTL against Machine & C.C. Account (Against Stock & Debtors) of Punjab National Bank, Jatal Road, Panipat would now become the liabilities of the Company". It is thus clear that though the said document mentioned the value of the deal as Rs. 80 lacs but which was paid by the Company to the appellant by taking over the liabilities of the appellant and by issuing the capital of Rs. 15 lac to the appellant. It will thus be seen that the entire consideration for the factory premises, plant, machinery stood paid by the Company in liquidation to the appellant in such manner. The argument that consideration has not been paid thus appears to be fallacious.

7. The counsel for the appellant however contends that the shares of the value of Rs. 15 lacs were not issued to the appellant. We are of the opinion that even if the said shares have not been issued, the claim of the appellant, after having in part performance of the said agreement of transfer of the property, delivered the possession of the factory premises, plant, machinery to the Company, is only of enforcing the same against the Company in liquidation, if such claim is within time and otherwise maintainable and the appellant cannot claim back the factory premises, plant and machinery or interfere in the sale thereof in liquidation of the Company.

8. We are even otherwise of the opinion that the present is a fit case for piercing of the corporate veil. From what has been recorded in detail by the learned Company Judge and as found by us, it is apparent that the appellant is using the cloak of the Company for defrauding the creditors of the Company. The appellant as aforesaid was a substantial shareholder in active management of the affairs of the Company. The appellant let others deal with the Company by representing that the factory premises, plant, machinery etc. belonged to the Company. The appellant cannot now, when such other persons are enforcing their claims against the Company, be heard to contend otherwise.

9. The Supreme Court in **Delhi Development Authority Vs. Skiper Construction Company (P) Ltd.** (1996) 4 SCC 622 held that the concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the Court would ignore the corporate character and look at the reality behind the corporate veil i.e. the persons who actually work for the corporation, to pass appropriate orders to do justice. In **Kapila Hingorani Vs. State of Bihar** (2004) SCC (L&S) 586, the Supreme Court observed that the doctrine of lifting the corporate veil is a changing concept and its horizon is expanding (as also held in **State of U.P. Vs. Renusagar Power Company** AIR 1988 SC 1737). It was further held that whenever a corporate entity is abused for an unjust and inequitable purpose, the Court would not hesitate to lift the veil and look into the realities so as to identify the persons who are guilty and liable therefore. Corporate veil was held to be pierceable when the corporate personality is found to be opposed to justice, convenience and interest of the revenue or workman or against public interest.

10. We are therefore satisfied that there is no infirmity in the order of the learned Single Judge and dismiss this appeal. We refrain from imposing any costs on the appellant.

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CRL. M.B

RAJESH KUMAR ….APPELLANT

VERSUS

STATE (GOVT. OF NCT) OF DELHI ....RESPONDENT

(M.L. MEHTA, J.)

CRL. M.B. NO. : 100/2012 DATE OF DECISION: 29.03.2012
& CRL. A. NO. : 1047/2010

Code of Criminal Procedure, 1973—Section 389, 482—Indian Penal Code 1872—Sections 304-B and 498A—Instant application under Section 389 Cr.PC read with Section 482 Cr.Pc is preferred by appellant/applicant for suspension of sentence and grant of interim bail—Main ground for suspension of sentence and grant of Interim bail—That has been pressed is that appellant is in jail for about six years and wants to establish family and social ties—It has been argued that grounds on which parole is granted to convicts under the Guidelines of 2010, and one of which is re-establing family and social ties, would be applicable to grant of interim bail to appellant—Held, since Appellate Court is in seisin of appeal of convict, as per Clause 10 of the Guidelines of 2010, parole cannot be granted to convict by Competent Authority and as per said clause, appropriate orders can be passed by Appellate Court is such cases where appeal of convict is pending.

Since this Court is *seisin* of appeal of the convict, as per Clause 10 of the Guidelines, the parole cannot be granted to the convict by the Competent Authority. As per the said clause, the appropriate orders can be passed by this Court in such cases where the appeal of the convict is pending. Section 389 of Cr.PC deals with suspension of sentence pending appeal and release of the convict on bail. In **Phool Chand v Union of India** [2000 (3) SCC 409], the Supreme Court observed that though parole has different connotation than bail, the substantial legal effect of the bail and parole is to release a person from detention or custody. There is no statutory provisions dealing with question of grant of parole which is generally speaking an administrative action. Parole is not suspension of sentence or period of detention, but provides convict's release from custody and changing mode of undergoing sentence. **(Para 4)**

The grounds which are available for grant of parole are also available for consideration of suspension of sentence and interim bail pending appeal of the convicts in this Court. Since parole has different connotation than bail, the parole does not suspend the sentence or the period of detention. The suspension of sentence pending appeal is provided under Section 389 Cr.P.C. This specific provision provides discretion to the appellate court to suspend the sentence of the convict and release him on bail. However, the discretion that can be exercised by the appellate court is to be judicious having regard to the entire factual matrix as well as other facts and circumstances, both of the convicts as also of the victims and the society. Then for suspending the sentence of a convict and releasing him on bail, the reasons are required to be recorded in writing by the appellate court. Section 389 Cr.PC does not permit suspension of sentence and grant of bail as a matter of routine or for that matter as a matter of right. It is not only that the grounds of parole mentioned in the Guidelines would be considered by this Court while exercising discretion under Section 389. In addition, the Court would also be required to take into account the main considerations such as whether any prima

facie ground is disclosed for substantial doubt about the conviction, the seriousness of the offence, the period of sentence, whether the disposal of appeal or revision is likely to take unreasonable time. The ground of establishing family or social ties would not be available in each case for suspension of sentence and grant of interim bail to the convicts. This would all depend upon the facts and circumstances of each case. **(Para 5)**

Important Issue Involved: (A) Where Appellate Court is in *seisin* of appeal of convict, as per Clause 10 of the Guidelines of 2010, parole cannot be granted to convict by Competent Authority and as per said clause, appropriate orders can by passed by Appellate Court in such case where appeal of convict is pending.

(B) Ground of establishing family or social ties would not be available in each case for suspension of sentence and grant of interim bail to convict; this would all depend upon facts and circumstances of each case,

[Ta Si]

APPEARANCES:

FOR THE APPELLANT : Mr. Vivek Sood, Advocate.

FOR THE RESPONDENT : Ms. Fizani Husain, APP for State

CASES REFERRED TO:

1. *Rajesh Kumar* vs. *Govt. of NCT of Delhi* [W.P.(C) 5128/2011].
2. *Phool Chand* vs. *Union of India* [2000 (3) SCC 409].

RESULT: Dismissed.

M.L. MEHTA, J.

1. The present appeal was filed by appellant namely Rajesh Kumar assailing the judgment and order on sentence dated 3.12.2009 and

7.12.2009 passed by learned ASJ, Delhi whereby the appellant was convicted to undergo RI for 10 years under Section 304-B and to undergo RI for 3 years under Section 498A IPC and to pay a fine of Rs.5,000/-. The appellant is in JC for the last about six years.

2. The instant application under Section 389 Cr.PC read with Section 482 Cr.PC is preferred by the appellant/ applicant Rajesh Kumar for suspension of sentence and grant of interim bail. The main ground for suspension of sentence and grant of interim bail that has been pressed is that the appellant is in jail for about six years and wants to establish family and social ties. It has been argued that the grounds on which parole is granted to the convicts under the Guidelines of 2010, and one of which is re-establishing the family and social ties, would be applicable to the grant of interim bail to the appellant. Reliance was placed on the decision of Division Bench of this Court dated 19.12.2011 in **Rajesh Kumar Vs. Govt. of NCT of Delhi** [W.P.(C) 5128/2011].

3. I have heard learned counsel for the appellant as also learned APP on behalf of the State and perused the record. With regard to the consideration of Parole/ Furlough Guidelines of 2010 for the release of the convict on interim bail or suspension of sentence, the Division Bench of this Court in the aforesaid case held as under:

> "7. We are however of the opinion that even when application for interim suspension of sentence or bail is filed by a convict in a pending appeal, it is always open to the convict to seek suspension/ bail from this Court on the grounds as provided for regular parole and the High Court can always take those grounds in consideration while entertaining applications for suspension and/or interim suspension of the sentence. There is nothing in Section 389 or otherwise in law, barring the appellate Court from granting interim bail or suspending the sentence on considerations as for parole. Clause 10 very clearly stipulates that the "convict can seek appropriate orders from the High Court" which means that the convict can seek the order on parity of grounds for regular parole....."

4. Now since this Court is *seisin* of appeal of the convict, as per Clause 10 of the Guidelines, the parole cannot be granted to the convict by the Competent Authority. As per the said clause, the appropriate

orders can be passed by this Court in such cases where the appeal of the convict is pending. Section 389 of Cr.PC deals with suspension of sentence pending appeal and release of the convict on bail. In **Phool Chand v. Union of India** [2000 (3) SCC 409], the Supreme Court observed that though parole has different connotation than bail, the substantial legal effect of the bail and parole is to release a person from detention or custody. There is no statutory provisions dealing with question of grant of parole which is generally speaking an administrative action. Parole is not suspension of sentence or period of detention, but provides convict's release from custody and changing mode of undergoing sentence.

5. In view of the judgment of Division Bench of this Court in **Rajesh Kumar** (supra), there does not remain any doubt that the grounds which are available for grant of parole are also available for consideration of suspension of sentence and interim bail pending appeal of the convicts in this Court. Since parole has different connotation than bail, the parole does not suspend the sentence or the period of detention. The suspension of sentence pending appeal is provided under Section 389 Cr.P.C. This specific provision provides discretion to the appellate court to suspend the sentence of the convict and release him on bail. However, the discretion that can be exercised by the appellate court is to be judicious having regard to the entire factual matrix as well as other facts and circumstances, both of the convicts as also of the victims and the society. Then for suspending the sentence of a convict and releasing him on bail, the reasons are required to be recorded in writing by the appellate court. Section 389 Cr.PC does not permit suspension of sentence and grant of bail as a matter of routine or for that matter as a matter of right. It is not only that the grounds of parole mentioned in the Guidelines would be considered by this Court while exercising discretion under Section 389. In addition, the Court would also be required to take into account the main considerations such as whether any prima facie ground is disclosed for substantial doubt about the conviction, the seriousness of the offence, the period of sentence, whether the disposal of appeal or revision is likely to take unreasonable time. The ground of establishing family or social ties would not be available in each case for suspension of sentence and grant of interim bail to the convicts. This would all depend upon the facts and circumstances of each case.

6. The offence under which the appellant was convicted is not only

serious but a menace to the society. It is experienced that there is high rise of such like offences in the city. The social impact of the crime cannot be lost sight of. Any liberal attitude in invoking the discretion in suspending the sentence and admitting such persons on bail may be counterproductive and against social interest which needs to be cared for and protected and strengthened by sting of deterrence. Public abhorrence of the crime needs reflection not only through imposition of appropriate sentence by the Courts, but also by sending message of the concern of the Court. Having regard to the facts and circumstances of the case and the nature of offence and the manner in which the offences are committed, this ground alone which has been taken by the appellant does not entitle him for suspension of his sentence and release him on interim bail. I find no merits in the application. The application is hereby dismissed.

ILR (2012) V DELHI 41
LPA

HARISH KUMAR ….APPELLANT

VERSUS

PROVOST MARSHAL-CUM-APPELLATE AUTHORITY & ORS. ….RESPONDENTS

(A.K SIKRI, ACJ. & RAJIV SAHAI ENDLAW, J.)

LPA. NO. : 253/2012 DATE OF DECISION: 30.03.2012

Right to Information Act, 2005—Section 8(i)(j) 2005—There were disputed between the appellant and his wife—The Central Public Information Officer (PIO) vide order dated 3rd December, 2010 informed the appellant that the information sought was a third party personal information, disclosure where of was likely to cause undue invasion into the privacy of the individual concerned and the information also did not serve any

public activity of interest and was therefore exempted from disclosure under Section 8 (1) (j) of the Act, The appellant was further informed that the information could be provide to the appellant subject to consent of third party i.e. his father-in-law and after following the procedure prescribed under Section 11(1) of the Act. The appellant was thus requested to provide postal address of his father-in-law, for the procedure under Section 11(1) to be followed—The appellant however instead of providing address of his father-in-law, preferred an appeal. The said appeal was dismissed—The appellant preferred by the second appeal to the CIC. The CIC however dismissed the said appeal. The learned Single Judge has dismissed the writ petition observing that the information sought was of personal nature and the appellant was unable to disclose any public interest in the disclosure thereof disclosure of information sought by the appellant was to wreck vengeance on account of his matrimonial dispute—The counsel for the appellant before us has argued that the learned Single Judge has erred in observing that there was no public interest in the disclosure sought by the appellant. It is argued that the same is irrelevant under the RTI Act. What is found in the present case is that the PIO had not refused the information. All that the PIO required the appellant to do was, to follow third party procedure. No. error can be found in the said reasoning of the PIO—There can be no dispute that the information sought by the appellant was relating to a third party and supplied by a party—The PIO was thus absolutely right in, response to the application for information of the appellant, calling upon the appellant to follow the third party procedure under Section 11. Reliance by the PIO on Section 8 (1) (j) which exempts from disclosure of personal information and the disclosure of which has no relationship to any public activity or interest and which would cause unwanted invasion of

the privacy of the individual was also apposite. Our constitutional aim is for a casteless society and it can safely be assumed that the disclosure made by a person of his caste is intended by such person to be kept confidential. The appellant however as aforesaid, wanted to steal a march over his father-in-law by assessing information, though relating to and supplied by the father-in-law, without allowing his father-in-law to oppose to such request.

Important Issue Involved: (A) Under Section 11 of the Act, the PIO if called upon to disclose any information relating to or supplied by a third party and which is to be treated as confidential, is required to give a notice to such third party and it to give an opportunity to such third party to object to such disclosure and to take a decision only thereafter.

(B) Reliance by the PIO on Section 8 (1) (j) which exempts from disclosure of personal information and the disclosure of which has no relationship to any public activity or interest and which would cause unwanted invasion of the privacy of the individual was also apposite. Our constitutional aim is for a casteless society and it can safely be assumed that the disclosure made by a person of his or caste is intended by such person to be kept confidential.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Mr. C. Hari Shankar & Mr. S. Sunil Advocate.

FOR THE RESPONDENT : Mr. B.V. Niren, CGSC with Mr. Utkarsh Sharma & Mr. Peasouk Jain Adv. For UOI.

CASES REFERRED TO:

1. *Paardarshita Public Welfare Foundation* vs. *UOI* AIR 2011 Del. 82.
2. *Secretary General, Supreme Court of India* vs. *Subhash Chandra Agarwal* AIR 2010 Del. 159.
3. *Vijay Prakash* vs. *UOI* AIR 2010 Del 7.
4. *Collector* vs. *Canara Bank* (2005) 1 SCC 496.
5. *Rajagopal* vs. *State of Tamil Nadu* (1994) 6 SCC 632.
6. *Gobind* vs. *State of Madhya Pradesh* (1975) 2 SCC 148.
7. *O.K. Ghosh* vs. *Ex. Joseph* MANU/SC/0362/1962.

RESULT: dismissed.

A.K. SIKRI, ACTING CHIEF JUSTICE

1. This Intra-Court appeal impugns the order dated 27th January, 2012 of the learned Single Judge dismissing W.P.(C) No. 554/2012 preferred by the appellant. The said writ petition was preferred assailing the order dated 14th September, 2011 of the Central Information Commission (CIC) dismissing the appeal preferred by the appellant.

2. The appellant had sought the following information under the Right to Information Act, 2005 with respect to his father-in-law:-

a. Name of the Office/Battalion/Regiment from where he retired?
b. On which date he was retired?
c. What is his pension?
d. As per records, of which caste he belongs?
e. Please provide me the photocopy of his caste certificate?

3. At this stage, it may be stated that there are disputes between the appellant and his wife.

4. The Central Public Information Officer (PIO) vide order dated 3rd December, 2010 informed the appellant that the information sought was a third party personal information, disclosure whereof was likely to cause undue invasion into the privacy of the individual concerned and the information also did not serve any public activity or interest and was

therefore exempted from disclosure under Section 8 (1) (j) of the Act. The appellant was further informed that the information could be provided to the appellant subject to consent of third party i.e. his father-in-law and after following the procedure prescribed under Section 11(1) of the Act. The appellant was thus requested to provide postal address of his father-in-law, for the procedure under Section 11(1) to be followed.

5. The appellant however instead of providing address of his father-in-law, preferred an appeal. The said appeal was dismissed vide order dated 18th January, 2011 directing third party procedure under Section 11(1) to be followed, upon compliance by the appellant of the requisite formalities.

6. The appellant however was not wanting the said third party procedure to be followed and wanted the information, though pertaining to his father-in-law, but without his father-in-law having any chance to object to the disclosure of the said information. The appellant with the said intent preferred the second appeal to the CIC. The CIC however dismissed the said appeal.

7. The learned Single Judge has dismissed the writ petition observing that the information sought was of personal nature and the appellant was unable to disclose any public interest in the disclosure thereof and disclosure of information sought by the appellant was to wreck vengeance on account of his matrimonial dispute.

8. The counsel for the appellant before us has argued that the learned Single Judge has erred in observing that there was no public interest in the disclosure sought by the appellant. It is argued that the same is irrelevant under the RTI Act.

9. What we find in the present case is that the PIO had not refused the information. All that the PIO required the appellant to do was, to follow third party procedure. No error can be found in the said reasoning of the PIO. Under Section 11 of the Act, the PIO if called upon to disclose any information relating to or supplied by a third party and which is to be treated as confidential, is required to give a notice to such third party and is to give an opportunity to such third party to object to such disclosure and to take a decision only thereafter.

10. There can be no dispute that the information sought by the appellant was relating to a third party and supplied by a third party. We

may highlight that the appellant also wanted to know the caste as disclosed by his father-in-law in his service record. The PIO was thus absolutely right in, response to the application for information of the appellant, calling upon the appellant to follow the third party procedure under Section 11. Reliance by the PIO on Section 8 (1) (j) which exempts from disclosure of personal information and the disclosure of which has no relationship to any public activity or interest and which would cause unwanted invasion of the privacy of the individual was also apposite. Our constitutional aim is for a casteless society and it can safely be assumed that the disclosure made by a person of his or her caste is intended by such person to be kept confidential. The appellant however as aforesaid, wanted to steal a march over his father-in-law by accessing information, though relating to and supplied by the father-in-law, without allowing his father-in-law to oppose to such request.

11. A Division Bench of this Court in **Paardarshita Public Welfare Foundation Vs. UOI** AIR 2011 Del. 82, in the context of Section 8(1)(j) (supra) and relying upon **Gobind Vs. State of Madhya Pradesh** (1975) 2 SCC 148, **Rajagopal Vs. State of Tamil Nadu** (1994) 6 SCC 632 and **Collector Vs. Canara Bank** (2005) 1 SCC 496 has held right to privacy to be a sacrosanct facet of Article 21 of the Constitution of India. It was further held that when any personal information sought has no nexus with any public activity or interest, the same is not to be provided. Finding the information sought in that case to be even remotely having no relationship with any public activity or interest and rather being a direct invasion in private life of another, information was denied. The full bench of this Court also in **Secretary General, Supreme Court of India Vs. Subhash Chandra Agarwal** AIR 2010 Del. 159 has held that the conflict between the right to personal privacy and public interest in the disclosure of personal information is recognized by the legislature by incorporating Section 8(1)(j) of the Act. It was further observed that personal information including tax returns, medical records etc. cannot be disclosed unless the bar against disclosure is lifted by establishing sufficient public interest in disclosure and disclosure even then can be made only after duly notifying the third party and after considering his views. It was yet further held that the nature of restriction on right to privacy is of different order; in the case of private individuals, the degree of protection afforded is greater; in the case of public servants, the degree of protection can be lower, depending upon what is at stake; this

is so because a public servant is expected to act for public good in the discharge of his duties and is accountable for them. This Court in **Vijay Prakash Vs. UOI** AIR 2010 Del 7 also, where information of an estranged wife's service record was sought, held that the transparency values have to be reconciled with legal interest protected by law, such as other fundamental rights, particularly the fundamental right to privacy; relying on **O.K. Ghosh Vs. Ex. Joseph** MANU/SC/0362/1962 it was held that an individual does not forfeit his fundamental rights by becoming a public servant; that a distinction has to be drawn between official information and private information and private details of date of birth, Personal Identification Number etc. are to be disclosed only if such disclosure is necessary for providing knowledge of proper performance of the duties and tasks assigned to the public servant; not finding any public interest in the disclosure of information sought, the order of the CIC denying the information was upheld.

12. We are even otherwise pained to find that the provisions of the RTI Act are being used for personal vendetta and owing whereto the PIOs are under huge load and strain.

13. We thus do not find any merit in this appeal. The same is dismissed. We refrain from imposing any costs on the appellant.

ILR (2012) V DELHI 48
RFA

RAMESH CHAND ….APPELLANT

VERSUS

SURESH CHAND & ANR. …..RESPONDENTS

(VALMIKI J. MEHTA, J.)

RFA NO. : 358/2000 DATE OF DECISION: 09.04.2012

Indian Contract Act, 1872—Section 202—Whether a power of attorney given for consideration would stand extinguished on the death of the executant of the power of attorney—Held—No. The object of giving validity to a power of attorney given for consideration even after death of the executants is to ensure that entitlement under such power of attorney remains because the same is not a regular or a routine power of attorney but the same had elements of a commercial transaction which cannot be allowed to be frustrated on account of death of the executant of the power of attorney. Appeal dismissed.

There is also one other aspect which needs to be clarified before proceeding ahead and which is whether a power of attorney given for consideration would stand extinguished on the death of the executant of the power of attorney. The answer to this is contained in illustration given to Section 202 of the Contract Act, 1872, and the said provision with its illustration reads as under:-

> **"Section 202. Termination of agency, where agent has an interest in subject matter.-** Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be

terminated to the prejudice of such interest.

Illustrations

(a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.

(b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death."

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

(Para 4)

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. Rajesh Aggarwal, Advocate with Mr. Ravi Wadhwani, Advocate.

FOR THE RESPONDENT : Mr. R.L. Sharma Advocate for Respondent No.1.

CASES REFERRED TO:

1. *Suraj Lamps & Industries Pvt. Ltd.* vs. *State of Haryana and Anr.* 183 (2011) DLT 1 (SC).
2. *State of Rajasthan* vs. *Basant Nehata* MANU/SC/0547/2005 : 2005 (12) SCC 77.
3. *Asha M. Jain* vs. *Canara Bank* 94 (2001) DLT 841.
4. *Kashibai & Anr.* vs. *Parwatibai & Ors.* 1995 IV AD S.C. (C) 41.

RESULT: Appeal dismissed.

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal was dismissed by a detailed judgment on 28.2.2011. A Special Leave Petition was filed in the Supreme Court against the judgment dated 28.2.2011 and the Supreme Court has remanded the matter back for a fresh decision by its order dated 31.10.2011. The order of the Supreme Court dated 31.10.2011 is based on the issue of the Supreme Court passing the judgment in the case of **Suraj Lamps & Industries Pvt. Ltd. Vs. State of Haryana and Anr.** 183 (2011) DLT 1 (SC), and as per which judgment the Supreme Court overruled the Division Bench judgment of this Court in the case of **Asha M. Jain Vs. Canara Bank** 94 (2001) DLT 841. Since the judgment of this Court dated 28.2.2011 had relied upon the Division Bench judgment in the case of **Asha M. Jain** (supra), and which judgment was over ruled by the Supreme Court in the case of **Suraj Lamps & Industries Pvt. Ltd.** (supra), the matter was therefore remanded back to this Court.

2. Before I proceed to dispose of the appeal, and which would turn substantially on the judgment in the case of **Suraj Lamps & Industries Pvt. Ltd.** (supra), it is necessary to reproduce certain paras of this judgment of the Supreme Court, and which paras are paras 12, 13, 14 and 16, and which read as under:-

"12. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of Sections 54 and 55 of Transfer of Property Act and will not confer any title nor transfer any interest in an immovable property (**except to the limited right granted under Section 53A of Transfer of Property Act**). According to Transfer of Property Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of Transfer of Property Act enacts that sale of immoveable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject matter.

Scope of Power of Attorney

13. A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property.

The power of attorney is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (see Section 1A and Section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time **unless it is made irrevocable in a manner known to law.** Even an irrevocable attorney does not have the effect of transferring title to the grantee. In **State of Rajasthan v. Basant Nehata** MANU/SC/0547/2005 : 2005 (12) SCC 77 this Court held:

> "A grant of power of attorney is essentially governed by Chapter X of the Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by the principal in favor of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well known, a document of convenience.
>
> Execution of a power of attorney in terms of the provisions of the Contract Act as also the Powers-of-Attorney Act is valid. A power of attorney, we have noticed hereinbefore, is executed by the donor so as to enable the done to act on his behalf. Except in cases where power of attorney is coupled with interest, it is revocable. The donee in exercise of his power under such power of attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee."

An attorney holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney

and convey title on behalf of the grantor.

Scope of Will

14. A will is the testament of the testator. It is a posthumous disposition of the estate of the testator directing distribution of his estate upon his death. It is not a transfer inter vivo. The two essential characteristics of a will are that it is intended to come into effect only after the death of the testator and is revocable at any time during the life time of the testator. It is said that so long as the testator is alive, a will is not be worth the paper on which it is written, as the testator can at any time revoke it. If the testator, who is not married, marries after making the will, by operation of law, the will stands revoked. (see Sections 69 and 70 of Indian Succession Act, 1925). Registration of a will does not make it any more effective.

16. We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of 'GPA sales' or 'SA/GPA/WILL transfers' do not convey title and do not amount to transfer, nor can they be recognized or valid mode of transfer of immoveable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognized as deeds of title, except to the limited extent of Section 53A of the Transfer of Property Act. Such transactions cannot be relied upon or made the basis for mutations in Municipal or Revenue Records. What is stated above will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validly transferred only under a registered Assignment of Lease. It is time that an end is put to the pernicious practice of SA/GPA/WILL transactions known as GPA sales." (emphasis added)

3. A reference to the aforesaid paras shows that unless there is a proper registered sale deed, title of an immovable property does not pass. The Supreme Court has however reiterated that rights which are created pursuant to Section 53A of the Transfer of Property Act, 1882 dealing with the doctrine of *part performance* (para 12), an irrevocable right of

a person holding a power of attorney given for consideration coupled with interest as per Section 202 of the Contract Act, 1872 (para 13) and devolution of interest pursuant to a Will (para 14). Therefore, no doubt, a person strictly may not have complete ownership rights unless there is a duly registered sale deed, however, certain rights can exist in an immovable property pursuant to the provisions of Section 53A of the Transfer of Property Act, 1882, Section 202 of the Contract Act, 1872. There also takes place devolution of interest after the death of the testator in terms of a Will.

4. There is also one other aspect which needs to be clarified before proceeding ahead and which is whether a power of attorney given for consideration would stand extinguished on the death of the executant of the power of attorney. The answer to this is contained in illustration given to Section 202 of the Contract Act, 1872, and the said provision with its illustration reads as under:-

> **"Section 202. Termination of agency, where agent has an interest in subject matter.-** Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.
>
> Illustrations
>
> (a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.
>
> (b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death."

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

5. In the aforesaid background, I would seek to reproduce the relevant paras of the judgment passed by me on 28.2.2011 to show that the said reasons given in the judgment dated 28.2.2011 would still apply for disposal of the present appeal and which reasons have no co-relation to the aspect of overruling the Division Bench judgment of **Asha M. Jain** (supra). The relevant paras of the judgment dated 28.2.2011 are as under:-

> "1. The challenge by means of this regular first appeal under Section 96 of the Code of Civil Procedure, 1908, is to the impugned judgment and decree dated 11.5.2000 whereby the suit of the respondent No.1/plaintiff for possession and mesne profits with respect to the property No. 563, Ambedkar Basti, near Balmiki Gate, Ghonda, Delhi-110053 was decreed.
>
> 2. The case of the respondent No.1/plaintiff was that Sh. Kundan Lal, father of the parties, who owned the property, sold the property to him by means of the documents being the agreement to sell, power of attorney, affidavit, receipt and Will on 16.5.1996. It was pleaded that the appellant/defendant No.1 was residing as a licensee in the suit property and which licence was terminated making the appellant/defendant No.1 liable to hand over possession of the suit property. It was also pleaded that the appellant/defendant No.1 had the possession of the original papers of the property and which he had refused to part with and therefore a mandatory injunction was also sought for return of the documents.
>
> 3. The appellant/defendant No.1 contested the suit by stating that the father Sh. Kundan Lal owned three properties namely the suit property, another property being property no. 290 at the same Ambedkar Basti and third property being the property adjoining property no. 290. It was stated that father during his life time partitioned the properties. The suit property fell to the share of the appellant/defendant No.1. The partition was stated to be in July, 1973. The appellant/defendant No.1 also filed a counter-claim for cancellation of the documents executed in favour of the respondent No.1/plaintiff by the father on 16.5.1996.
>
> 4. After the pleadings were complete, the trial court framed following issues.

"1. Has the plaintiff any right, title or interest in the suit property?

2. Whether the defendant became the owner of the suit property by virtue of oral partition in the year 1973? OPD

3. Whether the defendant no.1 became the owner of the suit property on the basis of adverse possession also? OPD

4. Whether the alleged documents i.e. agreement to sell, GPA, will are null and void in view of the para 5 of the preliminary objection in the W.S.? OPD

5. Whether the suit is barred by O-2 Rule 2 CPC? OPD.

6. Whether the suit is not properly valued? OPP

7. Whether the plaintiff is entitled to the relief claimed.

8. Whether the defendant no.1 is entitled to the relief of counter claim? OPD"

xxxx xxxx xxxx xxxx

6. The respondent No.1/plaintiff appeared in the witness box and proved the documents dated 16.5.1996 being the agreement to sell (Ex.PW1/2), General Power of Attorney (Ex.PW1/6), Affidavit (Ex.PW1/3), Receipt for Rs.1,40,000/- (Ex.PW1/4) and Will (Ex.PW1/5). The respondent No.1/plaintiff also got support of their stand from the depositions of the attesting witnesses to the documents namely Sh. Munir Ahmed who was examined as PW-3 and Sh. Shri Ram was examined as PW-4. Brother of the parties Sh. Ram Swaroop, deposed in favour of the respondent No.1/plaintiff as PW-2.

7. In my opinion, the respondent No.1/plaintiff has validly proved that the right in the suit property was transferred in his favour by means of the documents dated 16.5.1996. The witnesses to these documents deposed in favour of the respondent No.1/plaintiff and supported the execution of the documents. Learned counsel for the appellant sought to argue that there were inconsistencies in the statement of the attesting witnesses because Sh. Munir Ahmed (PW-3) stated that he did not know whether Sh. Kundan Lal used to put thumb impression or signatures and

Sh. Shri Ram (PW-4) talked of a sale deed whereas the documents in question do not show existence of a sale deed. Learned counsel for the appellant also argued that the brother Ram Swaroop (PW-2) stated that the property bearing no.290 Ambedkar Basti was given in gift and not in sale and thus there was contradiction in the statement of PW-2 because the suit property was not gifted but sold.

8. I do not find any substance whatsoever in the arguments of the learned counsel for the appellant. A civil case is decided on balance of probabilities. In every case, there may appear inconsistencies in the depositions of witnesses however, the depositions have to be taken as a whole. Minor inconsistencies which do not affect the main substance of the case, are to be taken in correct perspective along with the other evidences, including documentary evidence which is led in the case. Assuming that a witness is not stating correctly in some places does not mean that he is to be held lying generally and hence an unreliable witness. This is so because it has been repeatedly said by the Supreme Court that the doctrine **Falsus in Uno, Falsus in Omnibus** does not apply in India. The inconsistencies which are pointed out by learned counsel for the appellant do not in any manner, whittle down the effect of the documents dated 16.5.1996, and which established that, the respondent No.1/plaintiff paid consideration of Rs.1,40,000/- to his father for purchase of the property. In any case, it has come in the deposition of the other brother PW-2 that the father offered the property for sale to all the brothers, and it was only the respondent No.1/plaintiff who offered to purchase the property, and thereafter purchased the property. The deposition of the brother Ram Swaroop (PW-2) is important because if the case of the appellant/defendant No.1 was correct that there was a partition in the year 1973 then, even Sh. Ram Swaroop would have got one of the properties, but Sh. Ram Swaroop who was having good relations with the appellant/defendant No.1, deposed that there was no partition in the year 1973. Another aspect worth noting is that before the stand of the appellant/defendant No.1 can be considered that there was a partition in the year 1973, it was necessary to be shown that besides the suit property Sh. Kundan Lal also

owned two other properties namely 290 Ambedkar Basti and also the property adjoining of the 290 Ambedkar Basti. There is not a shred of evidence on record that Sh. Kundan Lal owned the two properties namely 290 Ambedkar Basti and the property adjoining 290 Ambedkar Basti and thus, this case of partition of the appellant/defendant No.1 accordingly falls to the ground. Also, if there was a partition, then, surely, the father also would have taken some share in the properties however, as per the case of the appellant/defendant No.1, the father did not choose to have even one out of three properties. This also is unbelievable assuming that father owned two other properties besides the suit property, and which in any case he is never shown to have owned.

9. At this stage, I must bring a relevant fact on record that this case was argued in detail on 31.1.2011 whereafter it was fixed for today. There was a possibility of compromise in the appellant/defendant No.1 getting a share of the said property. It transpires that in fact the appellant/defendant No.1 has also sold 50% of this property, whereas at best if the property was to be partitioned today, the appellant would have had only 1/4th share of the properties as there were three sons of late Sh. Kundan Lal and one daughter. The respondent No.1 agreed that the appellant/defendant No.1 may keep receipt for sale consideration of 50% of the property, which in fact would be double of his share of 1/4th, however, the counsel for the appellant, on instructions from the appellant, who is present in court refused the offer of the respondent No.1/plaintiff.s

10. This court is entitled to interfere with the findings and conclusions of the trial court only if the findings and conclusions of the trial court are illegal and perverse. Merely because two views are possible, this court will not interfere with the impugned judgment and decree unless the same causes grave injustice. I do not find illegality or perversity in the impugned judgment and decree which calls for interference by this court. The facts of the case show that respondent No.1/plaintiff was duly able to substantiate his case and get support from both attesting witnesses of the documents besides also from the brother Ram Swaroop who had good relations with the appellant/defendant

No.1.

xxxx xxxxx xxxx xxxx"

6. To avoid unnecessary repetition, I am not again stating all the facts, issues, evidence and discussion as contained in the aforesaid paras and I would seek to adopt the same for the purpose of disposal of this appeal as if the said paras are in fact part of this judgment.

The summarization is that the documents which were executed by the father-Sh. Kundan Lal in favour of the respondent No.1/plaintiff/son dated 16.5.1996 would not *stricto sensu* confer complete ownership rights, however, the said documents would create rights to the extent provided for by Section 202 of Contract Act, 1872 and ownership on account of devolution in terms of the Will after the death of the testator in terms of relevant provisions of Indian Succession Act, 1925. Of course, I hasten to add that so far as the facts of the present case are concerned, I am not giving the benefit of the doctrine of *part performance* under Section 53A of the Transfer of Property Act, 1882 to the respondent No.1/plaintiff inasmuch as learned counsel for the appellant is correct in arguing that the benefit of the said doctrine cannot be given as the physical possession of the property was not transferred to the respondent No.1/plaintiff by the father-Sh. Kundan Lal under the agreement to sell dated 16.5.1996.

7. Accordingly, even if we do not give the benefit of Section 53A of the Transfer of Property Act, 1882 to the respondent No.1/plaintiff, the respondent No.1/plaintiff however would be entitled to benefit of Section 202 of the Contract Act, 1872 and the fact that ownership had devolved upon him in terms of the Will executed by the father in his favour on 16.5.1996. The argument urged on behalf of the appellant by his counsel that power of attorney, Ex.PW1/6 ceased to operate after the death of the father is an argument without any substance in view of the provision of Section 202 of the Contract Act, 1872 alongwith its illustration (which I have reproduced above) and which shows that power of attorney given for consideration operates even after the death of the executant.

8. Great stress was laid on behalf of the appellant to the fact that the respondent No.1/plaintiff had failed to prove the Will, Ex.PW1/5 in accordance with law inasmuch as no attesting witnesses were examined. Reliance is placed on behalf of the appellant on the judgment of the

Supreme Court in the case of **Kashibai & Anr. Vs. Parwatibai & Ors.** 1995 IV AD S.C. (C) 41 to argue that the Will has to be proved in terms of the provisions of Indian Succession Act, 1925 and Section 68 of the Evidence Act, 1872 by calling of the attesting witnesses and if the same is not done merely because there is an exhibit mark given to the Will, the same cannot be said to be proved.

In my opinion, the judgment of the Supreme Court in the case of **Kashibai & Anr.** (supra), and various other judgments which deal with the issue of requirement of a Will having to be proved by summoning of an attesting witness, are judgments given in those cases where there are inter se disputes between the legal heirs of a deceased testator and the validity of the Will is questioned in those circumstances. Observations in the said judgments cannot have application to the facts of those cases where the disputes with regard to Will are not classical disputes between the legal heirs of the deceased testator and the Will is an instrument which really furthered an intent to transfer the rights in an immovable property by the testator to the beneficiary. I may note that in the present case, there is absolutely no cross examination at all on behalf of the appellant when the registered Will was proved and exhibited in the statement of the respondent No.1/plaintiff as PW-1. Once there is no cross-examination, in the cases such as the present, which are different than the classical disputes inter se the legal heirs of a deceased testator, I would feel that the Will should be held to be a proved document inasmuch as the object of the Will in cases such as the present was really to transfer rights in an immovable property after the death of the testator. Further, I may note that the observations with respect to Will having to be very strictly proved by calling the attesting witness are in probate cases where the judgment is a judgment in rem whereas in the present case the judgment on the basis of ownership rights devolving upon the respondent No.1/plaintiff under a Will will not be a judgment in rem but only a judgment inter se the parties. Also another aspect to be borne in mind is that besides the two sons of the deceased Sh. Kundan Lal, who were the plaintiff and defendant No.1 in the suit, the other legal heirs of the deceased Sh. Kundan Lal were very much in knowledge of the present litigation but they never chose to add themselves as parties. Whereas the other son i.e. the brother of the parties to the present suit, Sh. Ram Swaroop deposed in favour of respondent No.1/plaintiff as PW-2, the only daughter of the deceased Sh. Kundan Lal namely Smt. Krishna

deposed in favour of the appellant/defendant No.1 as DW-2. Therefore, all the interested parties, who would claim any benefit in the suit property, were aware of the subject litigation.

9. Another argument very strenuously put forth on behalf of the appellant was that the documents dated 16.5.1996 executed by the father in favour of the respondent No.1/plaintiff were forged and fabricated documents created after the death of the father who died in the year 1997. In my opinion, this argument is totally without any merit for the reason that the documents being the agreement to sell, general power of attorney, receipt, etc. dated 16.5.1996 includes a registered document being the Will which was registered with the sub-Registrar on the date of its execution i.e. 16.5.1996. Therefore, this argument that the documents were fabricated after the death of Sh. Kundan Lal in 1997, is therefore rejected.

10. Learned counsel for the appellant finally laid great stress on paras 18 and 19 of the judgment of the Supreme Court in the case of **Suraj Lamps & Industries Pvt. Ltd.** (supra) and which read as under:-

> "18. We have merely drawn attention to and reiterated the well-settled legal position that SA/GPA/WILL transactions are not 'transfers' or 'sales' and that such transactions cannot be treated as completed transfers or conveyances. They can continue to be treated as existing agreement of sale. Nothing prevents affected parties from getting registered Deeds of Conveyance to complete their title. The said 'SA/GPA/WILL transactions' may also be used to obtain specific performance or to defend possession under Section 53A of TP Act. If they are entered before this day, they may be relied upon to apply for regularization of allotments/leases by Development Authorities. We make it clear that if the documents relating to 'SA/GPA/WILL transactions' has been accepted acted upon by DDA or other developmental authorities or by the Municipal or revenue authorities to effect mutation, they need not be disturbed, merely on account of this decision.
>
> 19. We make it clear that our observations are not intended to in any way affect the validity of sale agreements and powers of attorney executed in genuine transactions. For example, a person may give a power of attorney to his spouse, son, daughter,

brother, sister, or a relative to manage his affairs or to execute a deed of conveyance. A person may enter into a development agreement with a land developer or builder for developing the land either by forming plots or by constructing apartment buildings and in that behalf execute an agreement of sale and grant a Power of Attorney empowering the developer to execute agreements of sale or conveyances in regard to individual plots of land or undivided shares in the land relating to apartments in favour of prospective purchasers. In several States, the execution of such development agreements and powers of attorney are already regulated by law and subjected to specific stamp duty. Our observations regarding 'SA/GPA/WILL transactions' are not intended to apply to such bona fide/genuine transactions."

These paragraphs were relied upon in support of the proposition that by these paras the Supreme Court in fact explained its earlier observations made in paras 12, 13, 14 and 16 of its judgment and that the Supreme Court did not intend to give any rights in immovable property. In other words, the argument was that in spite of paras 12 to 16 of the judgment in the case of **Suraj Lamps & Industries Pvt. Ltd.** (supra) the documents being an agreement to sell under Section 53A or a power of attorney coupled with interest or a Will cannot create rights in an immovable property. In my opinion, this argument urged on behalf of the appellant really does not convey any meaning to me inasmuch as the argument, if accepted, would mean that I am ignoring the binding observation/ratio of the Supreme Court given in paras 12 to 16 of the judgment in the case of **Suraj Lamps & Industries Pvt. Ltd.** (supra).

11. Finally, I would like to take on record the fact that learned counsel for the respondent No.1 has reiterated the stand of the respondent No.1/plaintiff contained in para 9 of the judgment dated 28.2.2011 that the respondent No.2 who seems to have acted bonafidely should not be unnecessarily prejudiced by the litigation in the family and to the extent of 50% rights created in favour of respondent No.2 in the suit property the same are preserved and such rights in favour of respondent No.2 will remain and the respondent No.1/plaintiff is only claiming possession of the balance portion of the suit property from the appellant/defendant No.1. Also, I may for the sake of completeness state that the arguments which were raised on behalf of the appellant in this Court were only with respect to issue Nos.1, 2 and 4 which were framed by the trial Court

and no other issue was pressed or urged before this Court.

12. In view of the aforesaid facts and the validity of the documents, being the power of attorney and the Will dated 16.5.1996, the respondent No.1/plaintiff would though not be the classical owner of the suit property as would an owner be under a duly registered sale deed, but surely he would have better rights/entitlement of possession of the suit property than the appellant/defendant No.1. In fact, I would go to the extent saying that by virtue of para 14 of the judgment of the Supreme Court in the case of **Suraj Lamps & Industries Pvt. Ltd.** (supra) taken with the fact that Sh. Kundan Lal has already died, the respondent No.1/plaintiff becomes an owner of the property by virtue of the registered Will dated 16.5.1996. A right to possession of an immovable property arises not only from a complete ownership right in the property but having a better title or a better entitlement/right to the possession of the property than qua the person who is in actual physical possession thereof. The facts of the present case show that the respondent No.1/plaintiff has undoubtedly better entitlement/title/rights in the suit property so as to claim possession from the appellant/defendant No.1/brother. I have already held above that the appellant/defendant No.1 miserably failed to prove that there was any partition as alleged of the year 1973 whereby the suit property allegedly fell to the share of the appellant/defendant No.1. In fact, the second reason for holding the appellant to be unsuccessful in establishing his plea of partition is that the appellant failed to lead any evidence as to the other two properties being the property No.290, Ambedkar Basti, Delhi and the second property being the property adjoining the property No.290, Ambedkar Basti, Delhi as having belonged to the father-Sh. Kundan Lal.

13. In view of the above, I do not find any merit in the appeal, which is accordingly dismissed subject to the observations made above that the respondent No.1/plaintiff will only be entitled to possession of 50% of the suit property which is in possession of the appellant/defendant No.1, and the rights of respondent No.2 would remain secure with respect to the 50% share of the suit property which was purchased by the respondent No.2/defendant No.2 from the appellant/defendant No.1. Parties are left to bear their own costs. Trial Court record be sent back.

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W.P. (C)

MANOJ KUMAR ….PETITIONER

VERSUS

GOVT. OF NCT OF DELHI AND ORS. ….RESPONDENTS

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

W.P. (C). NO. : 2194/2012 DATE OF DECISION: 23.04.2012

` Service Law—The petitioner who was working as a Jail Warden, was charge sheeted for unauthorizedly abstaining from duty between 05.08.2007 to 25.06.2008—The petitioner received the charge sheet and submitted a reply dated 30.07.2008 claiming that his absence was neither deliberate nor intentional and was purely on account of circumstances beyond his control, he being unwell during this period. The petitioner, however, did not participate in the inquiry despite repeated notices and the inquiry was accordingly, held ex-parte—The Inquiry Officer, vide his report dated 05.02.2009 found the charges against the petitioner to be proved—The Disciplinary Authority vide order dated 11.05.2009, imposed penalty of removal from service upon the petitioner, which was ordinarily not to be a disqualification for further employment under the Government—The period of absence was treated as unauthorized, without any pay. The appeal filed by the petitioner was dismissed by the Appellate Authority vide order dated 26.08.2010. Being aggrieved by the orders passed by the Disciplinary Authority and the Appellate Authority, the petitioner filed the OA which came to be dismissed by the Tribunal by virtue of the impugned order—During the course of arguments, the first contention of the learned counsel for the petitioner was that since the

petitioner was suffering from various ailments during the period of absence, he was not in a position to attend the duty and, therefore, his absence cannot be said to be deliberate and intentional—Admittedly, the petitioner was governed by CCS (Leave) Rules—Since the petitioner did not produce any medical certificate from an authorized medical attendant with respect to his absence from duty except between 07.09.2007 to 18.10.2007, his absence from duty was clearly unauthorized—More importantly, the petitioner, despite receiving a charge-sheet and submitting a reply, chose not to participate in the inquiry. He thereby did not avail the opportunity which was available to him, to establish before the Inquiry Officer, that he was genuinely sick, during the period he did not attend duty, and therefore, had a sufficient cause for remaining away from the work—The petitioner remained absent from duty for almost one year and he made no attempt to justify his absence, by participating in the inquiry and satisfying the Inquiry Officer with respect to his alleged illness—It cannot be said that the punishment awarded to the petitioner is so disproportionate to the charge held proved against him as to shock the conscience of the Court Consequently, no valid ground to interfere with the penalty imposed upon the petitioner.

Important Issue Involved: In the case before us, the petitioner has remained absent from duty for almost one year and he made no attempt to justify his absence, by participating in the inquiry and satisfying the Inquiry Officer with respect to his alleged illness. In the facts and circumstances of this case, it cannot be said that the punishment awarded to the petitioner is so disproportionate to the charge held proved against him as to shock the conscience of the Court.

[Ch Sh]

APPEARANCES:

FOR THE PETITIONER : Mr. Yudhvir Singh Chauhan.

FOR THE RESPONDENT : Mr. Rajiv Nanda, ASC with Ms. Shawana Bari and Mr. Ashijeet.

CASES REFERRED TO:

1. *Ex. Head Constable Manjeet Singh* vs. *Union of India & Ors,* WPC 2431/2011.
2. *State of Punjab* vs. *Dr. P.L.Singla:* AIR 2009 SC 1149.
3. *Mahesh Chand* vs. *UOI & Others: 145*(2007) DLT 588 (DB).
4. *V.Ramana* vs. *A.P.SRTC And Others:* (2005) III LLJ 725 SC.
5. *B.C.Chaturvedi* vs. *Union of India:* 1995(6) SCC 749.
6. *Union of India And Others* vs. *Giriraj Sharma:* AIR 1994 SC 215.
7. *State of Orissa And Others* vs. *Bidyabhushan Mohapatra:* (1963) ILLJ 239 SC.

RESULT: Dismissed.

V.K. JAIN, J.

1. The writ petition is directed against the order dated 22.11.2011 passed by the Central Administrative Tribunal, Principal Bench (hereinafter referred to the 'Tribunal') whereby OA 353/11 filed by the petitioner, was dismissed.

The facts giving rise to the filing of this writ petition can be summarized as under:-

The petitioner who was working as a Jail Warden, was charge sheeted for unauthorizedly abstaining from duty between 05.08.2007 to 25.06.2008. The period of absence was 05.08.07 to 19.08.07 (15 days), 07.09.07 to 17.10.07(11 days), 20.11.07 to 27.11.07 (08 days), 06.12.07 to 12.12.07 (07 days), 01.01.08, to 05.01.08 (05 days), 27.01.08 to 08.02.08(13 days), 28.02.08 to 10.03.08 (12 days), 22.03.08 to 26.03.08 (05 days), 05.04.08 to 19.04.08 (15 days) and 30.04.08 to 08.06.08.

2. The petitioner received the charge sheet and submitted a reply dated 30.07.2008 claiming that his absence was neither deliberate nor intentional and was purely on account of circumstances beyond his control he being unwell during this period. The petitioner, however, did not participate in the inquiry despite repeated notices and the inquiry was accordingly held ex-parte. The Inquiry Officer, vide his report dated 05.02.2009 found the charges against the petitioner to be proved. The Disciplinary Authority vide order dated 11.05.2009, imposed penalty of removal from service upon the petitioner, which was ordinarily not be a disqualification for future employment under the Government. The period of absence was treated as unauthorized, without any pay. The appeal filed by the petitioner was dismissed by the Appellate Authority vide order dated 26.08.2010. Being aggrieved by the orders passed by the Disciplinary Authority and the Appellate Authority, the petitioner filed the OA which came to be dismissed by the Tribunal by virtue of the impugned order.

3. During the course of arguments, the first contention of the learned counsel for the petitioner was that since the petitioner was suffering from various ailments during the period of absence, he was not in a position to attend the duty and, therefore, his absence cannot be said to be deliberate and intentional. Admittedly, the petitioner was governed by CCS (Leave) Rules. 4. Rule 19 of CCS (Leave) Rules To the extent, it is relevant, reads as under:

> **"Rule-19. Grant of leave on medical certificate to Gazetted and non-Gazetted Government servants**
>
> (1) An application for leave on medical certificate made by-
>
> x x x x x
>
> (ii) a non-Gazetted Government servant, shall be accompanied by a medical certificate Form 4 given by a CGHS Doctor if such a Government servant is a CGHS beneficiary or by Government Hospital or by an Authorized Medical Attendant if he is not a CGHS beneficiary; and by an Authorized Doctor of the private hospital, recognized under CGHS/Central Services (Medical Attendance) Rules, 1944, in case of hospitalization or indoor specialized treatment duly approved by the Competent Authority in respect of particular kind of disease like heart disease, cancer,

etc., for the treatment of which the concerned hospital has been recognized by the Ministry of Health and Family Welfare: Provided that the non-Gazetted Government servant who is a CGHS beneficiary, if at the time of illness is away from CGHS area or proceeds on duty outside the Headquarters will produce M.C. or F.C. in Form 4 or 5, as the case may be, given by an Authorized Medical Attendant (AMA) or by Registered Medical Practitioner (RMP) if there is no AMA available within a radius of 8 kilometers (kms) from his residence or place of temporary stay outside his Headquarters and also in the circumstances when he finds it difficult to obtain MC or FC from a CGHS Doctor or an AMA;

x x x x

(5) The grant of medical certificate under this rule does not in itself confer upon the Government servant concerned any right to leave; the medical certificate shall be forwarded to the authority competent to grant leave and orders of that authority awaited.

5. Thus, under the rules applicable to him, the petitioner was required to produce either the medical certificate issued by a CGHS dispensary in case he was a beneficiary of CGHS or by an Authorized Medical Attendant in case he was not a member of the Scheme.

6. During the course of arguments before us, the petitioner did not claim that he was a member of CGHS. He does not claim that he was hospitalized during the period of his absence. Therefore, he was required to produce medical certificates from an Authorized Medical Attendant. Only one medical certificate purporting to be issued by a government doctor was pointed out to us by the learned counsel for the petitioner. This medical certificate purports to be issued by Dr. A.K. Pandey, of Primary Health Centre, Mehrauli. It has been certified by the doctor that Manoj Kumar was suffering from backache and the period of absence from duty from 07.09.07 to 18.10.07 was absolutely necessary for restoration of his/her health. Even if, we presume that the doctor who issued this certificate was an Authorized Medical Attendant, this could justify absence of the petitioner only for the period 07.09.07 to 18.10.07. With respect to the other periods of absence, no medical certificate issued by any government hospital or any authorized medical attendant was brought to our notice. On going through the purported medical certificates filed with the petition we could not find medical certificate

issued by a government doctor or a government hospital.

7. Since the petitioner did not produce any medical certificate from an authorized medical attendant with respect to his absence from duty except between 07.09.07 to 18.10.07, his absence from duty was clearly unauthorized.

8. More importantly, the petitioner, despite receiving a charge-sheet and submitting a reply, chose not to participate in the inquiry. He thereby did not avail the opportunity which was available to him, to establish before the Inquiry Officer, that he was genuinely sick, during the period he did not attend duty and, therefore, had a sufficient cause for remaining away from the work. For this purpose, the petitioner could have produced evidence including the private doctors from where he claims to have received treatment during the period of his absence. When questioned, as to why the petitioner did not participate in the inquiry, the learned Counsel for the petitioner stated that since the petitioner was not getting salary he could not participate in the inquiry. The explanation given by the learned Counsel on behalf of the petitioner is not convincing at all. An employee who has been charge-sheeted for remaining absent from duty and who has an opportunity to establish his illness during the course of the inquiry must necessarily avail that opportunity in case he is genuinely sick and convince the Inquiry Officer in this regard. Non-payment of salary could not have prevented the petitioner from participating in the inquiry and proving the illness claimed by him. Had the petitioner participated in the inquiry that he was genuinely sick and was not in a position to attend the duty, it could have been open to him to say that his taking treatment from private doctors would not show that his absence from duty was intentional and, hence, though the leave may be denied to him on account of non-submission of medical certificate from an Authorized Medical Attendant, the penalty imposed him was not called for. The petitioner however, chose to altogether stay away from the inquiry. We, therefore, find no ground to interfere with the finding recorded by the Inquiry Officer, which has been accepted by the Disciplinary Authority and confirmed by the Appellate Authority.

9. The other contention of the learned Counsel for the petitioner was that the punishment awarded to the petitioner was wholly disproportionate to the charge proved against him. In support of his contention the learned Counsel for the petitioner has relied upon **Union**

of India And Others v. Giriraj Sharma: AIR 1994 SC 215 and **Mahesh Chand v. UoI & Others:** 145(2007) DLT 588 (DB).

10. As regards the quantum of punishment, this Court in WPC 2431/2011 **Ex. Head Constable Manjeet Singh v. Union of India & Ors,** had, inter alia, observed as under:-

> "It is a settled proposition of law that neither the Central Administrative Tribunal nor the Writ Court can interfere with the punishment awarded in a departmental proceeding, unless it is shown that the punishment is so outrageously disproportionate, as to suggest lack of good faith. While reviewing an order of punishment passed in such proceedings, the Court cannot substitute itself for the Appellate Authority and impose a lesser punishment merely because it considers that the lesser punishment would be more reasonable as compared to the punishment imposed by the Disciplinary Authority. The Court or for that matter even the Tribunal can interfere with the punishment only if it is shown to be so disproportionate to the nature of the charge against the delinquent official that no person, acting as a Disciplinary Authority would impose such a punishment. The following observations made by Supreme Court in **V.Ramana v. A.P.SRTC And Others:** (2005) III LLJ 725 SC are pertinent in this regard:
>
> "The common thread running through in all these decisions is that the court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in Wednesbury case the court would not go into the correctness of the choice made by the administrator open to him and the court should not substitute its decision for that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision.
>
> To put it differently unless the punishment imposed by the disciplinary authority or the Appellate Authority shocks the conscience of the court/Tribunal, there is no scope for interference. Further to shorten litigations it may, in exceptional and rare cases, impose appropriate punishment by recording cogent

> reasons in support thereof. In a normal course if the punishment imposed is shockingly disproportionate it would be appropriate to direct the disciplinary authority or the Appellate Authority to reconsider the penalty imposed."

In **B.C.Chaturvedi v. Union of India:** 1995(6) SCC 749, Supreme Court, after considering a Constitution Bench decision in **State of Orissa And Others v. Bidyabhushan Mohapatra:** (1963) ILLJ 239 SC and some other decisions, inter alia held as under:

> "A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

11. The petitioner before us was absent from duty for almost one year, he was posted as a warden in jail. His unauthorized absence from duty is bound to have some effect on the functioning of the jail in which he was posted. He made no effort to substantiate the explanation given by him for his unauthorized absence from duty. In this regard, the following observations made by the Supreme Court in **State of Punjab v. Dr. P.L.Singla:** AIR 2009 SC 1149 are apt:

> Unauthorized absence (or overstaying leave), is an act of indiscipline. Whenever there is an unauthorised absence by an employee, two courses are open to the employer. The first is to condone the unauthorized absence by accepting the explanation and sanctioning leave for the period of the unauthorized absence

in which event the misconduct stood condoned. The second is to treat the unauthorized absence as a misconduct, hold an enquiry and impose a punishment for the misconduct.

An employee who remains unauthorisedly absent for some period (or who overstays the period of leave), on reporting back to duty, may apply for condonation of the absence by offering an explanation for such unauthorized absence and seek grant of leave for that period. If the employer is satisfied that there was sufficient cause or justification for the unauthorized absence (or the overstay after expiry of leave), the employer may condone the act of indiscipline and sanction leave post facto. If leave is so sanctioned and the unauthorized absence is condoned, it will not be open to the employer to thereafter initiate disciplinary proceedings in regard to the said misconduct unless it had, while sanctioning leave, reserved the right to take disciplinary action in regard to the act of indiscipline. We may note here that a request for condoning the absence may be favourably considered where the unauthorized absence is of a few days or a few months and the reason for absence is stated to be the sudden, serious illness or unexpected bereavement in the family. But long unauthorized absences are not usually condoned. In fact in Security services where discipline is of utmost importance, even a few of days overstay is viewed very seriously. Be that as it may.

12. In **Giriraj Sharma** (supra) the respondent had overstayed only for 12 days and for this absence his services were terminated. It was observed by Supreme Court that punishment of dismissal for overstay of 12 days, in the facts and circumstances of the case, was harsh since the circumstances had compelled the respondent to overstay beyond the leave granted to him. While quashing the order of High Court, the Supreme Court left it open to the department to visit the respondent with a minor punishment. In **Mahesh Kumar** (supra) the first period of overstay of 32 days was on account of celebrations in the family, followed by the demise of his father. The second absence was on account of demise of his mother, followed by his illness. The total overstay in that case was for 85 days. While quashing the dismissal of the petitioner and leaving it to the Disciplinary Authority to decide upon the lesser punishment, this Court inter alia observed as under:

x x x x There may be cases where resumption of duties may not be an impossibility but given regard to what human life and affairs are, circumstances may sufficiently justify a delayed joining back for duties. Suffice it to say that it would all depend upon the facts and circumstances of each case whether the overstaying of leave was or was not justified. No strait-jacket formula can be formulated or applied in such cases nor can any norms be prescribed for a uniform application to all situations. What is to be kept in mind by the disciplinary authority and those hearing appeals against the orders of punishment is whether overstaying of leave was for such a long period and so unjustified that the same smacked of indiscipline, defiance or desertion. Whether the justification advanced for late resumption of duty was factually false or wholly unacceptable being moon shine and whether the person concerned was a habitual offender in the sense that he was incorrigible in his conduct and disrespect for the rules regulating his service conditions. It is only where the authorities find the case to be hopeless on all these fronts that they may be justified in getting rid of the man by dismissing him. In other cases, a lesser punishment ought to be sufficient to meet the ends of justice.

13. In the case before us, the petitioner has remained absent from duty for almost one year and he made no attempt to justify his absence, by participating in the inquiry and satisfying the Inquiry Officer with respect to his alleged illness. In the facts and circumstances of this case, it cannot be said that the punishment awarded to the petitioner is so disproportionate to the charge held proved against him as to shock the conscience of the Court. Consequently, we find no valid ground to interfere with the penalty imposed upon the petitioner.

14. For the reasons stated hereinabove the writ petition is hereby dismissed without any order as to costs.

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STATE GOVT OF NCT OF DELHI ….PETITIONER

VERSUS

KHALIL AHMED ….RESPONDENT

(SURESH KAIT, J.)

CRL. REV. P. NO. : 42/2012 & CRL. M.A NO. : 975/2012

DATE OF DECISION: 23.04.2012

Maharashtra Control of Organized Crime Act, 1999—Section 3(2), 3(4) and Section 4, Indian Penal Code, 1860—Section 384, 387, 506, 467, 471—Chargesheet filed under I.P.C (MCOCA)—It was alleged that against the respondent there were 34 cases pending—He was also found in possession of properties any money in four bank accounts, out of which two existed in the name of wife and one in the name of his daughter, beyond the known sources of his income—Accused was discharged under the provisions of MCOCA on the ground that there was no material to substantiate that the accused was a member of any gang and that prosecution failed to show that respondent was holding above properties either being a member of an organized crime syndicate or on behalf of other syndicate—Held, to attract Section 2(A) there has to be continuing unlawful activities by an individual singly or jointly either by an organized crime syndicate or on behalf of such syndicate—Such activities should involve use of violence or threat of violence or intimidation or coercion or other unlawful means with an activity of gaining pecuniary benefits or other undue advantage for the person who undertakes such an activity—Expression 'any unlawful means' refer to any such which has direct nexus with commission of

a crime which MCOCA seeks to prevent or control—Section 2(e) of MCOCA cannot be invoked for petty offences—Unless there is prima facie material to establish that there is an organized crime syndicate and prima facie material firstly, to establish that there is organized crime syndicate and secondly, that organized crime has been committed by any member of organized crime syndicate or by anyone on its behalf, provisions of MCOCA cannot be involved.

On perusal of Section 2 (e), it can be seen that there has to be continuing unlawful activities and such activities will have be by an individually singly or jointly either by a member of organized crime syndicate or on behalf o such syndicate. Therefore, there has to be use of violence there has to be use of violence or threat of violence or intimidation or coercion or other lawful means and such an activity has to be with an objective of gaining pecuniary benefits or gaining undue economic or other advantage for the person who undertakes such an activity or any other person or promoting insurgency. **(Para 72)**

It would be safe to presume that the expression any lawful means, it would be safe to presume that the expression 'any unlawful means' must refer to any such act which has a direct nexus with the commission of a crime which MCOCA seeks to prevent or control. **(Para 79)**

Section 2(e) of MCOCA cannot be invoked for petty offences. The legislative intent is clear that MCOCA is for curing the organized crime unless there is a prima facie material to establish that there is an organized crime syndicate and prima facie material, firstly, to establish that there is an organised crime syndicate and, secondly, that organized crime has been committed by any member of the organized crime syndicate or any person on behalf o such syndicate, the provisions of MCOCA cannot be invoked. **(Para 80)**

Therefore, the offence under MCOCA must comprise continuing unlawful activity relating to organized crime

undertaken by an individual singly or jointly, either as a member of the organized crime syndicate or on behalf of such syndicate by use of coercive or other unlawful means with the objective of gaining pecuniary benefits or gaining undue economic or other advantage for himself or for any other person or for promoting insurgency. **(Para 84)**

Important Issue Involved: Provisions of MCOCA cannot be involved unless there is prima facie material to establish that there is organized crime syndicate and secondly that organized crime has been committed by any member of organized crime syndicate or any person on behalf of such syndicate.

[La Ga]

APPEARANCES:

FOR THE PETITIONER : Mr. Dayanu Krishnan, ASC with Mr. Nikhil A Menon, Advocates.

FOR THE RESPONDENT : Mr. Rakesh Khanna, Senior Advocate with Mr. Rahul Tyagi, Mr. C.P. Tyagi & Mr. V.V. P. Singh, Advocates.

CASES REFERRED TO:

1. *State of Maharashtra* vs. *Jagain Gagansingh Nepali @ Jagya & Ors :* Crl. Appeal No.20/2011.
2. *Madan Ramkisan Gangwani,* 2009 ALL MR (Cri)1447.
3. *Ganesh Nivrutti Marne* vs. *The State of Maharashtra* in Criminal Appeal No. 930 of 2009.
4. *Anil Sadashiv Nanduskar* vs. *State of Maharashtra* [2008 (3) MAH. L.J. (CRI) 650].
5. *Sherbahadur Akram Khan* vs. *State of Maharashtra,* 2007 ALL MR (Cri) 1.
6. *Jagmohan @ Mohar Singh* vs. *Commission of Police & Ors.(Delhi) :* 2007 (1) JCC 292.

7. *Vinod G. Asrani* vs. *State of Mahrashtra :* 2007 (3) SCC 633.
8. *State of Maharashtra* vs. *Lalit Somdatta Nagpal & Ors. :* 2007(4) SCC 171.
9. *Amarsingh* vs. *State* 2006 ALL MR (Cri) 407.
10. *Jaisingh* vs. *State* (2003) ALL MR (Cri) 1506.
11. *Bharat Shah* vs. *State* 2003 ALL MR (Cri) 1061.
12. *Bharat Shantilal Shah and Ors.* vs. *The State of Maharashtra* Criminal Writ Petition No. 27/2003.
13. *Prafulla* vs. *State of Maharashtra :* Crl.Appeal No.664/ 2002.
14. *Kari Choudhary* vs. *Mst. Sita Devi & Ors.,* (2002) 1 SCC 714.
15. *Harbhajan Singh* vs. *Press Council of India,* (2002) 4 SCC 275.
16. *Grasim Industries Ltd.* vs. *Collector of Customs, Bombay,* (2002) 4 SCC 297.
17. *Institute of Chartered Accountants of India* vs. *Price Waterhouse,* (1997) 6 SCC 312.
18. *Union of India* vs. *Deoki Nandan Aggarwal,* 1992 Supp (1) SCC 323.
19. *Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd.* vs. *Custodian of Vested Forests,* 1990 Supp SCC 785:AIR 1990 SC 1747.

RESULT: Crl. revision dismissed.

SURESH KAIT, J.

1. Vide instant petition, the State – petitioner has sought to quash the impugned order dated 16.11.2011 passed by learned Additional Sessions Judge-01, (Central) Delhi whereby learned Trial Judge found no sufficient evidence to make out prima facie case against respondent Khalil Ahmed for the offence punishable under Section 3(2), 3(4) and Section 4 of the Maharashtra Control of Organised Crime Act (hereinafter referred to as the MCOCA). Thus, learned Trial Judge discharged the respondent for the offences alleged therein.

2. It is pertinent to mention here that the charge-sheet was filed against the petitioner for the offences punishable under Sections 384/387/506/467/468/471 Indian Penal Code, 1860 and Section 3(2), 3(4) and Section 4 of MCOCA. However, finding prima facie offences punishable under Section 386/387/506-II and Section 467/468/471 Indian Penal Code, 1860, which are triable by the Court of learned Magistrate, the matter has been sent back, accordingly.

3. The facts in brief of the case are that complainant namely Sh.Qmar Ahmad has been running a trading company in the name of M/s A.S. Traders at Khari Baoli, Delhi. On 16.02.2009, when he was present at his shop along with his business partner namely Sanjeev Bhist, two persons came at his shop at about 02:30 PM. One of them handed over his mobile phone to him and forced to talk with Khalil Ahmed/respondent, a notorious criminal of the area. It was alleged that respondent had threatened him & demanded Rs. 10.00 Lacs. Also threatened in case of non-payment, he should be ready to face the music and in that eventuality he would eliminate him and his family. Respondent asked him to reach Darya Ganj immediately. Complainant expressed his inability to reach there immediately, he asked him to come to Tis Hazari on the next day at about 11:00 AM. One of the persons picked up the visiting card also from his shop. It was further alleged that while leaving the shop, both the persons threatened the complainant that in case extortion amount was not paid, complainant would have to face the consequences. It was further alleged that he was so terrified that he did not report the matter to the police.

4. On 17.02.2009, when the complainant along with Sanjeev were getting the complaint prepared at Karkardooma Court, complainant had received a call on his mobile phone bearing no. 931063391 from a mobile phone bearing no.9210459185, respondent was caller and he rebuked him for not reaching at Tis Hazari and again terrorized him. Complainant disconnected the phone. Though, complainant had received 2-3 more calls from the said number yet complainant did not attend the same. It was stated that at about 11:50 AM, complainant had again received a call from the same number, but this time it was attended by Sanjeev posing himself as driver of complainant and when Sanjeev told that 'sahib (complainant) had gone inside the court' respondent infuriated and threatened him. Complainant continued to receive numerous calls from the above number and another number i.e. 9871144610, but he did not

attend the calls. At about 02:00PM, respondent alongwith 8-10 persons visited his shop and intimidated his servant Imran, who told the same to the complainant on phone.

5. On the statement of complainant, an FIR for the offences punishable under Sections 384/506 Indian Penal Code, 1860 was got registered. Upon lodging of the FIR, it was alleged that the complainant reached his shop in the evening. The respondent came there and threatened the complaint that he would have to face the music of lodging the FIR against him. On 26.02.2009, respondent was apprehended from near India Habitat Centre, Lodhi Road, New Delhi, when he along with his associate came there on a bike. Though his associate had managed to escape, yet police succeeded in apprehending the respondent.

6. From the respondent, two mobile phones bearing Nos.9210459185 and 9871144610 were recovered. It was alleged that said phones were used in threatening the complainant. One Lancer car bearing registration No.DL-3C-S-1209 was also recovered at the instance of respondent. It was alleged that original papers of several properties and other incriminating documents were recovered from the said car. During the search of house of respondent located at F-2 Andrew Ganj, New Delhi, 12 cheque books, one pass book and photostate papers of many properties were recovered.

7. During interrogation respondent had confessed his guilt of extortion of Rs. 10.00 Lacs from complainant but respondent did not reveal the name of his associates who visited the shop of complainant and threatened him. It is further revealed that respondent was a notorious extortionist of the area and was found involved in 34 cases of extortion, dacoity, kidnapping, assault, intimidation, murder, attempt to murder etc. He was allegedly running an organized crime syndicate with the help of his associates to terrorize the businessmen and shopkeepers of walled city area and used to extort money from them.

8. Considering the above revelation, on 23.03.2009, after taking the prior approval of Joint Commissioner of Police, Special Cell, Delhi, provisions of MCOCA were invoked against the respondent. During investigation, it was surfaced that respondent had many bank accounts, debit and credit cards of various banks and he had acquired number of properties in his name in a few years, despite the fact that he had no source of regular income. During scrutiny of said documents of 19

properties – which were recovered from his house - out of those, six properties were found disputed. It was alleged that respondent had tried to terrorize one party at the behest of another one with some consideration, sometimes directly and sometimes behind the scene. Papers of six disputed properties had been placed on record of learned Trial Judge; whereas the documents pertaining to other 13 properties have not been produced. Original documents of some properties were also recovered from the house of respondent.

9. It is further revealed that respondent had got transferred property bearing No.503/22 Zakir Nagar, Okhla, New Delhi by preparing forged documents as the stamp of vendor of non-judicial paper and stamp of notary on the transfer documents were found fake. The owner of property Rehena Begum was untraced. Accordingly, Sections 467/468/471 Indian Penal Code, 1860 were added in the challan. It was alleged that property bearing No.113A, Khasra No.159 village Adhchini, New Delhi was sold by one Riazuddin to Asfaq and documents of said transaction were got prepared by respondent and the stamp of notary on the said documents was found fake. It was alleged that part of the said property was forcibly occupied by respondent and from which respondent is running his office of tour and travels in the name of 'M/s.Creative International'. It was alleged that Asfaq had not received the document from respondent despite making the payment for the property. It was also alleged that in one case, Asfaq was forced to give a receipt of Rs. 12.50 lac in the name of respondent despite the fact that no payment was made to Asfaq.

10. Further allegations against the respondent are that he had purchased an industrial plot bearing No.S-18, Handloom Complex Industrial Estate, Loni, Ghaziabad, UP from 'UP Financial Corporation and made a payment of Rs. 9.50 Lacs 'UP Financial Corporation' through various cheques and demand drafts during the period 2000 to 2002. He had purchased the said lancer car for the sum of Rs. 5.00 lac from one Mukesh. He had also procured a three storied house bearing No.503/22 Zakir Nagar, Okhla, New Delhi.

11. Further, it is alleged that the present market value of above properties and car is about Rs. 1.00Crore, which is beyond the known source of income of respondent. Thus, it was alleged that respondent had acquired the above properties by extortion and other fraudulent means by running an organized crime syndicate, accordingly Section 4 of MCOCA

was added in the challan.

12. During investigation, it is further revealed that four bank accounts of the respondent existed; out of which two bank accounts of his wife Reshma Khalil and one bank account in the name of her daughter namely Ms. Ananta Khalil, were surfaced and scrutiny of transactions revealed that substantial amount have been involved which is beyond the known source of respondent.

13. Further it is alleged that he had procured mobile connection bearing No.9210459185 by using the ID of Avinash Chander Chawla; whereas, mobile connection bearing No.9871144610 was procured in the name of Razia Rajesh, sister in law of respondent. It was further alleged that on scrutiny of calls detail of both the phones, revealed that location of respondent on 17.02.2009 was found in the area of Khari Baoli, Delhi. It is further alleged that respondent was found involved in more than 34 cases and details of cases wherein cognizance had been taken during the last 10 years have been placed before learned Trial Judge.

14. Further it is alleged that the remaining associates of respondent could not be identified due to his non-co operation in the investigation.

15. Since the allegations against respondent is that he alongwith his associates has been running an organized crime syndicate in Delhi with an intention to get pecuniary gain by committing various crimes by threat, extortion, murder, attempt to murder, kidnapping assault etc; therefore, after obtaining sanction under Section 23 of MCOCA, accordingly challan was filed for the offence punishable under Sections 3(2), 3(4) and Sec.4 of MCOCA and under sections 384/386/506/467/468/471 Indian Penal Code, 1860.

16. Thereafter, supplementary challan also filed on the allegations that market value of property bearing No.S-18, Handloom Complex Industrial Estate, Loni, Ghaziabad was found Rs. 60,90,000/-; whereas the market value of property bearing No.503/22, Zakir Nargar, Okhla, New Delhi was found Rs.8,14,650/-. The respondent had purchased many items worth of Rs. 5,48,681/- by using his different five credit cards during the period 2006 to 2009. It was also alleged that respondent had filed his Income Tax Returns under two different PAN which is not permissible. Beside that investigating officer also filed the FSL result on the record.

17. Learned Trial Judge in the impugned order has observed that to make out a prima facie case against respondent under MCOCA, first of all, the prosecution has to establish that respondent was either a member of the organized crime syndicate or gang or was acting on behalf of such syndicate or gang.

18. Learned Trial Judge has referred the 'Statement of Object', Section 2(e), 2(d) and 2(f) of MCOCA and recorded that in the charge-sheet, it is alleged that the respondent was running a organized crime syndicate with the help of his associates, yet the investigating officer failed to describe the alleged syndicate. Even the investigating agency failed to identify or nab the associates of respondent on the ground that he did not cooperate during investigation.

19. Here, learned Trial Judge recorded that right to remain silent is the fundamental right of the accused, thus the reason furnished by the investigating agency for not ascertaining the identity of his alleged associates is not justifiable.

20. Admitted case of the prosecution is that respondent was found involved in more than 34 criminal cases. Even some cases, respondent had been charge-sheeted along with other persons. Despite that no efforts were made to find out whether his earlier co-accused were the persons to whom he had sent at the shop of complainant for the demand of extortion of Rs. 10.00 lacs. Investigating officer could easily show the dossier of earlier co-accused of respondent to the complainant and other witnesses to ascertain as to whether his earlier companions were the persons who had threatened the complainant on behalf of respondent. But no such efforts were made in this regard.

21. It is further recorded that the investigating officer has filed the list of 34 cases showing the involvement of respondent since 1985 to 2009. In the year 1996, respondent was charge-sheeted for the offence punishable under Sections 392/397/34 Indian Penal Code, 1860 in case FIR No.30/96 registered at police station Keshav Puram, Delhi and again charge-sheeted for the offence punishable under Sections 387/506/34 Indian Penal Code, 1860 in case FIR No.39/08 PS Spl. Cell lodged at PS-Spl. Cell. In case FIR no. 39/08, respondent was charge-sheeted along with one Amit Vaish @ Jugnu whereas in case FIR No.30/96 said Amit Vaish @ Jugnu was not an accused. In all the 34 cases, either respondent is alone charge-sheeted or if there is any co-accused, then that person

was not charge-sheeted in subsequent cases. Thus, there is no common accused in more than one case.

22. In these circumstances, learned Trial Judge was of the opinion that it cannot be said that respondent was running any syndicate or gang or acting on behalf of any such syndicate or gang.

23. Similarly, there is no evidence on record that persons who had threatened the complainant on behalf of respondent were the persons who ever associated with the respondent in any criminal activity.

24. Learned Trial Judge on the aspect of approval and sanction order passed by Mr.P.N.Aggawal, Joint Commission of Police, Special Cell, New Delhi observed that the approval was granted on 19.03.2009 whereas; sanction order was passed on 11.06.2009. When the investigation was not concluded, approval was granted stating therein respondent was running a crime syndicate for committing organised crime, who was planning to harm the lives and property of Shri Qmar Ahmed and his family with the help of his associates/syndicate members. When investigation was completed, sanction to prosecute the respondent was accorded stating that respondent was engaged in illegal acts of murder, attempt to murder, criminal intimidation, extortion and kidnapping etc and have been continuing in unlawful activities as a member of an organised crime syndicate.

25. Learned Trial Judge has further recorded that approval order and sanction order are paradoxical because as per approval, respondent was running an organised crime syndicate, whereas as per sanction order, he was merely a member of the organised crime syndicate. It means that after investigation, investigating officer found that respondent was not running an organised crime syndicate but he was merely a member of said syndicate. There is nothing in charge-sheet to show who was running the organised crime syndicate, of which respondent is merely a member.

26. Therefore, learned Trial Judge was of the opinion that investigating agency failed to collect sufficient evidence to show prima facie that respondent was either running an organised crime syndicate or was member of any such syndicate.

27. On the contentions relating to - whether the charge-sheet filed against respondent, satisfied the conditions of Section 2(d) MCOCA or

not? In order to satisfy the condition of Section 2(d) of the Act, prosecution has relied upon the list of 34 criminal cases, which were filed against the respondent during the period 1985 to 2009. These 34 cases includes present one. Scrutiny of the cases reveals that prosecution has not filed the copy of charge-sheet of 20 cases, thus these 20 cases cannot be considered at the time of considering the continuous unlawful activities of the respondent because in the absence of charge-sheet, learned Trial Judge was unable to ascertain as to whether the offence committed therein was related to organised crime or not. Out of remaining 16 cases, two cases (FIR No.183/2006 and 96/2006) pertained to the offence punishable under Section 25 of the Arms Act, 1959. One case (FIR No. 09/2004) pertained to Section 20 of NDPS Act.

28. Learned Trial Judge was of the opinion that by no stretch of imagination, the offences allegedly committed under the above FIRs can be considered as an offence committed either as a member of an organised crime syndicate or on behalf of such syndicate.

29. I note, learned Trial Judge has recorded that the contents of three cases i.e. FIR Nos.34/1992, 395/2001 and 85/1986, on considering all the facts of these three cases and involvement of respondent therein, learned Trial Judge was of the view that prosecution has failed to show prima facie that above three cases were committed by respondent as a member of organised crime syndicate or on behalf of such syndicate. Thus, he was of the opinion that said three cases do not qualify the requirements of Section 2(d) of the Act.

30. While dealing with the contention regarding to so called huge properties acquired by the respondent, according to the prosecution, respondent had acquired three immovable properties namely 503/22, Zakir Nagar, Okhla, New Delhi (property no.1), 113A-Village, Adhchhini, New Delhi (property no.2) and S-18, Handloom Complex, Industrial Estate, Loni, Ghaziabad (property no.3) and one movable property i.e lancer car (property no.4). The prosecution case is that respondent had acquired the said properties by doing unlawful activities and occupied the properties being the member of an organised crime syndicate.

31. I find, learned Trial Judge discussed the links of the properties and the investigation thereon and came to the conclusion that there is no evidence on record whatsoever that value of the said property in the year 2000 was more than Rs. 70,000/- or respondent had forced the vendor

to sell the property against her wishes at just throw away prices. Moreover, there is no allegation against the respondent that respondent had acquired the said property by committing an offence as a member of an organised crime syndicate or on behalf of such syndicate. The mere allegation is that he acquired the property by doing unlawful activities/offences, which is not sufficient.

32. Qua property No.2, learned Trial Judge opined that there is no allegation that Riazuddin had not received the payment of said transaction qua the aforesaid property. There are no allegations that there was any dispute between the vendor and vendee. Secondly, the documents of seized by the police reveals that vendor Riazuddin had sold the property to vendee in the sum of Rs. 2,75,000/- on 05.01.2008, on payment so received by Riazuddin. Since the property was sold by Riazuddin to Ashfaq, there was no occasion for Ashfaq to make payment to the respondent. Moreover, there is no allegation that Riazuddin had not received the payment of said transaction. Moreso, it is clear if the respondent had occupied a portion of said premises forcibly then why no action initiated against respondent.

33. Therefore, learned Trial Judge was of the opinion that neither there is allegation nor it can be culled out by any stretch of imagination that the said act could fall within the purview of an organised crime.

34. Qua property No.3, learned Trial Judge opined that if the value of the plot is appreciated during 1999 to 2009, then what is the fault of respondent. It appeared to learned Trial Judge that appreciated value has been mentioned in the charge-sheet to mislead the court, otherwise there was no occasion to mention the estimated present market value of the plot when the exact value of the plot is undisputed.

35. Qua property No.4, i.e. lancer car, learned Trial Judge has opined that when the value of the car is depreciated even just after buying being labelled as 'second hand car'. This shows that the investigation has not been conducted fairly and impartially.

36. Learned Trial Judge has recorded that to invoke the Section 4 of the MCOCA, the prosecution has to show prima facie that respondent was holding the above properties either being the member of an organised crime syndicate or on behalf of any member of such syndicate. Thus, learned Trial Judge was of the opinion that prosecution has failed to

make out a prima-facie case for the offence punishable under Section 4 of the MCOCA.

37. Learned Trial Judge has also in the impugned order recorded on maintaining four bank accounts; out of them two accounts were maintained by his wife while, his daughter was maintaining one bank account. By totalling the debit and credit balance, investigating officer has mentioned the amount in the charge-sheet, which is not the proper method to analysis an account of a person.

38. Learned Trial Judge has further recorded in the impugned order that during the course of arguments, neither learned Public Prosecutor nor investigating officer able to point out any entry or specific period which appeared doubtful. The analysis of all the bank accounts filed by the prosecution on record reveals that respondent had deposited minimum Rs. 400 and maximum Rs. 60,000/- in the accounts. It is admitted case of the prosecution that respondent was running a Tours and Travels business, in such type of business maximum transactions take place in cash. In the absence of any contrary evidence, learned Trial Judge finds no reason to disbelieve the contention of learned defence counsel that the credit entry in the bank accounts pertain to the sale proceeds of the said business. Moreover, it looks quite absurd that a person of criminal mind would deposit the booty in the bank account. If prosecution version is believed, it means that all credit entries such as Rs. 400/-, Rs. 1000/- Rs. 2000/-, Rs. 2500/- and so on were part of booty amount. Therefore, learned Trial Judge was of the opinion that it would amount to illogical inference.

39. On the basis of above, learned Trial Judge opined that prosecution failed to make out a prima facie case against the respondent for the offence punishable under Section 3(2), 3(4) and Section 4 of the MCOCA. Thus, discharged respondent from the above charges.

40. Being aggrieved, the State has filed instant petition wherein it is stated that learned Trial Judge has discharged the respondent from the Sections of MCOCA on the grounds that there is no evidence to show that respondent was a member of organized crime syndicate allegedly being run by him. Learned Trial Judge pointed out that prosecution failed to identify the members of alleged organized crime syndicate who were suspectedly involved in the instant case.

41. Further, learned Trial Judge observed that:- *'Approval order and Sanction order are paradoxical because as per approval respondent Khalil Ahmed was running an organised crime syndicate whereas as per sanction order he was merely a member of the organised crime syndicate. It means that after investigation, investigating officer found that respondent was not running an organised crime syndicate but he was merely a member of said syndicate. There is nothing in charge-sheet to show who was running the organised crime syndicate, of which respondent Khalil Ahmed is merely a member'.*

42. Learned Trial Judge observed that prosecution could not prove that alleged offences committed by respondent were committed as a member of organized crime syndicate with an objective to pecuniary gains or undue economic advantage. That although, prosecution had given the list of 34 criminal cases of respondent, certified copy of 14 charge-sheets and cognizance taken by the Court, details of associates/ members of organized crime syndicate arrested with respondent in 10 criminal cases but prosecution could not establish that these offences were committed being member of organized crime syndicate or on behalf of such syndicate.

43. Learned counsel for the petitioner further submitted that learned Trial Judge observed that prosecution could not prove that three properties, one lancer car, money deposited in various bank accounts held by respondent and his family members and money used in purchase of various items through various debit/credit cards have been earned through crime proceeds.

44. Mr.Dayanu Krishanan, learned Additional Standing Counsel submitted that learned Trial Judge did not appreciate the evidence collected by the prosecuting agency and ignored contentions submitted which were fully supported by the concrete evidence. Rather, learned Trial Judge chose to appreciate the contentions of defence counsel despite the fact that he did not produce any documentary or reliable evidence in support of his claim.

45. As per contention of learned counsel for petition, learned Trial Judge did not consider the following aspects of investigation in judicious manner;

46. Learned Trial Court believed the contentions of defence counsel

without any supportive documents like rental income of respondent from the plot at Loni.

47. Learned Trial Judge failed to appreciate the modus operandi of respondent to change his associates frequently and not to repeat them in subsequent offences to avoid invocation of MCOCA. Out of 34 cases, the list of which has been provided, cases of robbery, dacoity, extortion, theft NDPS etc are property offences which were evidently committed by respondent for pecuniary gain. Other offences of murder, attempt to murder kidnapping, hurt, assault, intimidation etc were committed to dominate the world of crime to spread terror/fear in the public to extort money or to settle scores of old rivalry / personal enmity etc. Respondent has been continuously and consistently committing crime at regular interval since the year 1985 as evidence from the list of cases.

48. Ld. Counsel submitted that respondent was charge sheeted and cognizance was taken by the Courts in seven cases during the last ten years while the requirement of MCOCA is only in more than 01 case cognizance taken by the Court during the last ten years.

49. Before proceeding further, it is would in place to mention that both learned counsel for parties, relied upon even on same decisions; hence, first the submission of respondent is being taken and thereafter, reliance of both learned counsel shall be dealt with.

50. Mr.Rakesh Khanna, learned Senior Advocate appearing on behalf of respondent submitted that learned Trial Judge has passed a correct order which does not require any interference. The allegation as made in the charge-sheet clearly shows commission of offence under Indian Penal Code, 1860 and not MCOCA. The sanction order, charge-sheet and approval order are contrary to each other. The prosecution initially alleged that respondent is a head of crime syndicate and at later stage, respondent has been projected as member of the syndicate.

51. He further submitted that the case as has been presented by prosecution before this Court is being argued for the first time. All the grounds and contentions raised by learned Additional Standing Counsel neither pleaded before learned Trial Judge nor same are part of the charge-sheet. Hence, in the revision petition no fresh grounds or contentions can be entertained and instant petition is liable to be dismissed.

52. After hearing both learned counsel for parties, before adverting

to the merits of the matter, reliance of both the parties can be recapitulated as follows.

53. To support his contention, learned counsel for petitioner, relied upon **Jagmohan @ Mohar Singh v. Commission of Police & Ors.(Delhi)** : 2007 (1) JCC 292 wherein Division Bench of this Court on Section 2(d) of the MCOCA observed as under:-

> "14. The main thrust of the argument on behalf of Mohar Singh has been that MCOCA has been wrongly applied. In most of the cases registered against Jag Mohan a verdict of acquittal was returned. If these cases are excluded from consideration it will be difficult to bring the case under MCOCA. Now as the definition of continuing unlawful activity goes under Section 2(d) of MCOCA, the requirement is that the activity is undertaken as a member of an organized crime syndicate in respect of which more than one charge-sheet has been filed within the preceding period of ten years. The definition does not carve out any distinction between charge-sheets which end in acquittal and those which end in conviction. It is contended that since the petitioner was acquitted in all the cases punishable with imprisonment for three years or more if those cases are taken into consideration the petitioner would be put to double jeopardy which is not permissible under Article 20 of the Constitution of India. At the same time it is submitted that Section 2(d) having used the words charge-sheets have been filed and court has taken cognizance which would mean that those charge-sheets are still pending. In other words, the contention is that if the decided cases were to be taken into consideration the language used would have been "charge-sheets had been filed" and "court had taken cognizance of such offences".
>
> 15. Learned Counsel for the petitioner is categorical that he is not challenging the virus of the Act. If Section 2(d) is not ultra virus it has to be given the effect to in the same sense in which it has been framed. In our opinion, the language of the section cannot be interpreted in this manner. It cannot be said that simply because the language used is "charge-sheets have been filed" and "court has taken cognizance" the section has to be interpreted as only referring to charge-sheets pending. The

language of the section clearly indicates that all such offences in respect of which charge-sheets have been filed and courts have taken cognizance have to be considered. When a case is decided there is either acquittal or conviction. There is no dispute that if the cases end in conviction they would indicate that an accused had been involved in the past 10 years in unlawful activity. However, if the interpretation of the petitioner's counsel is accepted, even those cases in which a conviction have been secured, would have to be excluded from consideration. This is not at all the intent of the legislature. The purpose of the Act is to control organized crime and hence if a person is convicted and hence proved to be a criminal, his further criminal activity is what comes under scrutiny by virtue of this Act.

16. So far as the objection to taking into account the cases in which an acquittal has taken place in view of bar of Article 20 of the Constitution of India is concerned one has to keep in mind that the accused/petitioner is not being asked to stand trial for those cases. Those cases are cited only to say that he has been accused in the past.

17. In fact the very definition shows that before a case under MCOCA is registered there should be previous charge-sheets and cognizance taken thereon. In case, petitioners interpretation of Article 20 being applicable is accepted, entire definition of the offence would be hit by Article 20 and, therefore, should be struck down. Although, the petitioner's counsel is categorical that he is not challenging the constitutionality of the Act but he wants to protect his client under Article 20. The Bombay High Court dealt with the question of virus of the Act in the light of the fundamental rights of the citizens and in that connection also came to examine whether the result of the previous prosecutions had any effect on the current FIR or prosecution. The Bombay High Court came to the same conclusion that the result of the previous charge-sheet is not material for our present purpose. While holding the definition of Section 2(1)(d) to be constitutionally valid High Court of Bombay in the case of **Bharat Shantilal Shah and Ors. v. The State of Maharashtra** Criminal Writ Petition No. 27/2003, observed as under:

27. We also do not find substance in the challenge that the equality clause in the Constitution is violated because the definition ropes in anyone charged more than once, irrespective of whether the charge resulted in an acquittal or conviction. The circumstances that followed the charge are not material. The provision only defines what is continued unlawful activities and refers to whether a person has been charged over a period of ten years for the purpose of seeing whether the person is charged for the first time or has been charged often. The circumstance of conviction or acquittal that followed the charge are not material. The limited purpose is to see antecedents of the person. Not to convict.

18. The definition of the offence, i.e., continuing unlawful activity and organized crime under Section 2(d) & (e) of MCOCA, pre-supposes an earlier trial with filing of the charge-sheet and cognizance being taken by the Court. The acquittal or conviction is not determinative of commission of the offence. Rather, the filing of the charge-sheets and cognizance by the Court are regarded as demonstrative of indulging in and having propensity in unlawful activity or organized crime, which is actionable under the Act.

19. Learned Counsel for the petitioners had laid considerable emphasis in urging that the facts of the cases in which petitioners have been acquitted cannot be taken into account for the purposes of invocation of MCOCA. As noted earlier, the conviction is not a sine qua non for invocation of the offence under Section 2(d) & (e) of MCOCA. The ingredients of the offence to be satisfied are filing of more than one charge-sheet before the Competent Court against a member of the organized crime syndicate and taking of cognizance. The requirement of conviction has understandably not been made one of the ingredients of the offence considering the object sought to be achieved. Respondents have sought to demonstrate the chain and sequence of events, where acquittals have followed witnesses turning hostile or the non-availability of witnesses. Understandably, petitioners cannot be permitted to take advantage of these acquittals, especially which have followed witnesses turning hostile or evidence being obliterated."

54. Learned counsel for respondent relied upon on para Nos.19 & 39 of the above cited case, wherein it has been observed as under:-

> "19. Learned Counsel for the petitioners had laid considerable emphasis in urging that the facts of the cases in which petitioners have been acquitted cannot be taken into account for the purposes of invocation of MCOCA. As noted earlier, the conviction is not a sine qua non for invocation of the offence under Section 2(d) & (e) of MCOCA. The ingredients of the offence to be satisfied are filing of more than one charge-sheet before the Competent Court against a member of the organized crime syndicate and taking of cognizance. The requirement of conviction has understandably not been made one of the ingredients of the offence considering the object sought to be achieved. Respondents have sought to demonstrate the chain and sequence of events, where acquittals have followed witnesses turning hostile or the non-availability of witnesses. Understandably, petitioners cannot be permitted to take advantage of these acquittals, especially which have followed witnesses turning hostile or evidence being obliterated.
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> 39. Thus existence of a crime syndicate could be inferred by the Joint Commissioner of Police when he granted sanction for including MCOCA in FIR No.525/05. At the time when the sections of MCOCA were included in the FIR, there were allegations of their continuing involvement in crime syndicate particularly in offences of extortion and intimidation. Evidence of the main accused and the brothers having amassed wealth by means of their criminal activities was also being discovered. It is not necessary that every activity of extortion or other offence of violence gets registered in the form of an FIR. Since the allegations are that the brothers are indulging in unlawful criminal activity, even those activities for which no FIR had been registered till then could be taken into account. Thus, the FIR being registered on the basis of available material as discussed above cannot be quashed on the ground that subsequent investigation did not yield any evidence against all the four or against anyone of the four. The sufficiency of the evidence for the purpose of charge can be examined either at the time of summoning of the accused or at the time of framing of charge. When FIR has been rightly registered the police has a right to proceed to arrest the accused. The arrest of the four petitioners, namely, Jai Chand @ Munna, Brij Mohan @ Pappu, Khoob Singh and Sher Singh, have been kept in abeyance and they have been interrogated by the investigation without arrest. The embargo against their arrest is accordingly removed and the State can proceed against them as per law as warranted."

55. On the aspect of sanction, learned counsel for petitioner relied upon Ganesh Nivrutti Marne v. The State of Maharashtra Crl.Appeal No.930/2009 on 07.05.2010 by Division Bench of Mumbai High Court wherein it has been held as under:-

> "15. At the outset, we must state that we are unable to accept the argument that the approval order or the sanction must specifically state the charges and the role of each accused. Neither the approval order nor the sanction order is expected to be like a treatise. It cannot be equated with a charge-sheet. Undoubtedly, it is necessary for the investigating authority to place adequate material before the authority which grants approval and sanction and the approval order and the sanction order being not a mechanical exercise must disclose application of mind. But they are not expected to be verbose. It is wrong to hold that prolixity is indicative of application of mind. We have carefully read and the approval order. It refers to the proposal and relevant papers submitted by the Kothrud Police Station. It states the names of the accused, who are members of the organized crime syndicate. It states that after perusal of the material it appears that the accused are indulging in continuing unlawful activities for gaining pecuniary undue economic and other advantages and, therefore, it is necessary to initiate action under the provisions of the MCOCA and, therefore, the approval is being given for that purpose. The approval order, in our opinion, is issued after proper application of mind."

56. Learned counsel for respondent in addition to above para, relied upon the observation of Division Bench in para Nos.2, 12, 16 & 17 which reads as under:-

> "2. The prosecution case needs to be shortly stated. It is as under:

The appellant along with other accused hatched conspiracy and committed murder of Sandeep Mohol (for convenience, "the deceased") on 4/10/2006 at about 11.30 a.m. while he was proceeding in his four wheeler near a traffic signal near Paud Flyover Bridge, Paud Road, Pune. The appellant and others committed murder of the deceased with the aid of chopper, sickle, revolver, etc. on account of previous enmity and rivalry between the two gangs. The appellant heads the Ganesh Marane Gang and all the accused are members of the said gang. The appellant and other members of the organized crime syndicate have committed several offences of similar nature in the past to gain an edge over the rival gang and to achieve supremacy in the local area. The appellant and other accused acting in a synchronized manner planned and conspired to murder the deceased on 4/10/2006. The accused came on motorcycles and surrounded the four wheeler in which the deceased was sitting. They broke the glasses of the windows of the four wheeler of the deceased and attacked the deceased in a well planned manner. After successfully commissioning the crime, they fled away. Offences punishable under Sections 302, 307, 143, 147, 148, 149, 120-B and 109 of the Indian Penal Code (for short, "the IPC") and Section 3(25) of the Arms Act were registered vide C.R. No.562 of 2006 at Kothrud Police Station, Pune on the complaint lodged by Mr. Prakash Dagdu Karpe against five named accused and 3-4 unknown persons. During the course of investigation, police came to the conclusion that the appellant and other accused are members of organized crime syndicate headed by the appellant and they were indulging in organized crime with a view to gaining pecuniary benefits. Therefore, after obtaining approval under Section 23(1) of the MCOCA, offences under Sections 3(1), 3(2) and 3(4) of the MCOCA came to be added. Thereafter, sanction under Section 23(2) of the MCOCA was obtained from the Competent Authority. The appellant and others came to be arrested on 25/10/2006. The application preferred by the appellant praying for discharge has been rejected vide the impugned order and, hence, the appellant has preferred this appeal.

12. Mr. Chitnis strenuously urged that since the facts involved in the co-accused's case are identical and similar arguments

were advanced in both the matters, judicial propriety demanded learned Special Judge to follow the view taken in the similar matter by his predecessor and discharge the appellant. Ordinarily if the role of the accused is identical and all the facts are similar, a court would follow the view taken by a coordinate court. However, before us the entire matter is at large. We will have to consider the case of the present appellant independently. The view taken by a coordinate trial court is not binding on us. We must also bear in mind that the present appellant heads the gang. The gang is named after him. We would, therefore, consider his case independently. We must however note our dissatisfaction about the conduct of the investigating agency. It is not understood how if it was desirous of challenging the order discharging the co-accused Taru, it slept over the matter for such a long time. The Director General of Police, State of Maharashtra needs to look into this matter.

16. It is pertinent to note that the sanction order begins by saying that the Assistant Commissioner of Police, Crime-I has submitted official note sheets dated 20/3/2007 and 28/3/2007 along with papers of investigation of C.R.No.562 of 2006 and proposal for sanction under Section 23(2) of the MCOCA. It states the names of the accused. It refers to the evidence collected during investigation and states that it reveals that the accused are members of the organized crime syndicate. It states that the investigation has revealed that the appellant and his associates run an organized crime syndicate with a view to gaining pecuniary benefits and other advantages for themselves by use of violence, intimidation and other coercive means. It states that the evidence clearly establishes that the appellant and his associates in furtherance of the activities of their organized crime syndicate have committed offence in question by using firearms voluntarily to establish their supremacy over their rival gang.

17. We are, therefore, of the opinion that the sanction order has been issued after perusing the proposal as well as two official note sheets. It is not as if the sanction order has been issued on the basis of a cryptic note placed before the sanctioning authority. The averments made in the sanction order indicate that it is issued after application of mind."

57. On count of 'pecuniary gain' learned counsel for petitioner relied upon **Vinod G. Asrani v. State of Mahrashtra** : 2007 (3) SCC 633 wherein the Apex Court in Para Nos. 7 to 9 observed as under:-

> "7. According to Mr. Altaf Ahmed, the non-inclusion of the petitioner's name in the approval granted under Section 23 (1) (a) is of no consequence since during investigation his complicity was established and thereafter sanction was sought to prosecute him along with the others under Section 23 (2) of MCOCA. Mr. Ahmed submitted that the allegations against the petitioner were sufficient to charge sheet him under the provisions of MCOCA along with other accused as being part of an organized crime syndicate involved in the commission of organized crimes.
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> 8. We have carefully considered the submissions made on behalf of the respective parties and the relevant provisions of MCOCA and we are of the view that the High Court did not commit any error in dismissing the petitioner's writ application. We are inclined to accept Mr. Altaf Ahmed's submissions that non-inclusion of the petitioner's name in the approval under Section 23 (1) (a) of MCOCA was not fatal to the investigation as far as the petitioner is concerned. On the other hand, his name was included in the sanction granted under Section 23 (2) after the stage of investigation into the complaint where his complicity was established. The offences alleged to have been committed by the petitioner has a direct bearing and/or link with the activities of the other accused as part of the Chhota Rajan gang which was an organized crime syndicate.
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> 9. As pointed out by Mr. Ahmed, this Court in the case of **Kari Choudhary vs. Mst. Sita Devi & Ors.,** (2002) 1 SCC 714, had while considering a similar question observed that the ultimate object of every investigation is to find out whether the offences alleged have been committed and, if so, who had committed it. The scheme of the Code of Criminal Procedure makes it clear that once the information of the commission of an offence is received under Section 154 of the Code of Criminal Procedure, the investigating authorities take up the investigation and file charge sheet against whoever is found during the investigation to have been involved in the commission of such offence. There is

> no hard and fast rule that the First Information Report must always contain the names of all persons who were involved in the commission of an offence. Very often the names of the culprits are not even mentioned in the F.I.R. and they surface only at the stage of the investigation. The scheme under Section 23 of MCOCA is similar and Section 23 (1) (a) provides a safeguard that no investigation into an offence under MCOCA should be commenced without the approval of the concerned authorities. Once such approval is obtained, an investigation is commenced. Those who are subsequently found to be involved in the commission of the organized crime can very well be proceeded against once sanction is obtained against them under Section 23 (2) of MCOCA."

58. On the aspect whether 'other advantage' has to be read with 'gaining pecuniary advantage' in Section 2(e) of MCOCA, learned counsel for petitioner relied upon **State of Maharashtra v. Jagain Gagansingh Nepali @ Jagya & Ors** : Crl. Appeal No.20/2011 decided by Full Bench of Bombay High Court in August, 2011 wherein it has been observed as under:-

> "Since the Division Bench of this Court vide its order dated 26th April 2011 passed in Criminal Appeal No.20/2011 has disagreed with the view taken earlier by two Division Benches of this Court in **Sherbahadur Akram Khan v. State of Maharashtra,** 2007 ALL MR (Cri) 1 and **Madan Ramkisan Gangwani,** 2009 ALL MR (Cri)1447 that the term "other advantage" used in Section 2(e) of the Maharashtra Control of Organized Crime Act,1999 ("MCOCA" for short) has to be read ejusdem generis with the words "for pecuniary benefits and undue enonomic", the matter is placed before us.
>
> 2. The question, therefore, that we are called upon to answer is "as to whether the term "other advantage" has to be read as ejusdem generis with the words "gaining pecuniary benefits, or gaining undue economic advantage" or whether the said term "other advantage" is required to be given a wider meaning".
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> 3. We have heard Mrs.A.S.Pai, learned Addl. P.P. and Mr.Amit Desai, learned senior counsel in support of the proposition that the term "other advantage" is required to be given wider meaning

and Mr.S.R. Chitnis, learned senior counsel, Mr.A.H.H.Ponda and Mr.Shrikant Shivade, learned counsel in support of the proposition that the term "other advantage" is required to be read as ejusdem generis with the words "gaining pecuniary benefits, or gaining undue economic advantage.

20. The perusal of section 2(e) would reveal that after the words "gaining pecuniary benefits" there is a "comma" followed by the words "or gaining undue economic or other advantage". We have already reproduced hereinabove the dictionary meaning of "pecuniary" and "economic". To a pertinent query as to what the words "other advantage" could mean, if the principle of ejusdem generis was to be applied. Mr.Ponda, learned counsel stated that other advantage would mean and include financial, material, monetary profit, corruption, controlling market, parallel market and enrichment of participation. It can, thus, clearly be seen that all these would encompass within the term either "pecuniary" or "economic". It would, thus, be clear that the class or category of "pecuniary benefit" and "economic advantage" will stand exhausted. As such one of the essential conditions for applying the principle of ejusdem generis, would not be available. Since the preceding words do not constitute mere specification of the genus but constitute description of complete genus, the rule of ejusdem generis will have no application as held by the Apex Court in **Amar Chandra Chakraborty v.Collector of Excise, Tripura & Tribhuban Parkash v. Union of India** (cited supra). It is a settled principle of law that the rule has to be applied with care and caution. It is not inviolable rule of law but it has only permissible inference in the absence of any indication to the contrary. For the reasons to be discussed herein-after we also find that even the legislative intent would not permit such a narrow construction. If the construction as put forth by the respondents has to be accepted, then the term "other advantage" would become otiose. The Apex Court in the case of **Grasim Industries Ltd. v. Collector of Customs, Bombay,** (2002) 4 SCC 297 has observed thus :

10. No words or expressions used in any statute can be said to be redundant or superfluous. In matters of interpretation one should not concentrate too much on one word and pay too little

attention to other words. No provision in the statute and no word in any section can be construed in isolation. Every provision and every word must be looked at generally and in the context in which it is used. It is said that every statute is an edict of the legislature. The elementary principle of interpreting any word while considering a statute is to gather the mens or sentential legis of the legislature. Where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the Court to take upon itself the task of amending or alternating the statutory provisions. Wherever the language is clear the intention of the legislature is to be gathered from the language used. While doing so what has been said in the statute as also what has not been said has to be noted. The construction which requires for its support addition or substitution of words or which results in rejection of words has to be avoided. As stated by the Privy Council in **Crawford v. Spooner** "we cannot aid the Legislature's defective phrasing of an Act, we cannot add or mend and, by construction make up deficiencies which are left there. In case of an ordinary word there should be no attempt to substitute or paraphrase of general application. Attention should be confined to what is necessary for deciding the particular case. This principle is too well settled and reference to few decisions of this Court would suffice. [See: **Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. v. Custodian of Vested Forests,** 1990 Supp SCC 785:AIR 1990 SC 1747, **Union of India v. Deoki Nandan Aggarwal,** 1992 Supp (1) SCC 323, **Institute of Chartered Accountants of India v. Price Waterhouse,** (1997) 6 SCC 312 and 29 **Harbhajan Singh v. Press Council of India,** (2002) 4 SCC 275] (emphasis supplied)"

59. On Para Nos.11, 34, 35, 37, 38, & 42 of the same decision has been relied upon by respondent, which reads as under:-

"11. From the perusal of section 2(e), it can be seen that the following ingredients will be necessary to make out the case of an organised crime: (i) that there has to be a continuing unlawful activities; (ii) that such an activity will have to be by an individual, singly or jointly; (iii) that such an activity is either by a member of an organised crime syndicate or on behalf of such syndicate;

(iv) that there has to be use of violence or threat of violence or intimidation or coercion or other unlawful means; (v) that such an activity has to be with an objective of gaining pecuniary benefits or gaining undue economic or other advantage for the person who undertakes such an activity or any other person or promoting insurgency. The ingredients of continuing unlawful activities would be: (i) that such an activity should be prohibited by law for the time being in force; (ii) that such an activity is a cognizable offence punishable with imprisonment of three years or more (iii) that such an activity is undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate; (iv) that in respect of such an activity more than one chargesheet must have been filed before a competent Court; and (v) that the chargesheets must have been filed within a preceding period of ten years; and (vi) that the Courts have taken cognizance of such offences."

34. It can, thus, clearly be seen that the purpose behind enacting the MCOCA was to curb the activities of the organised crime syndicates or gangs. The perusal of the Preamble and the Statement of Objects and Reasons and Preface, in our considered view, does not lead to any narrower meaning that MCOCA has been enacted only for the purpose of curbing activities which involve pecuniary gains or undue economic advantages. The mischief which is sought to be cured by enactment of MCOCA is to curb and control menace of organised crime. The law has been enacted with the hope that the elements spread by the organised crime in the Society can be controlled to a great extent and for minimizing the fear spread in the society. If a narrower meaning as sought to be placed is accepted, it will frustrate the object rather than curing the mischief for which the Act has been enacted.

35. For appreciating this issue, it would also be relevant to refer to subsection (4) of section 3 of MCOCA. It can be seen that the said provision also provides for punishment only by virtue of a person being a member of the organised crime syndicate. If the contention advanced by the respondents is to be accepted, subsection (4) of section 3 will be rendered redundant. We are also of the considered view that there could be various "unlawful

continuing activities" by a member of "organised crime syndicate" or by any person on behalf of such a syndicate which can be for the advantages other than economic or pecuniary. We will consider some illustrations. (i) A politician is murdered by a member of organised crime syndicate or gang on its behalf at the behest of rival political leader. In the facts of a given case, this was without any pecuniary or economic consideration, it was to gain an advantage in the nature of political patronage to the said organised crime syndicate by the political leader at whose behest the murder has taken place. (ii) If a member of an organised crime syndicate or any person on its behalf murders or kills the leader of another syndicate or rival gang in order to get supremacy in the area, there may be no direct economic or pecuniary advantage by that particular unlawful activity. However, in the long term by the very fact of having supremacy in the area, the organised crime syndicate would be in a position to get economic or pecuniary advantage. (iii) A witness in the trial against the member of an organised crime syndicate may be killed. There may not be any pecuniary advantage in such an activity, however, advantage of assuring acquittal of member of the syndicate could be there. (iv) A member of an organised crime syndicate murders another member of such syndicate. There may be no pecuniary or economic benefit by such an activity, however, there may be advantage to a person committing murder of getting a stronghold or supremacy in the 'organised crime syndicate' of which he is a member.

These could be some of the few illustrations which may come in the term "other advantage". There can be many more.

37. The answer to this question lies in the observations of the Apex Court, in the case of Sanjay Dutt (cited supra), that merely because the statute is likely to be abused cannot be a ground for upsetting its constitutionality or construction. In this respect, it will also be necessary to refer to the judgment of the Apex Court in the case of **Ranjitsing Brahmajeetsing Sharma** (supra); wherein the Apex Court has observed thus:

23. Interpretation clauses contained in Sections 2 (d) 2(e) and 2(f) are interrelated. An 'organised crime syndicate' refers to an

'organised crime' which in turn refers to 'continuing unlawful activity'. As at present advised, it may not be necessary for us to consider as to whether the words "or other lawful means" contained in Section 2(e) should be read "ejusdem generis"/ "nosciturasociis" with the words (i) violence, (ii) threat of violence, (iii) intimidation or (iv) coercion.

We may, however, notice that the word 'violence' has been used only in Section 146 and 153A of the Indian Penal Code. The word 'intimidation' alone has not been used therein but only Section 506 occurring in Chapter XXII thereof refers to 'criminal intimidation'. The word 'coercion' finds place only in the Contract Act. If the words 'unlawful means' is to be widely construed as including any or other unlawful means, having regard to the provisions contained in Sections 400, 401 and 413 of the IPC relating to commission of offences of cheating or criminal breach of trust, the provisions of the said Act can be applied, which prima facie, does not appear to have been intended by the Parliament.

24. The Statement of Objects and Reasons clearly state as to why the said Act had to be enacted. Thus, it will be safe to presume that the expression 'any unlawful means' must refer to any such act which has a direct nexus with the commission of a crime which MCOCA seeks to prevent or control. In other words, an offence falling within the definition of organized crime and committed by an organized crime syndicate is the offence contemplated by the Statement of Objects and Reasons. There are offences and offences under the Indian Penal Code and other penal statutes providing for punishment of three years or more and in relation to such offences more than one charge-sheet may be filed. As we have indicated hereinbefore, only because a person cheats or commits acriminal breach of trust, more than once, the same by itself may not be sufficient to attract the provisions of MCOCA.

The Apex Court had held that it will be safe to presume that the expression 'any unlawful means' must refer to any such act which has a direct nexus with the commission of a crime which MCOCA seeks to prevent or control.. The Apex Court had held

that it will be safe to presume that the expression 'any unlawful means' must refer to any such act which has a which direct nexus with the commission of a crime which MCOCA seeks to prevent or control.

38. It is difficult to accept the contention that if the wider meaning is given to the provision of section 2(e), provisions of MCOCA would be invoked even for petty offences. In case of **Sherbahadur Akram Khan v. State of Maharashtra** (cited supra), some of the offences resulted from the quarrel at public water tap. In the said matter, as in many of the cases, the accused had assaulted the injured with a fist blow. By no stretch of imagination, such an activity could be construed to be the one for which MCOCA could be invoked. If there are some altercations between two businessmen within four corners of shop and, as a result of which one of them slaps the other, by no stretch of imagination it can be said to be an offence for which MCOCA is to be invoked. Similarly, a dispute between two brothers on some property issue and even assault and that too by a deadly weapon would not come in the ambit of MCOCA.

The legislative intent is clear, that MCOCA is for curbing the organised crime. Unless there is prima facie material, firstly, to establish that there is an organised crime syndicate and, secondly, that organised crime has been committed by any member the organised crime syndicate or any person on behalf of such syndicate, the provisions of MCOCA cannot be invoked. In the earlier paragraph we have discussed in detail as to what are the so as to constitute an offence of "organised crime". The prosecution will, therefore, have to firstly establish that there is an organised crime syndicate. It will have to satisfy that there exist the ingredients of "continuing unlawful activity". It will thereafter have to satisfy that the ingredients of the "organised crime" as spelt out by us hereinbefore exist, prior to invoking the provisions of MCOCA. We are, therefore, unable to accept the contention that if the wider meaning is given, the MCOCA can be invoked even for sundry offences. As held by the Apex Court in the case of **Ranjitsing Brahmajeetsing Sharma** (supra), merely because the person who cheats or commits a criminal breach of trust more than once, the same by itself may not be

sufficient to attract the provisions of MCOCA. By the same analogy, if a person commits murder more than once, would not by itself be sufficient to attract the provisions of MCOCA. At the cost of repetition, we make it clear that unless all the ingredients to constitute the offence punishable under MCOCA are available, it will not be permissible to invoke the provisions of MCOCA.

42. For the reasons aforesaid, we answer the issue that the term "other advantage" cannot be read as ejusem generis with the words "pecuniary benefits" and "undue economic".

60. Learned counsel for petitioner relied upon **Govind Sakharam Udhe v. State of Maharashtra :** 2009 (3) Bombay CR (Crl.) 144 wherein Division Bench of Mumbai High Court observed as under:

"34. Therefore, the MCOCA contemplates a situation where a group of persons as members of organized crime syndicate indulge in organized crime. That is, they indulge in use of violence, threats of violence, intimidation, etc. to gain pecuniary benefit or undue economic or other advantage for themselves or any other person. These activities as per the definition of organized crime are continuing unlawful activity prohibited by law.

35. It is now necessary to go to the definition of 'continuing unlawful activity'. Section 2(1)(d) defines 'continuing unlawful activity' to mean an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years or more, undertaken either singly or jointly as a member of an organized crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheet have been filed before a competent court within the preceding ten years and that court have taken cognizance of such offence. Thus, for an activity to be a 'continuing unlawful activity' -

a) the activity must be prohibited by law;

b) it must be a cognizable offence punishable with imprisonment of three years or more;

c) it must be undertaken singly or jointly;

d) it must be undertaken as a member of an organized crime syndicate or on behalf of such syndicate

e) in respect of which more than one charge-sheet have been filed before a competent court.

36. The words 'in respect of which more than one charge-sheet have been filed' cannot go with the words 'a member of a crime syndicate' because in that case, these words would have read as 'in respect of whom more than one charge-sheet have been filed'.

37. But even otherwise, if all provisions are read together we reach the same conclusion. Section 2(1)(d) which defines 'continuing unlawful activity' sets down a period of 10 years within which more than one charge- sheet have to be filed. The members of the crime syndicate operate either singly or jointly in commission of organized crime. They operate in different modules. A person may be a part of the module which jointly undertakes an organized crime or he may singly as a member of the organized crime syndicate or on behalf of such syndicate undertake an organized crime. In both the situations, the MCOCA can be applied. It is the membership of organized crime syndicate which makes a person liable under the MCOCA. This is evident from section 3(4) of the MCOCA which states that any person who is a member of an organized crime syndicate shall be punished with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine, subject to a minimum of fine of Rs.5 lakhs. The charge under the MCOCA ropes in a person who as a member of the organized crime syndicate commits organized crime i.e. acts of extortion by giving threats, etc. to gain economic advantage or supremacy, as a member of the crime syndicate singly or jointly. Charge is in respect of unlawful activities of the organized crime syndicate. Therefore, if within a period of preceding ten years, one charge-sheet has been filed in respect of organized crime committed by the members of a particular crime syndicate, the said charge-sheet can be taken against a member of the said crime syndicate for the purpose of application of the MCOCA against him even if he is involved in one case.

The organized crime committed by him will be a part of the continuing unlawful activity of the organized crime syndicate. What is important is the nexus or the link of the person with organized crime syndicate. The link with the 'organized crime syndicate' is the crux of the term 'continuing unlawful activity'. If this link is not established, that person cannot be roped in.

38. In order to substantiate our construction of Section 2(1)(d) of the MCOCA, we will take hypothetical example of accused 1(A), accused 2(B), accused 3(C) and accused 4(D), who are members of the organized crime syndicate and who have committed crimes within preceding ten years. Insofar as accused A is concerned, it is alleged that he has committed an offence resulting in the death of any person which is punishable with death or imprisonment for life as described in Section 3(1) of the MCOCA. Accordingly, one charge-sheet is filed against him. Insofar as accused B is concerned, it is alleged that he has committed an offence resulting in the death of any person which is punishable with death or imprisonment for life as described in Section 3(2) of the MCOCA. Accordingly, one charge-sheet is filed against him. Likewise, insofar as accused C is concerned, it is alleged that he has committed an offence resulting in the death of any person which is punishable with death or imprisonment for life as described in Section 3(3) of the MCOCA. Accordingly, one charge-sheet is filed against him. Finally, it is alleged that accused D is a member of organized crime syndicate as described in Section 3(4) of the MCOCA and as such has indulged in organized crime and against whom also one charge-sheet is filed.

39. The submission on behalf of the appellant is that even though all the four accused namely, A, B, C and D may be members of the organized crime syndicate since against each of the accused not more than one charge- sheet is filed, it cannot be held that they are engaged in continuing unlawful activity as contemplated under Section 2(1)(d) of the MCOCA. Apart from the reasons which we have given hereinabove as to why such a construction is not possible, having regard to the object with which the MCOCA was enacted, namely to make special provisions for prevention and control of organized crime syndicate and for coping with

criminal activity by organized crime syndicate, in our opinion, Section 2(1)(d) cannot be so construed. Such a construction will defeat the object of the MCOCA. What is contemplated under Section 2(1)(d) of the MCOCA is that activities prohibited by law for the time being in force which are punishable as described therein have been undertaken either singly or jointly as a member of organized crime syndicate and in respect of which more than one charge-sheets have been filed. Stress is on the unlawful activities committed by the organized crime syndicate. Requirement of one or more charge-sheet is qua the unlawful activities of the organized crime syndicate.

45. Mr.Desai's submission that inasmuch as the appellant's name is not mentioned in the approval granted under Section 23(1)(a) of the MCOC Act, the prosecution qua the appellant is vitiated, must also be rejected. In its judgment in Vinod Asrani v. State of Maharashtra (Special Leave Petition (Cri.) No.6312 of 2006 dated 21/2/2007, the Supreme Court has considered the same submission and observed that non inclusion of the accused in the approval under Section 23(1)(a) of the MCOC Act is not fatal to the investigation qua that accused. The Supreme Court observed that Section 23(1)(a) provides a safeguard that no investigation into an offence under the MCOC Act should be commenced without the approval of the concerned authorities. Once such approval is obtained, an investigation is commenced. The Supreme Court further observed that those who are subsequently found to be involved in the commission of the organized crime can very well be proceeded against once sanction is obtained against them under Section 23(2) of the MCOC Act."

61. Learned counsel for petitioner also relied upon The State of Maharashtra v Rahul Ramchandra Taru Crl.Appeal No.239/2011 decided on 06.05.2011 by Division Bench of Bombay High Court wherein para No.14 held as under:-

"14. The learned APP placed reliance on unreported judgment in the case of **Ganesh Nivrutti Marne vs. The State of Maharashtra** in Criminal Appeal No. 930 of 2009 decided on 07th May, 2010. That appeal also had arisen from the Special Case No. 02 of 2007 which was filed by the accused no.7

whose application for discharge was rejected by the Special Judge, Special Court, Pune. It appears that the appellant in the said case was operating his own gang called as "Ganesh Marne Gang". Allegations against him were that he was operating a crime syndicate and committed several offences of similar nature in the past to gain an edge over the rival gang and to achieve supremacy in the local area. The Division Bench in the case (supra) examined the facts in Special Case No. 2 of 2007 qua the appellant before analysing expressions "continuing unlawful activity", "organised crime" and "organized crime syndicate". A reference was made to the judgment of the Division Bench of this court in the case of **Sherbahadur Akram Khan vs. State of Maharashtra** (2007 ALL MR (Cri.) 1) and held that Sherbahadur **Akram Khan's** case must be restricted to its own facts. The Division Bench while rejecting appeal laid great emphasis on the decision in the case of **Anil Sadashiv Nanduskar vs. State of Maharashtra** [2008 (3) MAH. L.J. (CRI) 650]. In the cases of Ganesh Nivrutti Marne as well as Anil Nanduskar, the question which was addressed by the Division Bench was whether expressions "other advantage" occurring under section 2(1)(e) are to be construed "ejusdem generis" with the earlier terms or it should be given wider meaning. The Division Bench in the case of Ganesh Nivrutti Marne has also made reference to the Supreme Court decision in the case of **Ranjeetsingh Brahmajeetsing Sharma vs. State of Maharashtra** (Supra) and observed that "the Supreme Court has expressly kept this question open."

62. Reliance has been placed upon above decision on behalf of respondent on Nos.4, 6 & 15; wherein it has been observed as under:-

"4. The respondent submitted an application vide Exh. 99, seeking his discharge from the offence punishable under section 3(i), 3(ii), 3(iii) and 3(iv) of the MCOCA. It was submitted that the material placed on record does not disclose any offence under the provisions of MCOCA. There is no evidence to show that the respondent-accused was at any point of time was a member of the organized crime syndicate. The State resisted this application. The learned Special Judge after considering the rival submissions, held that the material placed on record does not disclose offence

punishable under the MCOCA. He therefore, discharged the respondent-accused from the offences punishable under the MCOCA. Being aggrieved, by this order, the State has preferred this appeal. 6. Similar submissions were advanced before the learned Special Judge, Special Court, Pune. As regards two previous chargesheets, one being Sessions Case No. 418 of 2006 under section 395, 143, 147, 148 of the IPC and other being regular Criminal Case No. 120 of 2000 under sections 324, 323, 504 read with 34 of the IPC, the learned Special Judge observed that these offences were not committed by the organized crime syndicate. As regards the allegations in special case no. 02 of 2007, the offence with which the respondent-accused and others have been charged have not been committed with an objective of gaining pecuniary benefits or gaining undue economic or other advantage to the respondent-accused. Therefore, he discharged the respondent-accused.

15. We propose to clarify that to address the question which is posed in this appeal, interpretation of expressions "or other advantage" and "or other unlawful means", occurring under section 2(1)(e) of MCOCA, is not strictly necessary. Even if, both the terms are given wider meaning, the prosecution is not absolved of its duty to prove that within the preceding period of 10 years more than one chargesheets, alleging commission of cognizable offence punishable with imprisonment of three years or more, have been filed and further to prove that in such charge-sheets, it has been alleged that the accused either singly or jointly and as a member of organized crime syndicate or on behalf of such syndicate committed the unlawful activity. This follows that merely alleging that more than one charge-sheet in respect of cognizable offence punishable with imprisonment of three years or more have been filed, is not sufficient. This does not satisfy requirements of law. This is what precisely held by the Supreme Court in the case of **Ranjeetsingh Brahmajeetsing Sharma** (supra). The unlawful activity alleged in the previous chargesheets should have nexus with the commission of the crime which MCOCA seeks to prevent or control. An offence falling within the definition of organized crime and committed by organized crime syndicate is the offence contemplated by the

Statement of Objects and Reasons under the MCOCA."

63. Learned counsel for respondent relied upon **Prafulla v. State of Maharashtra** : Crl.Appeal No.664/2002 decided on 18.11.2008 by Division Bench of Bombay High Court wherein it has been held as under:-

"43. This fortifies the conclusion that mere proof of filing charge sheets in the past is not enough. It is only one of the requisites for constituting offence of organized crime. If only the past charges sheets were to be enough to constitute offence of organized crime, it could have the offended the requirement of Article 20(1) of the Constitution and possibly Article 29(2) as well, (and in any case Section 300 Cr. P.C.). Had these judgments of the Supreme Court and Division Benches of this Court been cited before the learned Single Judge deciding **Amarsingh Vs. State** (2006 ALL MR (Cri) 407, the learned Single Judge, without doubt, would not have held that the matter was simply one of an arithmetical equation. The said judgment cannot be reconciled with the judgments of Division Benches in **Jaisingh Vs. State** (2003) ALL MR (Cri) 1506 and **Bharat Shah Vs. State** 2003 ALL MR (Cri) 1061, which I am bound to follow.

44. It is not necessary to go into the implications of the expression 'prosecuted and punished' used in Article 20(2) of the Constitution. Section 300 Cr. P.C. itself clearly bars a fresh trial for the same offence. Section 21 of the MCOCA which prescribes modified applications of the Code to offences under MCOCA does not make provisions of Section 300 Cr.P.C. inapplicable. Therefore, since the previous criminal history of the applicants denotes that they had been or are being separately charged / tried for those offences before competent Courts, there is no question of such offences constituting offences of organized crime."

64. Further relied upon **State of Maharashtra v. Lalit Somdatta Nagpal & Ors.** : 2007(4) SCC 171 wherein the Apex Court observed as under:-

"62.However, we are in agreement with the submission that having regard to the stringent provisions of MCOCA, its provisions will have to be very strictly interpreted and the concerned authorities would have to be bound down to the strict observance

of the said provisions. There can be no doubt that the provisions of the MCOCA have been enacted to deal with organized criminal activity in relation to offences which are likely to create terror and to endanger and unsettle the economy of the country for which stringent measures have been adopted. The provisions of the MCOCA seek to deprive a citizen of his right to freedom at the very initial stage of the investigation, making it extremely difficult for him to obtain bail. Other provisions relating to the admission of evidence relating to the electronic media have also been provided for. In such a situation it is to be seen whether the investigation from its very inception has been conducted strictly in accordance with the provisions of the Act.

63. As has been repeatedly emphasized on behalf of all the parties, the offence under MCOCA must comprise continuing unlawful activity relating to organized crime undertaken by an individual singly or jointly, either as a member of the organized crime syndicate or on behalf of such syndicate by use of coercive or other unlawful means with the objective of gaining pecuniary benefits or gaining undue economic or other advantage for himself or for any other person or for promoting insurgency. In the instant case, both Lalit Somdutt Nagpal and Anil Somdutt Nagpal have been shown to have been involved in several cases of a similar nature which are pending trial or are under investigation. As far as Kapil Nagpal is concerned, his involvement has been shown only in respect of CR No.25/03 of Rasayani Police Station, Raigad, under Sections 468,420,34, Indian Penal Code and Sections 3, 7,9 & 10 of the Essential Commodities Act. In our view, the facts as disclosed justified the application of the provisions of the MCOCA to Lalit Nagpal and Anil Nagpal. However, the said ingredients are not available as far as Kapil Nagpal is concerned, since he has not been shown to be involved in any continuing unlawful activity. Furthermore, in the approval that was given by the Special Inspector General of Police, Kolhapur Range, granting approval to the Deputy Commissioner of Police (Enforcement), Crime Branch, C.I.D., Mumbai to commence investigation under Section 23 (1) of MCOCA, Kapil Nagpal has not been mentioned. It is only at a later stage with the registering of CR No.25/2003 of Rasayani Police Station,

Raigad, that Kapil Nagpal was roped in with Lalit Nagpal and Somdutt Nagpal and permission was granted to apply the provisions of the MCOCA to him as well by Order dated 22nd August, 2005.

64. In addition to the above, Nagpal, Kapil Nagpal and one Parasnath Ramdular Singh will reveal that such permission was being sought for, as far as Kapil Nagpal is concerned, in respect of an offence allegedly under Section 63 of the Sales Tax Act, which in our opinion would not attract the provisions of the MCOCA.

65. We, therefore, have

66. Since we have already of the MCOCA for offences under Sections 3 & 7 of the 1955 Act as well as the 1981 Act, we are left with the question as to whether the same had been applied to the case of Lalit Nagpal and Anil Nagpal strictly in accordance with the provisions of the MCOCA 1999. Having regard to the stringent provisions of the MCOCA, Section 23 (1) (a) provides a safeguard to the accused in that notwithstanding anything contained in the Code of Criminal Procedure, no investigation of an alleged offence of organized crime under the MCOCA, 1999 can be commenced without the prior approval of a police officer not below the rank of Deputy Inspector General of Police. An additional protection has been given under Sub-section (2) of Section 23 which prohibits any Special Court from taking cognizance of any offence under the Act without the previous sanction of a police officer not below the rank of Additional Director General of Police.

67. In the instant case, though sanction had been given by the Special Inspector General of Police, Kolhapur Range, on 31st August, 2004, granting permission under Section 23 (1) (a) of the MCOCA 1999 to apply its provisions to the alleged offences said to have been committed by Anil Nagpal, Lalit Nagpal and Vijay Nagpal, such sanction reveals complete non- application of mind as the same appears to have been given upon consideration of an enactment which is non est. Even if the subsequent approval order of 22nd August, 2005 is to be taken into consideration, the organized crime referred to in the said order is with regard to the

alleged violation of Sales Tax and Excise Laws, which, in our view, was not intended to be the basis for application of the provisions of the MCOCA 1999. To apply the provisions of MCOCA something more in the nature of coercive acts and violence in required to be spelt out so as to bring the unlawful activity complained of within the definition of "organized crime" in Section 2 (a) of MCOCA.

68. In our view, both the sanctions which formed the very basis of the investigation have been given mechanically and are vitiated and cannot be sustained. In taking recourse to the provisions of the MCOCA 1999, which has the effect of curtailing the liberty of an individual and keeping him virtually incarcerated, a great responsibility has been cast on the authorities in ensuring that the provisions of the Act are strictly adhered to and followed, which unfortunately does not appear to have been done in the instant case.

69.We are not, therefore, inclined to interfere with the decision of the High Court though for reasons which are entirely different from those given by the High Court."

65. I heard learned counsel for parties.

66. Law has been settled in **Ganesh Nivrutti Marne** (Supra) that it is necessary for the investigating authority to place adequate material before the authority which grants approval and sanction and the approval order and the sanction order being not a mechanical exercise must disclose application of mind. They are not expected to be verbose. In the aforesaid case, the appellant heads the Ganesh Marane Gang and all the accused were members of the said gang. The appellant and other members of the organized crime syndicate have committed several offences of similar nature in the past to gain an edge over the rival gang and to achieve supremacy in the local area. Whereas in the present case the prosecution failed to establish that the petitioner belongs to which gang and gang on behalf of any syndicate.

67. In the case mentioned above, the appellant and other accused found members of organized crime syndicate headed by the appellant and they were indulging in organized crime with a view to gaining pecuniary benefits. However, facts are different in case in hand.

68. It is also settled that the person must heads the gang and he is part of the gang and committing offences with the gang members or on behalf of the gang when these facts are established, only thereafter, the provisions of MCOCA are attracted. The prosecution had to establish that respondent herein and his associates in furtherance of the activities of their organized crime syndicate have committed offence in question.

69. The Scheme under Section 23 of MCOCA is similar and Section 23 (i) (a) provides a safeguard that no Investigation into an offence under MCOCA should be commenced without the approval of the concerned authority. Once such approval is obtained, the investigation is commenced. Those who are subsequently found to be involved in the commission of the organized crime can very well be proceeded against once sanction is obtained against them under Section 23 (2) of MCOCA. I am conscious in a case of **Jagain Gagansingh Nepali @ Jagya & Ors.** (Supra) the term "other advantage" used in section 2(e) of the Maharashtra Control of Organized Crime Control of Organized Crime Act, 1999 has been read as "ejusdem generis" with the words "for pecuniary benefits and undue enonomic".

70. While referring the case of Apex Court in **Chandra Chakraborty Vs. Collector of Tripura** (Supra), wherein it is held that principle of law that the rule has to be applied with care and caution.

71. In matters of interpretation one should not concentrate too much on one word and pay too little attention to other words. Every statute has an edict of the legislature. The elementary principle of interpreting any word while considering a statute is to gather the mens or sentential legis of the legislature. Where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the Court to take upon itself the task of amending or alternating the statutory provisions. The construction which requires for its support addition or substitution of words or which results in rejection of words has to be avoided. As stated by the **Privy Council in Crawford v. Spooner** "we cannot aid the Legislature's defective phrasing of an Act, we cannot add or mend and, by construction make up deficiencies which are left there". In case of an ordinary word, there should be no attempt to substitute or paraphrase of general application.

72. On perusal of Section 2 (e), it can be seen that there has to be continuing unlawful activities and such activities will have be by an individually singly or jointly either by a member of organized crime syndicate or on behalf o such syndicate. Therefore, there has to be use of violence there has to be use of violence or threat of violence or intimidation or coercion or other lawful means and such an activity has to be with an objective of gaining pecuniary benefits or gaining undue economic or other advantage for the person who undertakes such an activity or any other person or promoting insurgency.

73. The purpose behind enacting the MCOCA was to curb the activities of the organised crime syndicates or gangs. On perusal of Preamble and Statement of Objects and Reasons and Preface, it does not lead to any narrower meaning that MCOCA has been enacted only for the purpose of curbing activities which involve pecuniary gains or undue economic advantages. The mischief which is sought to be cured by enactment of MCOCA is to curb and control menace of organised crime. The law has been enacted with the hope that the elements spread by the organised crime in the Society can be controlled to a great extent and for minimizing the fear spread in the society.

74. It can be seen that the said provision also provides for punishment only by virtue of a person having a trade of organized crime syndicate. There can be various unlawful continuing activities by a member of organized crime syndicate or by any persons on behalf of such a syndicate which can be for the advantages other than economic or pecuniary.

75. For example, if a member of an organised crime syndicate or any person on its behalf murders or kills the leader of another syndicate or rival gang in order to get supremacy in the area, there may be no direct economic or pecuniary advantage by that particular unlawful activity. However, in the long term by the very fact of having supremacy in the area, the organised crime syndicate would be in a position to get economic or pecuniary advantage.

76. The above stated proposition has been answered by the Apex Court in case of **Sanjay Dutt vs. State of Maharasthra,,** that merely because the statute is likely to be abused cannot be a ground for upsetting its constitutionality or construction. In the judgment of Apex Court in **Ranjitsing Brahmajeetsing Sharma** (supra) it is observed that Interpretation clauses contained in Sections 2(d), 2(e) and 2(f) are

interrelated. An 'organised crime syndicate' refers to an 'organised crime' which in turn refers to 'continuing unlawful activity'.

77. As such Statement of Objects and Reasons clearly state as to why the said Act had to be enacted.

78. The expression 'any unlawful means' must refer to any such act which has a direct nexus with the commission of a crime which MCOCA seeks to prevent or control. In other words, an offence falling within the definition of organized crime and committed by an organized crime syndicate is the offence contemplated by the Statement of Objects and Reasons. If a person cheats or commits a criminal breach of trust, more than once, the same by itself may not be sufficient to attract the provisions of MCOCA.

79. It would be safe to presume that the expression any lawful means, it would be safe to presume that the expression 'any unlawful means' must refer to any such act which has a direct nexus with the commission of a crime which MCOCA seeks to prevent or control.

80. Section 2(e) of MCOCA cannot be invoked for petty offences. The legislative intent is clear that MCOCA is for curing the organized crime unless there is a prima facie material to establish that there is an organized crime syndicate and prima facie material, firstly, to establish that there is an organised crime syndicate and, secondly, that organized crime has been committed by any member of the organized crime syndicate or any person on behalf o such syndicate, the provisions of MCOCA cannot be invoked.

81. Therefore, the prosecution need to firstly establish that there is an organized crime syndicate. It will have to satisfy that there exists the ingredients of continuing unlawful activities. Finally, the Full Bench of Bombay High Court answers the issue that the term other advantage cannot be read as *"ejusdem generis" with the words "gaining pecuniary benefits or undue economic advantage"*

82. More so, in case of **Govind Sakharam Udhe** (Supra), it is observed that the words in respect of much more than one charge-sheet has been filed cannot go with the worlds Member of organized crime syndicate because in that case, these words would have read as in respect of whom more than one charge-sheet have been filed. A person should be a part of the module which jointly undertakes an organized

crime or he may singly as a member of the organized crime syndicate or on behalf of such syndicate undertake an organized crime. In both the situation MCOCA can be applied.

83. It is also observed that in the case mentioned above, that the organized crime committed by a person will be a part of continuing unlawful activity of the organized crime syndicate. The important factor is the nexus or the link of a person with organized crime syndicate. The link with the organized crime syndicate is the crux of the term continuing unlawful activity. If this link is not established, that person cannot be roped in. Section 23(1) (a) of the MCOCA provides a safeguard that no investigation of an offence under the MCOCA Act should be commenced with the approval of the concerned authorities. Once such an approval is obtained, investigation is commenced. Those who are subsequently found to be involved in the commission of the organized crime can very well be proceeded against once sanction is obtained against them under Section 23 (2) of MCOCA.

84. Therefore, the offence under MCOCA must comprise continuing unlawful activity relating to organized crime undertaken by an individual singly or jointly, either as a member of the organized crime syndicate or on behalf of such syndicate by use of coercive or other unlawful means with the objective of gaining pecuniary benefits or gaining undue economic or other advantage for himself or for any other person or for promoting insurgency.

85. In the case in hand, to satisfy the condition of Section 2(d) of the Act, prosecution has relied upon a list of 34 Criminal Cases which are filed against the respondent during the period 1985 to 2009. These 34 cases includes present one. The prosecution failed to ascertain as to whether the offences committed therein was related to organized crime or not. Out of remaining 16 cases 2 cases vide FIR No.183/2006 and 96/2006 pertain to the Offence punishable under Section 25 of the Arms Act, 1959. One case vide FIR No.09/04 pertain to Section 20 of NDPS Act. Therefore, the prosecution failed to establish that the respondent has committed an offence either as a member of organized crime syndicate or on behalf of such syndicate. As regards the properties to invoke Section 4 of the MCOCA, the prosecution failed to show prima facie that the respondent was holding the properties referred above either having a member of organized crime syndicate or on behalf of member of any

such syndicate.

86. In view of the above discussion, submission of ld. Counsel appearing on behalf of the parties and settled law, I find no infirmity in the order passed by ld. Trial Judge while discharging the respondent from the provisions of MCOCA. Therefore, I conquer the same.

87. Accordingly, Crl. Rev. 42/2012 is dismissed.

88. In view of above order, the interim order granted vide order dated 24.01.2012 in Crl.M.A.No.975/2012 (Stay) stands vacated and MA stands disposed of.

89. No order as to costs.

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DEEPAK KHOSLA ….APPELLANT

VERSUS

MONTREAUX RESORTS PVT. LTD. & ORS. ….RESPONDENTS

(SANJIV KHANNA & R.V. EASWAR, JJ.)

L.P.A. NO. : 16/2012 DATE OF DECISION: 24.04.2012

Mental Health Act, 1987—Section 22—Contention of the appellant is that the freedom of speech and expression and right of a litigant to self represent himself or the cosuitor are sacrosanct. There is no dissension between the fundamental right to freedom of speech and expression, the right to access the courts and appear in person or for a co-suitor. Denial of right of self representation is illegal and wrong—At that time, it was noticed that the appellant was recording the court proceedings. Digital devices/

gadgets, i.e. electronic recorder, mobile phone and a laptop, were seized and handed over to the Registrar (Vigilance). Writ help of experts, the recordings were copied on to a CD and the data was removed from the electronic recorder/mobile phone as directed by the learned single Judge—The impugned order records that The ld. Single Judge had heard the audio recordings and it was established that the appellant had recorded the proceedings of the said Court, proceedings before another Co-ordinate Single Bench of the High Court and proceedings before two different Additional Chief Metropolitan Magistrates (ACMMs, for short). The audio recordings of the proceedings before the ACMMs, revealed that appellant had not maintained dignity and decorum in the Court and the language used by him was condemnable. Thereafter, the order refers to and quotes the order dated 20th March, 2009 passed by the Arbitration Tribunal consisting of one retired Judge of the Supreme Court and two retired judges of this Court, who had tendered their resignation—A writ mandamus means a command that can be issued is favour of a person who establishes an inherent legal right in his case—Clause 8 of the Letters Patent Act, therefore, merely means that a litigant in person is not barred and prohibited from appearing in person and does not in any manner conflict with the inherent power/rights of the Court—Right to appear and address the Court under Section 32 of the Advocates Acts can be withdrawn subsequently. This right, even if granted, does not mean that it is permanent. Order granting permission can be always recalled for valid and just grounds—There is some controversy and dispute whether the learned single Judge had rejected the prayer for dasti copy of the impugned order. It appears that no such request was made when the order was dictated, but was made subsequently. The contention of the learned counsel for the appellant is that the request was

rejected. However, the impugned order itself records that a copy of the order be given dasti to the appellant. In such cases, the order should be given to the party, his counsel or his family member. It should be also given before the order is implemented as the party concerned has right to file and challenge the order in appeal and ask for stay. It is stated that the order was made available to the appellant only at 10 p.m. at night. We agree with the appellant that the order should have been given immediately—As noticed, there are number of proceedings/cases pending both in the High Court and in District Courts. Issue of this nature and whether or not Deepak Khosla is entitled to appear as a self represented litigant or for others, if taken up for consideration in different forums/courts, would lead to and cause it's own problems and difficulties. Apart from the possibility of conflicting orders, there would be delay, confusion and judicial time will be spent in several courts dealing with an identical/similar question/issue. It is therefore, advisable that this aspect be considered and decided before one Bench in the High Court rather than in different benches/courts. Further, this question should be decided first and immediately before Deepak Khosla can be permitted to appear and is given an audience. Keeping these aspect in mind, we feel that it will be appropriate that the entire aspect and issue is decided by the learned single Judge as expeditiously as possible and till the decision is taken, there should be stay of further proceedings in different matters before the High Court and in District Court. This direction will not apply and prevent Deepak Khosla for filing any writ petition under Article 226 or moving an application for bail/anticipatory bail. This will also not apply to any proceedings pending before the Supreme Court or Courts outside Delhi

Important Issue Involved: The High Court has inherent power distinct and separate from power of contempt to injunct/sanction vexatious or frivolous litigation, vexatious/habitual litigants, contumelious litigant and issue appropriate directions, including prohibiting the said litigant from appearing and arguing matters in person and for others and from initiating or filing proceedings, except with permission of the Court.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Mr. Prashant Bhushan, Ms. Indira Unninayar and Ms. Kirat Randhawa, Advocates.

FOR THE RESPONDENT` : Mr. Vibhu Bakhru, Sr. Advocate with Mr. Anand M. Mishra, Adv. For Vikram Bakshi & Group Mr. Arvind Nigam (Amicus Curiae).

CASES REFERRED TO:

1. *Deepak Khosla* vs. *Union of India &Ors* reported in 182 (2011) DLT 208 (DB).
2. *C. Venkatachalam* vs. *Ajitkumar C. Shah and ors.* (2011) 9 SCC 707.
3. *R.K. Anand* vs. *Registrar, Delhi High Court,* (2009) 8 SCC 106.
4. *Municipal Committee, Patiala* vs. *Model Town Residents Association and Ors.,* AIR 2007 SC 2844.
5. *Ila Vipin Pandya (2)* vs. *Smita Ambalal Patel,* (2007) 6 SCC 750.
6. *Bar Council of India* vs. *High Court of Kerala* (2004) 6 SCC 311.
7. *Bhamjee* vs. *Forsdick and Others,* (2004) 1 WLR 88.
8. *Attorney General* vs. *Ebert* (2004) EWHC 1838.
9. *Ex- Capt. Harish Uppal* vs. *Union of India and anr.*

(2003) 2 SCC 45.

10. *G.N. Nayak* vs. *Goa University* 2002 (2) SCC 712.
11. *A.P. &Ors.* vs. *M.R. Apparao & Anr.*, (2002) 4 SCC 638.
12. *Attorney General* vs. *Ebert*, (2002) 2 All England Reporter 789.
13. *State of Punjab* vs. *V.K. Khanna* (2001) 2 SCC 330.
14. *Ebert* vs. *Official Receiver,* (2001) 3 All England Reporter 942 (C.A.).
15. *Kumaon Mandal Vikas Nigam Ltd.* vs. *Girja Shankar Pant,* (2001) 1 SCC 182.
16. *Praveen C. Shah* vs. *K.A. Mohd. Ali,* (2001) 8 SCC 650.
17. *State of West Bengal* vs. *Shivananda Pathak,* (1998) 5 SCC 513.
18. *Supreme Court Bar Association* vs. *Union of India,* (1998) 4 SCC 409.
19. *Santha* vs. *Vasu, Muthalamada and ors.* AIR 1996 Ker 188.
20. *Raghavan and Anr*. vs. *Sankaran Ezhuthassan* AIR 1993 Ker 178.
21. *Chandigarh Administration and Anr.* vs. *Manpreet Singh and Ors.*, AIR 1992 SC 435.
22. *State of Jammu & Kashmir* vs. *A. R. Zakki & Ors,* AIR 1992 SC 1546.
23. *Chambers* vs. *Nasco Inc.*, 501 US 32 (1991).
24. *Supreme Court Employees' Welfare Association and Ors.* vs. *Union of India and Anr.,* AIR 1990 SC 334.
25. *Cooter and Gell* vs. *Hartmarx Corporation*, 496 US 384 (1989).
26. *Reichel* vs. *Magrath* (1989) 14. App. Cas 665.
27. *State of Himachal Pradesh* vs. *A Parent of a Student of Medical College, Simla and ors.,* AIR 1985 SC 910.
28. V*ijay Narain Singh* vs. *State of Bihar* 1984 (3) SCC 14.

29. *Cotton Corporation of India Limited* vs. *United Industrial Bank Limited:* AIR 1983 SC 1272.
30. *Cotton Corporation of India* vs. *United Industrial Bank Ltd.* (1983) 4 SCC 625.
31. *Harishankar Rastogi* vs. *Girdhari Sharma and anr.* AIR 1978 SC 1019.
32. *T. Arvindandam* vs. *T.V. Satyapal and Another,* (1977) 4 SCC 467.
33. *Gleeson* vs. *J. Wippall & Co. Ltd.:* 1977 (1) WLR 510.
34. *Faretta* vs. *California* 422 U.S. 806 (1975).
35. *Narinder Chand Hem Raj and Ors.* vs. *Lt. Governor, Administrator, Union Territory, Himachal Pradesh and Ors.*, AIR 1971 SC 2399.
36. *Prabhakar Rao H. Mawle* vs. *State of Andhra Pradesh,* AIR 1965 SC 1827.
37. *Link* vs. *Wabash Railroad Co.*, 370 US 626 (1962)].
38. *Kalyan Singh* vs. *State of UP,* AIR 1962 SC 1183).
39. *RadhaMadhab Jiu Thakur* vs. *Rajendra Prasad Bose:* AIR 1933 Pat 250.
40. *Ram Sadan Biswas* vs. *Mathura Mohan Hazra,* AIR 1925 Cal 233.
41. *Grepe* vs. *Loam* (1888) L.R. 37 Ch. D. 168.
42. *Metropolitan Bank* vs. *Pooley* (1885) 10 App les 210.
43. *Mohinder Singh Gill* vs. *Chief Election Commr.* (SCC pp. 432-33, para 43).

RESULT: Disposed of.

SANJIV KHANNA, J.

1. Deepak Khosla has preferred this intra-Court appeal impugning the order dated 4th January, 2012 passed by the learned single Judge. The impugned order in paragraph 15 gives two directions; that the appellant would not appear in any Court either in person or as an attorney of a third party, as he does not have inherent right to appear and argue; that the appellant should be medically examined whether he was suffering

from any mental disorder. The SHO of the police station Tilak Marg was directed to get the appellant admitted in the Institute of Human Behaviour and Allied Sciences (IHBAS, for short), Shahdara, Delhi. The Medical Superintendent of IBHAS was directed to submit a report within a week. The appellant was ordered not leave the premises of IHBAS and the SHO of the concerned police station was asked to provide adequate security.

2. By order dated 4th January, 2012, in appeal, operation of the second direction in the impugned order was stayed. Medical records maintained by IHBAS, Delhi were directed to be produced and have been directed to be kept in a sealed cover. However, copy of the same has been given to the appellant.

3. As far as the second direction is concerned, the appellant is entitled to succeed. There are various reasons for the same. The appellant has rightly drawn our attention to the provisions of Mental Health Act, 1987 including Sections 2(l), 2(m), 2(s), 14, 15-18, 19-28, 30-31 etc. Section 22 of the said Act may not be squarely applicable as it applies and postulates the procedure to be followed by a Magistrate but the procedure prescribed in the statute has a salutary purpose and object behind it. The directions given in paragraph 16 onwards are stringent, severe and deleterious. Before passing and issuing the said direction it would have been appropriate if a preliminary examination and report of a doctor or a psychiatric was obtained.Certain other aspects dealing with the second issue will be considered later on.

4. The first aspect is the core issue on which we have heard the learned counsel for the parties. We also had the assistance of Mr. Arvind Nigam, Sr. Advocate, who was asked to assist as Amicus Curiae. We appreciate the effort and assistance provided by him.

5. The first issue, as per the appellant, raises a dilemma and legal issues. Contention of the appellant is that the freedom of speech and expression and right of a litigant to self represent himself or the co-suitor are sacrosanct. There is no dissention between the fundamental right to freedom of speech and expression, the right to access the courts and appear in person or for a co-suitor. Denial of right of self representation is illegal and wrong for the following reasons:-

(a) Right to audience and to argue in person or for a co-suitor is conferred by clause 8 of the Letters Patent Act.

A Court order cannot take away the said right.

(b) The injunction/sanction order has been passed without opportunity to show cause and hearing.

(c) The order was passed without hearing or adhering to the principles of natural justice and is a nullity. The order can be ignored by the appellant and by the Courts.

(d) The order, including the first direction, is biased.

(e) Cont. Case (C) No.165/2008 in which directions have been issued, was earlier adjourned sine die. The direction could not have been passed as the said aspect could not have been examined and dealt with in the contempt petition.

(f) The direction is contrary and goes beyond the punishment stipulated in Section 12 of the Contempt of Courts Act, 1971 and cannot be sustained.

(g) The fair and reasonable procedure envisaged under the Contempt of Courts Act, 1971 and under Article 215 of the Constitution of India has not been adhered to and the procedure followed is contrary to the mandate of the Supreme Court.

6. The impugned order dated 4thJanuary, 2012, records that on 22nd December, 2011, a review application filed by the appellant was dismissed by the learned single Judge. At that time, it was noticed that the appellant was recording the court proceedings. Digital devices/gadgets, i.e. electronic recorder, mobile phone and a laptop, were seized and handed over to the Registrar (Vigilance). With help of experts, the recordings were copied on to a CD and the data was removed from the electronic recorder/mobile phone as directed by the learned single Judge.

7. The impugned order records that the ld. Single Judge had heard the audio recordings and it was established that the appellant had recorded the proceedings of the said Court, proceedings before another Co-ordinate Single Bench of the High Court and proceedings before two different Additional Chief Metropolitan Magistrates (ACMMs, for short). The audio recordings of the proceedings before the ACMMs revealed that the appellant had not maintained dignity and decorum in the Court and the language used by him was condemnable. Thereafter, the order refers to and quotes the order dated 20th March, 2009 passed by the Arbitration Tribunal

consisting of one retired judge of the Supreme Court and two retired judges of this Court, who had tendered their resignation. The order reads:-

> "For Claimants : Mr. Vibhu Bakru, Advocate Mr. P. Nagesh, Advocate Mr. Anand Mishra, Advocate along with Mr. Vikas Kakkar, Advocate. For Respondent: Mr. Deepak Khosla, representing respondents 1 & 2.
>
> Due to highly obstructive and abrasive conduct of Mr. Deepak Khosla representing Mrs. Sonia Khosla, his wife-respondent 1 and Mr. R.P. Khosla, his father- respondent-2 throughout the proceedings, we the three arbitrators have resigned as arbitrators in this matter. Mr. Khosla does not let the matter proceed on merits as he keeps on moving one application after another and insists on the applications being heard first. Moreover his stand (as recorded in proceedings on the late date of hearing dated 4.2.2009) is that this Arbitral Tribunal is not legally constituted. The resignations of each of the arbitrators, hand written and duly signed, are annexed hereto.
>
> JUSTICE ARUN KUMAR (Retd.)
> PRESIDING ARIBTRATOR"

8. The impugned order makes reference to the orders dated 29th May, 2009 and 28th January, 2009 passed by Gita Mittal, J., the relevant portions of which again for the sake of convenience are reproduced below:-

> **Order dated 29.5.2009**
>
> "42. Having regard to the protracted hearings before this court and the uncontrolled and vituperous allegations against the other side and their counsels, the matter has been taken up on all dates at the end of the Board. Adjournments which have been taken from the court on the pretext of sickness of his wife by Mr. Deepak Khosla, have been utilised to file voluminous and repetition applications to protract the hearings which appear to indicate that the applicant is bend on avoiding adjudication in the main issue which is pending consideration.
>
> These applications are filed in either Co.A.(SB) No.6/2008 or Co.A.(SB) No.7/2008 or both by Mr. Deepak Khosla utilising the

> shield of the appellants by the applicant. The applicants have not been present in court on any date of hearing. Yet the applications purport to make submissions on court proceedings which are incorrect.
>
> 43. By way of Co.A. No.512/2009, a prayer to cross examine his own counsels as well as counsels on the other side is made. Without there being any pleading or statement in respect of which they are to be cross-examined.
>
> 44. Furthermore, the application is premised on a total misconception about procedure as well as what would constitute pleadings in law. I find that the application has been filed as a dilatory tactic to avoid adjudication in CA No.1001/2008 in Co.A.(SB) No.7/2008 and CA No.1000/2008 filed in Co.A.(SB) No.6/2008. The same certainly is intended to pressurize the counsels appearing on the other side.
>
> 45. The manner in which the prayers have been couched amount to seeking yet another review.
>
> 46. While making submissions on the present application, Mr. Deepak Khosla has urged that if the order under review in the proceedings which are under consideration was correct, "either I have lost senses of my counsel has"; "counsel has to explain what a relief counsel has got me", "I can go on filing review ad nausesum and you have to entertain them". His conduct and utterances in the proceedings are noticed in other judgments on two other applications."
>
> **Order dated 28.1.2009**
>
> "The applications before this Court are in the nature of a review of hearings wherefrom a brother colleague has rescued himself for reasons of scandalous averments contained in CA no.1000/2008. It is well settled that consideration of any application has to abide by judicial record which is placed before the court. Fully conscious of the well settled legal position, unfounded allegations, before even submissions could be completed by counsel, have been made.
>
> The matter was adjourned at request of counsel for the

respondents to today. During the intervening period, CA No.133/2008 in Co.A (SB) 7/2008 and CCP No. 1/2009 in Co.A (SB) No.6/2008 have been filed on behalf of the applicant.

When the matter was called out for hearing today, the applicant insisted on arguing CCP NO. 1/2009 in Co.A. (SB) No.6/2008 and CA No. 27/2009 & 31/2009 in Co.A (SB) No.7/2008 objecting to the appearance of learned counsel on the other side on the ground that they have no right to appear.

Counsels for the respondents were heard and have drawn my attention to the memo of parties filed by Ms. Sonia Khosla before the Company Law Board wherein this company was arrayed as the respondent no.1 and was represented by counsel appearing for the respondent nos.2, 3 and 4 before this court. Counsels relied on Paras 3 to 9 of order dated 31st January, 2008 passed by the Company Law Board at Page 60 of Co.A (SB) No.6/2008.

In this background, in as much as counsels had appeared for the respondents before the Company Law Board and the present petition in appeal being continuation thereof, I saw no reason as to why they cannot continue to complete the arguments in the part-heard matter. It was pointed out that no such objection was ever raised even though the same counsel have been appearing in the matter right from the first date when the respondents first put in appearance. Caveat is also stated to have been filed. In this background, Mr. Vibhu Bhakru, Advocate who has been addressing arguments was asked to resume arguments on the part-heard application. At this stage, Mr. Deepak Khosla rose and started gesticulating. He interrupted the court proceedings in a loud voice making allegations that the counsels appearing in the matter have no right of audience in the matter and that proceedings in this court are not as per law. All requests to him to contain himself, to resume his seat and permit respondents. counsel to complete his submission did not bear any fruit. Mr. Khosla continued to interrupt the court proceedings in loud and obstructive tone and making allegations against the counsel appearing on the other side in open court that they are lying.

He used insulting language and has cast aspersions on counsel appearing on the other side. The allegations made are scandalous

and aimed at creating prejudice and embarrassment to counsel who are discharging their professional duties towards their client. I have been exercising considerable restraint keeping in view that Mr. Deepak Khosla was appearing in person. The respondents have objected to his appearance inasmuch as he is arrayed as respondent no.11 before the Company law Board in the petition which has been filed by his wife Ms. Sonia Khosla as the petitioner and Mr. Khosla is the opposite party before the Company Law Board.

His conduct in court today was so obstructive that this court found it impossible to record the order in open court and has risen to dictate this order in chambers.

The acts of Mr. Deepak Khosla in standing up when the other side is arguing, gesticulating with his hands, raising his voice and not permitting the proceedings in the court to continue amounts to interference with the due course of judicial proceedings before this court, which prima facie, constitutes criminal contempt of court.

Paras 1 to 9 of this order be treated as the facts constituting the gravamen of the charge as per para 10 above.

Let a copy of order be given to Mr. Deepak Khosla under signatures of the Court Master. Mr. Deepak Khosla is hereby called upon to submit his response to this order, which is being treated as a notice of charge, to be responded within two weeks.

The contempt matter may be place before Hon'ble the Chief Justice for placing before the appropriate Division Bench for further proceedings.

Registry shall appropriately register the matter and place copies of all the orders and applications noticed above before the Division Bench. Dasti."

9. The Single Judge made reference to the order dated 2nd December, 2011 passed by a Single Judge Bench of this Court in Arbitration Petition No. 323/2010. The impugned order further records that the office of the Commissioner of Customs and Central Excise, NOIDA had issued a show cause notice dated 31st August, 2004 and the appellant

and his cousin were arrested for violation of the provisions of the Customs Act, 1962 and the Central Excise Act, 1944. It is mentioned that the appellant invariably fights with the courts and uses insulting or contemptuous language and exhorts that he was not afraid of going behind the bars.

10. Learned single Judge has mentioned and referred to the decision in W.P.(C) 12787/2009 titled **Deepak Khosla Vs. Union of India &Ors** reported in 182 (2011) DLT 208 (DB). In the said writ petition, the appellant had prayed for declaration that he was entitled to non- intrusively audio record judicial proceedings; and a writ of prohibition or similar command be issued restraining the Registrar/Registrar General of this Court from interfering with the non-intrusive audio recording. The said writ petition was dismissed on the ground that there was no specific legislation, provision or any law regulating the field. A writ of mandamus means a command that can be issued in favour of a person who establishes an inherent legal right in his case. Such a writ is issued against a person who has a legal duty or obligation to perform but has failed or neglected to do so. It was accordingly held as under:-

> "6. There is no cavil over the issue that there is no specific legislation, provision or any law regulating the field referring to which it can be said that there is a mandate of law that the audio/ video recording is to be done in respect of Court proceedings. There is no statutory authority which has been given the said responsible function. A writ of mandamus means a command which is issued in favour of a person who establishes an inherent legal right in his case. Such a writ is issued against a person who has a legal duty or obligation to perform but has failed or neglected to do so. It needs no special emphasis to state that such a legal duty emanates either from discharge of a public duty or operation of law. In this context, we may refer with profit to the decision in Director of Settlements, **A.P. &Ors. v. M.R. Apparao & Anr.,** (2002) 4 SCC 638 wherein it has been stated thus:
>
> "The expression "for any other purpose" in Article 226 makes the jurisdiction of the High Courts more extensive but yet the Courts must exercise the same with certain restraints and within some parameters. One of the conditions for exercising power under Article 226 for issuance of a mandamus is that the Court

must come to the conclusion that the aggrieved person has a legal right, which entitles him to any of the rights and that such right has been infringed. In other words, existence of a legal right of a citizen and performance of any corresponding legal duty by the State or any public authority, could be enforced by issuance of a writ of mandamus. "Mandamus" means a command. It differs from the writs of prohibition or certiorari in its demand for some activity on the part of the body or person to whom it is addressed. Mandamus is a command issued to direct any person, corporation, inferior courts or Government, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. A mandamus is available against any public authority including administrative and local bodies, and it would lie to any person who is under a duty imposed by a statute or by the common law to do a particular act. In order to obtain a writ or order in the nature of mandamus, the applicant has to satisfy that he has a legal right to the performance of a legal duty by the party against whom the mandamus is sought and such right must be subsisting on the date of the petition (**Kalyan Singh v. State of UP,** AIR 1962 SC 1183). The duty that may be enjoined by mandamus may be one imposed by the Constitution, a statute, common law or by rules or orders having the force of law."

7. In the case at hand, the petitioner does not have a legal right which is provided for under any enactment, common law or by rules or orders which have the force of law. He has advanced his arguments on the basis of transparency. Needless to emphasise, the material brought on record pertains to the practice followed in other countries and the petitioner's personal belief as he has been litigating many cases before this Court. In a way, he has made an adroit effort to give sermons in the name of transparency. An individual sermon cannot earn the status of any law. What is canvassed by him is that the audio/video recording process will curtail the Courts' time and the submissions would be luculent and there would be saving of the proceedings for future. The feelings of the petitioner have not yet been codified into a law by the Legislature. Hearings in Court take place in open court except where it is stipulated by the statute that

proceedings shall be taken in camera or in certain cases of habeas corpus or matters relating to chamber proceedings. They are different from recording of proceedings in open court by way of audio/video recording. There is no rule in that regard. Framing of a rule is a matter of policy. Someone can have a grievance when there is a rule which is not followed and the litigant's legal right is affected. Therefore, no mandamus can be issued to the respondents for audio and video recording of the Court proceedings

8. In this context, we may refer with profit to certain authorities in the field. In **Narinder Chand Hem Raj and Ors. v. Lt. Governor, Administrator, Union Territory, Himachal Pradesh and Ors.,** AIR 1971 SC 2399, their Lordships have opined that no court can issue a mandate to a legislature to enact a particular law and similarly, no court can direct a subordinate legislative body to enact or not to enact a law which it may be competent to enact.

9. In **State of Himachal Pradesh v. A Parent of a Student of Medical College, Simla and ors.,** AIR 1985 SC 910 it has been ruled that the court cannot usurp the functions assigned to the executive and the legislature under the Constitution and it cannot even indirectly require the executive to introduce a particular legislation or the legislature to pass it WP(C) No.12787/2009 page 10 of 13 or assume to itself a supervisory role over the law making activities of the executive and the legislature.

10. In **Supreme Court Employees' Welfare Association and Ors. v.Union of India and Anr.,** AIR 1990 SC 334, it has been held that no court can direct an executive authority.

11. In **Chandigarh Administration and Anr. v. Manpreet Singh and Ors.,** AIR 1992 SC 435, their Lordships of the Apex Court has clearly stated that the High Court cannot assume the role of a rule making authority in exercise of the power under Article 226 of the Constitution of India.

12. In **State of Jammu & Kashmir v. A. R. Zakki & Ors,** AIR 1992 SC 1546, the principle was reiterated that a writ of mandamus cannot be issued to the legislature to enact a particular

legislation and the same is true as regards the executive when it exercises the power to make rules which are in the nature of subordinate legislation.

13. In **Municipal Committee, Patiala v. Model Town Residents Association and Ors.,** AIR 2007 SC 2844, though in a different factual WP(C) No.12787/2009 page 11 of 13 matrix, the Apex Court has opined that the High Court has no power to structure or restructure the legislative enactments. It has been reiterated that High Court must ensure that while exercising its jurisdiction which is supervisory in nature, it should not over step the well recognized bounds of its own jurisdiction.

14. In view of our premised reason, we answer the reference stating that a writ in the nature of mandamus cannot be issued for taking measures of audio/video recording in trial courts as well as in this Court. We may hasten to add that as the sole prayer in the writ petition pertains to the said relief, nothing subsists to be adjudicated in the writ petition. Accordingly, the writ petition stands dismissed without any order as to costs."

11. Learned single Judge has referred and quoted from the decision of the Supreme Court in **Ila Vipin Pandya (2) Vs. Smita Ambalal Patel,** (2007) 6 SCC 750. In our opinion, the aforesaid judgment is relevant and appropriate and our reasons are stated below. Our reasons will also disclose why we need not refer to some contentions and judgments referred to by the learned counsel for the appellant.

12. Litigation inter-se parties started in the year 2008, when wife and father of the appellant, Sonia Khosla and R.P. Khosla, filed a petition under Section 397/398 of the Companies Act, 1956 before the Company Law Board. This litigation has now broadened and embroiled the parties in various legal proceedings including criminal proceedings.

13. In most of these petitions/applications, Deepak Khosla, the appellant was/is appearing as an attorney of his wife and father, Sonia Khosla and R.P. Khosla, respectively. In some of the cases he appears in person as a litigant and has entered appearance for Sonia Khosla, R.P. Khosla etc. as a co-suitor.

Legal Position in England, the United States of America and other Countries

14. The legal question is whether the Court is competent, and is it permissible in law to direct/injunct a self-represented litigant or a pro se litigant from appearing in person or for a co-suitors and if so under when and under what circumstances. To our mind, the aforesaid question is answered by the Supreme Court in their decision in the case of **Ila Vipin Pandey** (2) (supra). We also feel that the said power is not a power exercised by the court under the Contempt of Court Act, 1971 and it is not a punishment imposed by the court. It is an inherent power of the Court, different and distinct from the power to punish for contempt. The view and legal position is not new but similar views have been expressed by the Courts in England and Wales and in the United States of America.

15. Vexatious and frivolous litigation has been held to be abuse of the legal system and the Courts have an inherent power to control and prevent such litigation and injunct/sanction vexatious litigants. Way back in 1879 in **Grepe versus Loam** (1888) L.R. 37 Ch. D. 168, first step was taken by the courts in England under the inherent powers to injunct and issue sanction against repeated frivolous applications for the purpose of impeaching the same judgment. The Court of Appeals passed an order prohibiting any further application without the leave of the court. The injunction order thereafter came to be known as the "Grepe versus Loam" order and the direction issued reads:-

> "That the said applicants or any of them be not allowed to make any further applications in these actions or either of them to this Court or to the Court below without leave of this Court being first obtained. And if notice of any such applications shall be given without such leave being obtained, the Respondents shall not be required to appear upon such applications, and it shall be dismissed without being heard."

16. The aforesaid order is presently known and described as "limited civil restraint order" and is issued when two or more applications are made, totally without merit. It is directed that further applications should not be permitted without permission of the court. United Kingdom has enacted statutes to prevent vexatious litigation, which were enacted in the years 1896, 1925 and 1981. In spite of the aforesaid statutory enactments, it has been repeatedly held that the courts have inherent power to stay

or dismiss actions which are frivolous and vexatious. The Supreme Court Practice (UK) in its commentary under Order 18 Rule 19 (which deals with striking off frivolous or vexatious pleadings) refers to " nherent power" of Courts to stay or dismiss actions and states:

> "Apart from the rule, the Court has an inherent jurisdiction to stay or dismiss actions, and to strike out pleadings which are vexatious or frivolous, or in any way an abuse of the process of the Court, under which it could deal with all the cases included in this Rule (**Reichel vs. Magrath** (1989) 14. App. Cas 665." **Gleeson vs. J. Wippall & Co. Ltd.:** 1977 (1) WLR 510. It can stay or dismiss actions, before the hearing, which it holds to be frivolous or vexatious: **Metropolitan Bank vs. Pooley** (1885) 10 App les 210. This jurisdiction is not diminished by Order 18 Rule 19."

17. The Courts in England have extended the **Grepe versus Loam order** (supra) to what is called extended "civil restraint order" for persistent vexatious behaviour which lasts for a specified period of no more than two years for applications touching upon existing subject matters. This can be granted by a Judge of the Court of Appeal, High Court or the designated Civil Judge. The third category of restraint order is a "general civil restraint order" which again can be for a maximum period of two years for all proceedings in the High Court or the specified County Courts. Further applications, which are devoid of merit, can lead to withdrawal of the right to appeal. Harassment of court or court officials can lead to penal prohibition, i.e. prohibiting the litigant from conducting or approaching the Court without permission. A list of vexatious litigant is maintained by Her Majesty's Court Service and is available on the official website.

18. European Court of Human Rights has held that the prohibitions imposed on self-represented litigants do not violate the right to access to justice under Article 6 of the European Convention. In **Golder versus United Kingdom,** (1979- 80) 1 EHRR 524, the European Commission on Human Rights observed that the provisions for curbing vexatious litigation do not violate a citizen's right to access to courts observing that vexatious litigants have abused their right to access, but having been declared a vexatious litigant, it is open to the person to prove to the court that he has a sustainable cause of action and should be allowed to

proceed. The courts have the power and authority to allow the litigant to proceed. Right to access the courts is, therefore, not absolute and some form of regulation of access to court may become necessary for proper administration of justice.

19. In **Ebert versus Official Receiver,** (2001) 3 All England Reporter 942 (C.A.) the Court of Appeal after referring to the decision of the European court, had examined and applied Section 42 of the Supreme Court Act, 1981 which ensures that the judicial processes are not abused.

20. In **Bhamjee versus Forsdick and Others,** (2004) 1 WLR 88, Lord Phillips of Worth Matravers has held that the access to justice could be limited if two conditions are satisfied; (i) the limitations applied should not restrict or refuse the access to courts of an individual in such a way or to such an extent that the very right is impaired and (ii) the restriction imposed is pursuant to a legitimate aim and there should be reasonable proportionality between the means and aim sought to be achieved.

21. Lord Phillips has summarized the different types of protective orders as:

> "(i) Protective measures Strasbourg Jurisprudence; (ii) Protective measures, Grepe vs. Loam; (iii) An extended Grepe vs. Loam order as passed by Neuberger J approved by the Court of Appeal in **Elbert vs. Vervil** 1999 (3) WLR 670;
>
> (iv) Protective measures under sec. 42; (v) Exceptional orders in **Att Gen vs. Elbert** 2002 (2) All ER 789; (vi) restraining the litigant from entering the Royal Courts or from interfering with the Court or its staff, and (vii) only paper procedure (i.e. no oral hearing) as inTaylor Landrena (2000) QB 528."

22. The position in law has been summarized by Lord Phillips as under:

> "It is, therefore, well established on authority that
>
> (i) This Court, like any Court, has an inherent jurisdiction to protect its process from abuse;
>
> (ii) The categories of abuse will never be closed;
>
> (iii) No litigant has any substantive right to trouble the Court

> with litigation which represents an abuse of its process;
>
> (iv) So long as the very essence of a litigant's right to access the Court is not extinguished, a Court has a right to regulate its processes as it thinks fit (absent any statute or rule or practice direction to the contrary effect) as its remedies are proportionate to the identified abuse (whether it is existing or threatened);
>
> (v) One way in which a Court may legitimately regulate its processes is by directing that the procedure be conducted in writing (rather than by giving an oral hearing).
>
> (vi) So far as the last of these matters is concerned, if a litigant persistently makes applications or institutes actions that are devoid of merit, then by his conduct, he will be disentitled to the hearing that would otherwise be available as of right. We know of no reasonable suggestion that the equivalent procedures in the House of Lords... or the European Court of Human rights itself, are not ECHR complaint."

23. The importance of the aforesaid ruling lies in the fact that it recognizes the inherent right of the court to protect its. process from abuse and that there is no violation of the right to access to courts if the same is not extinguished but only regulated by the court. The court has an inherent right/power to regulate its process as it may deem fit, in the absence of any statute or rule or practice as it remedies the proportionate identified abuse, whether existing or threatened. The court can legitimately regulate its process by directing that the procedure be conducted in writing rather than by giving an oral hearing. In **Attorney General versus Ebert,** (2002) 2 All England Reporter 789, the court exercised inherent power and restrained the litigant from wasting the time of court staff and disturbing orderly conduct of Court proceedings. In **Attorney General versus Ebert** (2004) EWHC 1838 (Administration), an application by the Attorney General to restrain Ebert from switching his activities to criminal courts was allowed for an indefinite period.

24. Courts in the United States have recognised the right of self-representation in criminal cases at the trial stage. In **Faretta versus California** 422 U.S. 806 (1975), the Supreme Court held that criminal defendants have a constitutional right to refuse counsel in State criminal

proceedings. It must be highlighted that the "Faretta right" applies only at the time of trial; there is no constitutional right to self-representation on direct appeal from a criminal conviction and in civil suits. In **Cooter and Gell versus Hartmarx Corporation,** 496 US 384 (1989), the court recognized that sanctions can be imposed on a pro se/pro per or in propria persona. The aforesaid principle was introduced in the form of Rule 11 of the Federal Rules of Civil Procedure in 1983 to knock down any abusive pro se litigant. Further, the said powers have been treated as a part of inherent power, which are necessary for functioning of the courts. These are implicit as the court must have the power to curb abuses associated with judicial litigation. The power of sanction is a necessary adjunct, as the courts have to function in an orderly manner and achieve expeditious disposal of cases. The Courts have the power to manage their own affairs. In some cases Court can impose or direct silence for compelling reasons. [See **Chambers versus Nasco Inc.,** 501 US 32 (1991) and **Link versus Wabash Railroad Co.,** 370 US 626 (1962)]. The line of reasoning, which has met acceptance, is that access to courts is one of the cherished freedoms, but there comes a point when limits should be imposed. Great latitude should be granted to pro-se litigants but the courts cannot turn their back to the rights of others and when the courts are used as a vehicle of harassment by "a knowledgeable and articulate experienced pro se litigant". In such circumstances, issuance of injunction is warranted. (**Ken versus City of New York,** 486 F. SUPP. 586, 590). Frivolous and vexatious litigation should be prevented as it subjects innocent parties to expense; it impounds an effort or a drain on the already pressed judicial resources and unnecessarily depletes public funds. Vexatious litigations mean litigation in bad faith, wantonly, and for oppressive reasons. The motive for filing should not be for an improper purpose such as harassment. Additionally, sanction can be issued against a Pro se litigant when there is a history of repetitive or vexatious litigation. Restriction can be put to require the litigator to obtain leave of the court before filing an additional action. Pro se litigants can be restrained from representing themselves as the plaintiffs if the said litigants have hampered efficient administration of justice to an invariable degree. The courts are not utterly powerless to deal with litigants who have hampered efficient administration of justice to an intolerable degree. The remedy being unique, it should be invoked as an appropriate response to what may well be a unique harm.

25. There are curbs in vexatious litigation in Australia and New Zealand. In Australia, under the High Court Rules of 1952, Rule 16.6 deals with vexatious proceedings. In New Zealand Section 88B of the Adjudicator Act, 1908 relates to restriction of institution of vexatious actions. There is also power under the High Court Rules (Part VII relating to speedy dismissal). In Canada there are specific statutory provisions in the federal system, which deal with prevention of vexatious proceedings. Section 40 of the Federal Court Act enables legal sanctions to restrict or to continue proceedings by those who have instituted vexatious proceedings or conducted proceedings in a vexatious manner.

Legal Position in India

26. In India, two states- Tamil Nadu and Maharashtra- have anti vexatious litigation acts, namely, Anti Vexatious Litigation (Prevention) Act, 1949 and Maharashtra Vexatious Litigation (Prevention) Act, 1971. The Law Commission of India in their 192nd Report has recommended statutory enactment for prevention of vexatious litigation. The said report refers to the earlier report, i.e., 189th Report of the Law Commission on Revision of Court Fee Structure in which reference is made to frivolous and vexatious litigation.

27. The Vexatious Litigation (Prevention) Act, 1949 was unsuccessfully made subject matter of challenge before the Andhra Pradesh High Court on the ground that it violated Article 19(1)(a) of the Constitution. The challenge was rejected by the Supreme Court also in their decision **Prabhakar Rao H. Mawle versus State of Andhra Pradesh,** AIR 1965 SC 1827. Hidayatullah, J., who has authored the majority judgment, held that the said enactment was legal as the Act is not intended to deprive a person from going to the court but it only creates a check that the opposite party is not harassed. A similar Act passed in England, it was observed has been applied to prevent abuse of process of court. The object of the Act promotes a good cause as it cannot be claimed that a litigant has unchecked right to bring vexatious action without control. The Act serves a public interest and is only to prevent a habitual litigant from filing repeated litigations without a reasonable cause. Challenge to Article 14 was also rejected. However, the majority took the view that the Act does not extend to the State of Andhra Pradesh and for this reason the appeal was allowed. Shah, J. in his separate judgment again upheld the constitutional validity of the Act as

it was not offending Article 19 or Article 14 of the Constitution. He, however, held that the Act extends to the State of Andhra Pradesh. On merits, Shah, J., opined that the drastic order of the nature passed was not justified in the facts of the said case.

28. Dispensing justice is a serious matter. There are two parties before the court; one who approaches and the one who defends. Courts of law, in a democratic system governed by Rule of Law, are regulated by practices in form of statutory provisions as well as customs and traditions. The hearing before the court has to be conducted in an orderly and punctilious manner. Right of audience before the court is a potent and cherished right but is subject to control and supervision of the court and can be withdrawn if it is repeatedly and persistently misused and abused. It is not an absolute right. Habitual refusal even after a warning to obey and abide by the basic fundamental canons or rules of appearance or audience, or when it amounts to wilful or deliberate misconduct, cannot and should not be tolerated and has to be dealt with, otherwise the adjudicatory institution itself suffers. Similarly, baseless, frivolous or vexatious filing puts the machinery of justice under burden and puts opposite party to needless expense and delay. It is not absolutely unknown that litigants can file cluster of cases, enclose reams of paper in the name of pleadings, move repeated motions or briefs/applications to delay and stall proceedings. Courts when inundated with applications/petitions suffer immense pressure and burden, as each matter even when frivolous and vexatious takes time, has to be heard and then dictated/decided. The cause of justice is defeated and justice is denied to other litigants in good faith, who are denied prompt and quick justice because of the delay caused by vexatious, frivolous or even repetitive litigation. Judicial or court time is precious and it is the duty of the parties also to ensure that judicial time is not diverted and spent on pointless repetitive, frivolous or vexatious litigation at the expense of time, and justice due to other litigants is not delayed.

29. At the same time, we have to be conscious that a pro se litigant faces disadvantages as he is inexperienced and at times faces challenges, polarisation and sometimes even resentment when opposed by a professional advocate. He is not familiar with the court processes and mannerisms. Being emotionally involved, at times he gets agitated and hostile by what he feels and perceives is an unequal treatment in an adversarial litigation process. Being unfamiliar with the art and skills of

advocacy, unschooled in the intricacies of law, rules or procedures, he loses his nerves gets agitated and is not able to project the matter in a dispassionate, calm, composed manner and with clarity of thought. The role of the judges here is important as they have to ensure that there should be a fair hearing. Access to justice for litigants in person is an important and valuable right which should be protected. In India, because of docket explosion and other reasons, judicial process may take time. The delay itself may generate frustration with the process and a pro se litigant may dwell and get a feeling that he has been denied what is due. He feels that there is adequate justification for his protest and that he has a right to raise objections. Further, we have illiterate indigent litigants and those without adequate resources and means. Such persons, when opposed Advocates or Senior Advocates, possibly feel that they are at a disadvantage and are discriminated in a system, where they have been pitted against experts. This is perceived as an adequate justification or support for their conduct when appearing in person and for indulging in repetitive litigation even after failure.

Definition of Words

30. It is important to understand the terms "vexatious" or "vexatious litigant" and persons who indulge in vexatious or frivolous litigation. The term "vexatious" in common parlance means "To vex" means anger by a slight or a petty annoyance; irritate. "Vexation" means the Act or an instance of vexing or annoying or distressing thing. "Vexatious" means such as to cause vexation. (See The **Oxford English Reference Dictionary,** Edition-1995). The term "vexatious", when used in law, signifies an action not having sufficient ground therefore and seeking only to annoy the adversary. In **Attorney General versus Barker** [2000] 1 FLR 759, it was observed:-

> "Vexatious is a familiar term in legal parlance. The hallmark of a vexatious proceeding is, in my judgement that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense, out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the

court process."

31. The term "vexatious" not only applies to vexatious litigation but also to vexatious litigants. Vexatious litigant indulges in frivolous litigation which has the effect to put the other side to inconvenience and harassment. In other words, the judicial process is used in a way, which is significantly different from its ordinary and proper use. Whether a person is a vexatious litigant, therefore, depends upon the nature and character of the litigation, which is initiated. It also relates to the manner in which litigation is conducted.

32. The term "frivolous litigation" can have various connotations. It can refer to merits of the litigation. However, in a given case it can refer to persistent and habitual litigation activity. It happens when a person sues a party repeatedly and relies upon persistently on the same cause of action. A habitual and persistent litigant keeps on litigating even when an earlier litigation has been unsuccessful or is pending consideration and when a rational time has come to stop.

33. The words "habitual" and "persistent" represent the same meaning. In **Vijay Narain Singh Vs. State of Bihar** 1984 (3) SCC 14 while dealing with Section 2(d)(iv) of the Bihar Control of Crimes Act, 1981 the majority judgment observed:-

> "The expression 'habitually' means 'repeatedly' or 'persistently'. It implies a thread of continuity stringing together similar repetitive acts. Repeated, persistent and similar, but not isolated, individual and dissimilar acts- are necessary to justify an influence of habit. It connotes frequent commission of acts or omissions of the same kind referred to in each of the said sub-clauses or an aggregate of similar acts or omissions..... Because the idea of 'habit' involves an element of persistence and tendency to repeat the acts or omissions of the same class or kind, if the acts or omissions in question are not of the same kind or even if they are of the same kind when they are committed with a long interval of time between them, they cannot be treated as habitual ones."

34. The word "habitual" means constant, customary or addicted to a special habit. The word "habit" means settled tendency or practise; physical constitution. It applies to a tendency or capacity resulting from

frequent repetition of the same acts (Refer Ramanatha Iyer's Law Lexicon, Second Edition).

35. In a given case, Court can opine that the litigant has become a vexatious litige or litigant even when there is no final decision in the earlier proceedings because of repetitive or habitual filing i.e. when the proceedings are repeatedly and habitually initiated on virtually identical cause of action with the object and purpose to cause prejudice or obstruct or interfere with the due course of the judicial proceedings. The conduct should be highly unreasonable to fall under the said category. Thus, manner by which proceedings are conducted may be relevant in determining whether the pro se litigant is indulging in frivolous litigation or is a vexatious litigant.

36. Rarely, but in exceptional cases, a quarrelsome, belligerent and combative litigant can be categorized as a vexatious litigant. Normally courts/judges are able to deal with and handle pro se litigants, but sometimes litigants demonstrate that they are completely uncontrollable and if audience is given to them the proceedings cannot continue. They perceive themselves to be right, no matter what the Judge does. They dictate. Nothing is acceptable unless the view or contention of the pro se litigant is accepted. When such litigants persistently indulge in intimidation or making gross imputations and cast aspirations causing breakdown or frequent adjournments of the judicial proceedings, inherent power to control the proceedings in an appropriate manner should be exercised. A persistent argumentative litigant, when in spite of the latitude, oversteps and becomes an obstacle, uses vague threats and abrasive behaviour or disrespectful language, the brazenness may not require the contempt, but injunction or a sanction under the inherent powers vested with the courts. Appropriate and deserving injunction or sanction, as may be necessary and required, should be given. These litigants for the sake of convenience can be called habitual contumelious litigant. The word "habitual" has been interpreted and explained above. The word "contumelious" postulates insolent and stubborn pervasiveness; incorrigible obstinacy; scornfully insolence and/ or insulting rudeness in speech or manners in the court proceedings or conduct.

Exercise of Discretion and the Test

37. The real dilemma lies in balancing the two rights/ principles; Self- represented litigant's right to address and the inherent power of the

court to deny a pro se vexatious litigant from appearing or addressing the court or from filing vexatious, frivolous or repetitive litigation. The said power or inherent right should be exercised with caution, with restraint and sparingly. The power is very potent and harsh and, therefore, the exercise of discretion has to be with great care and caution. The harsher the sanction, the more is the need and requirement that the discretion should be justified. It should be exercised in an extreme situation.

38. While it is apparent what is meant by the terms "vexatious litigation" and "frivolous litigation"; a test should be laid down to determine the whether an individual could be characterised as, and included within the realm of, a "habitual contumelious litigant". Exercise of the discretion test is to be applied in cases of a vexatious litigant or a habitual contumelious litigant. The exercise of discretion in such cases must, and should, meet the following test:

(1) The pro se litigant has indulged in repetitive or frivolous or vexatious litigation or has acted as a vexatious litigant.

(2) The sanction can be imposed if and only if there is no other way the pro se litigant/litigation can be dealt with. First an attempt should be to explain and warn the litigant. Then, cost can be imposed and only if thereafter the abuse continues, appropriate and mandated sanction order can be passed.

(3) The nature and type of sanction imposed should be commensurate with and should be proportionate to the abuse. It should not be excessive and disproportionate.

39. The true test is whether without the said sanction there would be order, i.e. but for the said sanction/ restraint, the courts would be prevented from orderly and expedient dispensation of the subject litigation. Special care and caution has to be taken when the litigant is indigent, financially weak and/ or illiterate. A stricter criteria can be applied in cases of wealthy, well read and knowledgeable litigants, who because they feel that they are articulate and well acquainted with law and facts are entitled to conduct the litigation themselves and on their own terms. Sanction may not be imposed particularly if there is a possibility that the litigant's conduct may be attributed to ignorance of law and proper procedures. In such a case, it should be the last resort.

Legal Authorities

40. As noted above, the view we have taken find resonance and acceptability in the decision of the Supreme Court in **Ila Vipin Pandya** (2)(supra). The relevant observations read as under:

"8. There is yet another disturbing feature of this case which needs to be highlighted. We must, at the outset, emphasise that a litigant appearing in person does not enjoy a status higher than that of a lawyer arguing a case for his client. We are also aware that such a litigant is nevertheless given extra consideration by the court for several justifiable reasons; first, the torturous and cumbersome court procedures are truly debilitating and tend to exhaust and frustrate the most hardened and energetic litigant, often making him bitter about the entire system; secondly, as a layman with limited knowledge of law he is unable to distinguish between a relevant and an irrelevant argument leading to verbosity; and finally, being oversensitive to his case with the opposite counsel and judge often being identified as belonging to a hostile camp, an occasional digression or deviation from established norms and mores is tolerated. We have, however, come to notice a growing tendency on the part of some litigants to misuse the latitude granted to them and to deliberately create a situation whereby the functioning of the court becomes an impossibility thus stultifying the entire judicial process. Smita Patel falls eminently within this category. During the course of arguments spread over parts of three days she refused to argue on the merits of her case and on the issues raised by Mr. Nariman but used foul language for some of the counsel who had been associated with this and other connected matters dubbing them as criminals closely associated with those who had been responsible for the Bombay blasts. We had at first advised her to be careful and to refrain from making baseless allegations against those who were not before the Court as parties and had subsequently cautioned her that she was overstepping the limits of decency which would compel us to take unpleasant steps against her, but to no avail. On the contrary she shouted back that the Court could do whatever it liked but she would continue to expose the advocates who were a threat to the safety and security of her country. Finding it impossible to proceed any

further we were constrained to record the following order on 3-5-2007:

"The respondent, appearing in person, had started her arguments in this case on 28-3-2007 at 3.00 p.m. and the matter remained part-heard on that day. Thereafter, she resumed her arguments on 12-4-2007 at 3.15 p.m. and did not complete even on that date. Thereafter, the matter came up for hearing on 19th April, 2007 when a telegram sent by the respondent was placed before us in which she had requested for adjournment of the matter till 2nd May, 2007. That is how the matter is before us today.

The respondent, appearing in person, resumed her arguments at 10.40 a.m. She has not addressed any argument so far which may be considered to be relevant to the issue involved in the appeal before us. We have repeatedly tried to persuade her to deal with the submissions urged on behalf of the appellant. Rather than doing that, she has been reading before us various documents in the different volumes of the paper-book relating to the conduct of certain advocates and she insisted that she is concerned about the misconduct of the advocates who have held this country to ransom and who have associated in causing bomb blasts in this country. When we tried to explain to her that we are not concerned with those issues and we are concerned with only those issues which are relevant to the dispute before us, she retorted that she is very much concerned with the misconduct of lawyers and her real fight is against them not the appellant and, therefore, we must hear her on those issues. When we explained to her that those issues are irrelevant and she must confine herself to the relevant issues she raised her voice and started addressing the Court in a manner unbecoming of even a party appearing in person. Having regard to the fact that she is a lady and she is appearing in person, and that she may have a grievance, we tolerated her to the extent possible. Her conduct is now beyond tolerance. She has reduced the judicial proceeding to a mockery. Since she is wasting the time of the Court by referring to irrelevant record and not addressing the Court on the issues involved, we are constrained to close the arguments. Since the respondent persists in raising her voice and making irrelevant comments in a manner which completely erodes the sanctity of judicial proceeding, we shall only be wasting the time of the Court, if we

continue to hear the respondent further. We shall proceed to pronounce our judgment in due course. The respondent who appears in person has handed over to us written arguments on affidavit and prays that her written submissions may be taken into consideration. We shall certainly take into consideration the written arguments submitted by her."

9. We have also gone through the earlier record of proceedings and find a very disturbing picture indeed."

41. The judgment thereafter went to show instances wherein the litigant appeared and conducted herself in as a habitual contumelious litigant.

42. We may appropriately refer to the observations of the Supreme Court in **T. Arvindandam versus T.V. Satyapal and Another,** (1977) 4 SCC 467 in which it has been held:

"We have not the slightest hesitation in condemning the petitioner for the gross abuse of the process of the court repeatedly and unrepentantly resorted to. From the statement of the facts found in the judgment of the High Court, it is perfectly plain that the suit now, pending before the First Munsif's Court, Bangalore, is a flagrant misuse of the mercies of the law in receiving plaints. The learned Munsif must remember that if on a meaningful-not formal-reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, be should exercise his power under Or. VII r. 1 1 C.P.C.taking care to see that the ground mentioned therein is fulfilled. And, if clever, drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order X C.P.C. An activist Judge is the answer to irresponsible law suits. The trial court should insist imperatively on examining the party at the first bearing so that bogus litigation can be shot down at the earliest stage. The Penal Code (Ch. XI) is also resourceful enough to meet such men, and must be triggered against them. In this case, the learned Judge to his cost realised what George Bernard Shaw remarked on the assassination of Mahatma Gandhi "It is dangerous to be too good." The trial court in this case will remind itself of s. 35-A C.P.C. and take deterrent action if it is satisfied that the litigation was inspired by vexatious motives and altogether groundless. In any view, that

suit has no survival value and should be disposed of forthwith after giving an immediate hearing to the par ties concerned. We regret the infliction of the ordeal upon the learned Judge of the High-Court by a callous party. We more than regret the circumstance that the party concerned has been able to prevail upon one lawyer or the other to present to the court a case which was disingenuous or worse. It may be a valuable contribution to the cause of justice if counsel screen wholly fraudulent and frivolous litigation refusing to be beguiled by dubious clients. And remembering that an advocate is an officer of justice he owes it to society not to collaborate in shady actions. The Bar Council of India, we hope will activate this obligation. We are constrained to make these observations and hope that the co-operation of the Bar will be readily forthcoming to the Bench for spending judicial time on worthwhile disputes and avoiding the distraction of sham litigation such as the one we are disposing of. Another moral of this unrighteous chain litigation is the gullible grant of ex parte orders tempts gamblers in litigation into easy courts. A judge who succumbs to ex parte pressure in unmerited cases helps devalue the judicial process. We must appreciate Shri Ramasesh for his young candour and correct advocacy."

43. In **Supreme Court Bar Association versus Union of India,** (1998) 4 SCC 409, it was held that punishment for professional misconduct prescribed under the Advocates Act can be only inflicted by the Bar Council after following the statutory procedure. Further, the nature and type of punishments, which a Court of Record, can impose in the case of established contempt under the common law have been now specifically incorporated and stipulated in the Contempt of Courts Act, 1971. The Contempt of Courts Act, 1971, which identifies and states the nature and type of punishments, does not impinge upon the inherent powers of the High Court under Article 215. No new type of punishment can be created or assumed by the High Court when punishment is awarded for contempt, even under Article 215 of the Constitution. However, in the said case it was also observed that the Supreme Court or the High Court can prevent the contemnor advocate from appearing before it, till he purges the contempt and this is different from suspending or revoking his licence or debarring him from practicing as an advocate. Subsequently, in **Praveen C. Shah versus K.A. Mohd. Ali,** (2001) 8

SCC 650, a lawyer was found guilty of contempt of court and as a consequence was debarred from appearing in the courts till he purged himself of the contempt. Constitution Bench of the Supreme Court in **Ex Captain Harish Uppal versus Union of India and Another,** (2003) 2 SCC 45 has stated that the right of appearance in courts is (still) "within the control and jurisdiction of courts". Article 145 of the Constitution gives the Supreme Court and Section 34 of the Advocates Act gives to the High Court power to frame rules including rules regulating the conditions on which a person (including an advocate) can practice in Supreme Court and or High Court and the courts subordinate thereto. If such rules are framed, the same would not have to do with the disciplinary jurisdiction of the Bar Council but would concern dignity and orderly functioning of the courts. It was stated that "Right to appear and conduct cases in courts is a matter on which the courts must and does have major supervisory and controlling power". Hence, "courts cannot and are not divested of control and supervising of conduct in court merely because it may involve the right of an advocate". Even if Section 30 of the Advocates Act were to be brought in force, control of proceedings in courts will always be remain with the court. Referring to the said decisions in the case of **R.K. Anand versus Registrar, Delhi High Court,** (2009) 8 SCC 106 it was held:

> **"238.** In Supreme Court Bar Assn. the direction prohibiting an advocate from appearing in court for a specified period was viewed as a total and complete denial of his right to practise law and the bar was considered as a punishment inflicted on him. In Ex. Capt. Harish Uppal it was seen not as punishment for professional misconduct but as a measure necessary to regulate the court's proceedings and to maintain the dignity and orderly functioning of the courts. We may respectfully add that in a given case a direction disallowing an advocate who is convicted of criminal contempt from appearing in court may not only be a measure to maintain the dignity and orderly functioning of the courts but may become necessary for the self-protection of the court and for preservation of the purity of court proceedings. Let us, for example, take the case where an advocate is shown to have accepted money in the name of a judge or on the pretext of influencing him; or where an advocate is found tampering with the court's record; or where an advocate is found actively

taking part in faking court orders (fake bail orders are not unknown in several High Courts!); or where an advocate has made it into a practice to browbeat and abuse judges and on that basis has earned the reputation to get a case transferred from an "inconvenient" court; or where an advocate is found to be in the habit of sending unfounded and unsubstantiated allegation petitions against judicial officers and judges to the superior courts. Unfortunately these examples are not from imagination. These things are happening more frequently than we care to acknowledge.

239. We may also add that these illustrations are not exhaustive but there may be other ways in which a malefactor's conduct and actions may pose a real and imminent threat to the purity of court proceedings, cardinal to any court's functioning, apart from constituting a substantive offence and contempt of court and professional misconduct. In such a situation the court does not only have the right but it also has the obligation cast upon it to protect itself and save the purity of its proceedings from being polluted in any way and to that end bar the malefactor from appearing before the courts for an appropriate period of time.

240. It is already explained in Ex. Capt. Harish Uppalthat a direction of this kind by the Court cannot be equated with punishment for professional misconduct. Further, the prohibition against appearance in courts does not affect the right of the lawyer concerned to carry on his legal practice in other ways as indicated in the decision. We respectfully submit that the decision in **Ex. Capt. Harish Uppal v. Union of India** places the issue in correct perspective and must be followed to answer the question at issue before us.

241. Lest we are misunderstood it needs to be made clear that the occasion to take recourse to the extreme step of debarring an advocate from appearing in court should arise very rarely and only as a measure of last resort in cases where the wrongdoer advocate does not at all appear to be genuinely contrite and remorseful for his act/conduct, but on the contrary shows a tendency to repeat or perpetuate the wrong act(s).

44. The aforesaid view/ratio is in conformity with the observations made above. The distinction between the power of the Court to regulate the right to appear and address arguments is different and distinct from the power of contempt.

Clause 8 of the Letters Patent Act

45. Learned counsel for the appellant had submitted that clause 8 of the Letters Patent Act applicable to Delhi confers a statutory right to a litigant to appear in person and for a co-suitor. It is further submitted that the aforesaid clause in the Letters Patent Act cannot be diluted and made otiose by applying the doctrine of inherent power/rights. Inherent power/rights of the courts cannot be exercised when there is a specific provision to the contrary. It is also submitted that a pro se litigant, who indulges in vexatious litigation can be punished with one of the punishments specified in Section 12 of the Contempt of Courts Act, 1971.

46. The aforesaid contention though attractive has to be rejected for several reasons. Clause 8 of the Letters Patent Act reads:

> "8. **Powers of High Court in making rules for the qualifications, etc., of Advocates, Vakils and Attorneys:**
>
> And We do hereby ordain that the High Court of Judicature at Lahore shall have power to make rules from time to time for the qualification and admission of proper persons to be Advocates, Vakils and Attorneys-at-law of the said High Court, and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakils or Attorneys-at-law ; and no person whatsoever but such Advocates, Vakils or Attorneys shall be allowed to act or to plead for, or on behalf of, any suitor in the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co-suitor."

47. The intention of incorporating and enacting the said Clause is apparent. The Letters Patent Act was enacted when the Lahore High Court was established. The Act itself stipulates that the Letters Patent was issued constituting the High Court of Judicature at Lahore. The clause was necessary and required as advocates, vakils and attorneys had to be enrolled and admitted for appearance before the High Court. Clause

8 has to be read along with clause 7, which reads:

> "7. **Powers of High Court in Admitting Advocates, Vakils and attorneys:**
>
> And We do hereby authorise and empower the High Court of Judicature at Lahore to approve, admit and enrol such and so many Advocates, Vakils and Attorneys as to the said High Court may seem meet ; and such Advocates, Vakils and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act for the said suitors, according as the said High Court may by its rules and directions determine, subject to such rules and directions."

48. Once advocates, vakils and attorneys were enrolled, then they were authorized, subject to the rules made from time to time, to appear, plead and act on behalf of the parties/litigants. The last part of clause 8 is a clarificatory in nature. It seeks to clarify and state that a litigant or a suitor is not prohibited from acting or pleading on his own behalf or on behalf of a co-suitor. This clarification was required to remove doubts whether or not a litigant in person can appear or every litigant must engage an advocate, vakil or an attorney registered and enrolled under Clause 7.

49. Moreover, the last part of Clause 8 of the Letters Patent merely permits and allows a suitor to appear and act on his own behalf and on behalf of a co-suitor. The said right in no way affects the inherent power of the court to ensure that the court proceedings are conducted in an orderly and proper manner and frivolous, repetitive or vexatious litigations are not brought to court and court's time is not wasted by a party, who engages in hilbert stubbornness and or acts in abstractive manner to prevent continuation and decision of the legal proceedings.

50. Clause 8 of the Letters Patent Act, therefore, merely means that a litigant in person is not barred and prohibited from appearing in person and does not in any manner conflict with the inherent power/rights of the Court.

51. Clause 8 of the Letters Patent Act is applicable only to High Courts and not to the district courts. As far as right to appear and audience for co-suitor under clause 8 is concerned, the same is contrary

to Section 32 of the Advocates Act, 1961. We need not examine whether Section 32 negates or overrides clause 8 of the Letters Patent Act, in view of the reasoning/ratio elucidated and explained. Once a restraint/ sanction order is passed against a self representing litigant, the necessary sequitor and effect thereof is that the order/permission granted to represent any person or a co-suitor stands withdrawn or cancelled. Section 32 of the Advocates Act states that a court can permit a person, who is not an Advocate, to appear before her or him in a particular case. Exercise discretion under the said Section has been settled by judicial pronouncements. [See **C. Venkatachalam versus Ajitkumar C. Shah and ors.** (2011) 9 SCC 707, **Harishankar Rastogi versus Girdhari Sharma and anr.** AIR 1978 SC 1019, **Ex- Capt. Harish Uppal versus Union of India and anr.** (2003) 2 SCC 45]. Reasoning given above concurs and is supported by the said pronouncements.

52. Right to appear and address the Court under Section 32 of the Advocates Acts can be withdrawn subsequently. This right, even if granted, does not mean that it is permanent. Order granting permission can be always recalled for valid and just grounds. It is not absolute and forever.

Sanction/injunction to institute legal proceedings

53. Section 41(b) of the Specific Relief Act reads as under:-

> **"41. Injunction when refused.** - An injunction cannot be granted-
>
> xxx
>
> (b) to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought;"

54. The aforesaid section recognize that injunction may be granted to restrain a person from instituting or prosecuting proceedings in a Court subordinate to the court granting injunction. The principle enshrined is that a superior Court can regulate the proceedings in a subordinate Court. This is implicit in the language of the section. It follows that a person can be restrained from instituting or prosecuting proceedings in a subordinate Court, but no such injunction can be granted to a Court of co-ordinate jurisdiction or superior jurisdiction under the said sections. In **Cotton Corporation of India Vs. United Industrial Bank Ltd.**

(1983) 4 SCC 625, after referring to the aforesaid provision it has been held as under:-

"8. It is, therefore, necessary to unravel the underlying intendment of the provision contained in Section 41(6). It must at once be conceded that Section 41 deals with perpetual injunction and it may as well be conceded that it has nothing to do with interim or temporary injunction which as provided by Section 37 are dealt with by the Code of Civil Procedure. To begin with, it can be said without fear of contradiction that anyone having a right that is a legally protected interest complains of its infringement and seeks relief through court must have an unhindered, uninterrupted access to law courts. The expression 'court' here is used in its widest amplitude comprehending every forum where relief can be obtained in accordance with law. Access to justice must not be hampered even at the hands of judiciary. Power to grant injunction vests in the court unless the legislature confers specifically such power on some other forum. Now access to court in search of justice according to law is the right of a person who complains of infringement of his legally protected interest and a fortiori therefore, no other court can by its action impede access to justice. This principle is deducible from the Constitution which seeks to set up a society governed by ride of law. As a corollary, it must yield to another principle that the superior court can injunct a person by restraining him from instituting or prosecuting a proceeding before a subordinate court. Save this specific carving out of the area where access to justice may be impeded by an injunction of the court, the legislature desired that the courts ordinarily should not impede access to justice through court. This appears to us to be the equitable principle underlying Section 41(b). Accordingly, it must receive such interpretation as would advance the intendment, and thwart the mischief it was enacted to suppress, and to keep the path of access to justice through court unobstructed.

9. Viewed from a slightly different angle, it would appear that the legal system in our country envisages obtaining of redressal of wrong or relief against unjust denial thereof by approaching the court set up for the purpose and invested with power both substantive and procedural to do justice that is to grant relief

against invasion or violation of legally protected interest which are jurisprudentially called rights. If a person complaining of invasion or violation of his rights is injuncted from approaching the court set up to grant relief by an action brought by the opposite side against whom he has a claim and which he wanted to enforce through court, he would have first to defend the action establishing that he has a just claim and he cannot be restrained from approaching the court to obtain relief. A person having a legal right and complains of its violation or infringement, can approach the court and seek relief. When such person is injuncted from approaching the court, he has to vindicate the right and then when injunction is vacated, he has to approach the court for relief. In other words, he would have to go through the gamut over again: when defending against a claim of injunction the person vindicates the claim and right to enforce the same. If successful he does not get relief but a door to court which was bolted in his face is opened. Why should he be exposed to multiplicity of proceedings? In order to avoid such a situation the legislature enacted Section 41(b) and statutorily provided that an injunction cannot be granted to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought. Ordinarily a preventive relief by way of prohibitory injunction cannot be granted by a court with a view to restraining any person from instituting or prosecuting any proceeding and this is subject to one exception enacted in larger public interest, namely, a superior court can injunct a person from instituting or prosecuting an action in a subordinate court with a view to regulating the proceeding before the subordinate courts. At any rate the court is precluded by a statutory provision from granting an injunction restraining a person from instituting or prosecuting a proceeding in a Court of coordinate jurisdiction or superior jurisdiction. There is an unresolved controversy whether a court can grant an injunction against a person from instituting or prosecuting a proceeding before itself but that is not relevant in the present circumstances and we do not propose to enlarge the area of controversy."

55. The controversy, regarding co-ordinate courts that the Supreme Court did not deal with, has been examined by the single Judge of the

Kerala High Court in **Raghavan and Anr. versus Sankaran Ezhuthassan** AIR 1993 Ker 178. This was subsequently accepted and relied upon by a Divisional Bench of the Kerala High Court in **Santha versus Vasu, Muthalamada and ors.** AIR 1996 Ker 188. The operative part of **Sankaran Ezhuthassan** (supra) reads as under:

> "3. Clause (b) of Section 41 of the Act lays down that an injunction cannot be granted to restrain any person from instituting or prosecuting any proceeding in a court "not subordinate" to that from which the injunction is sought. There must be a proceeding sought to be prevented and such proceedings must have been instituted or is being prosecuted in a court which is not subordinate to the court where the subsequent proceedings are instituted. "Not subordinate" are significant words. Courts are of (a) subordinate jurisdiction, (b) superior jurisdiction or (c) co-ordinate jurisdiction. The court of the subordinate judge, Thrissur, is not superior to the court of subordinate judge, Thrisur. It is the same court. It is also not subordinate to the same court. Co-ordinate means equal, of the same rank, or of importance. Since two equals cannot be subordinate to each other, it follows that there is no subordination between courts of co-ordinate jurisdiction. "Coordinate" necessarily means "not subordinate." The question whether Court A is subordinate, arises only in the context of another Court B in relation to which its status is to be decided. It therefore follows that the words "not subordinate" or "co-ordinate" have no application where there is only one court under consideration. Therefore in a case where both the proceedings are instituted in the same court the question even of "coordinate" status does not arise, for, there is only one court under consideration. It is therefore illogical even to consider whether the same court is subordinate to itself.
>
> 4. The question boils down to this. Can a court grant an injunction to restrain a person from instituting or prosecuting proceedings before itself. The sub court of Trissur is certainly not subordinate to itself because it is "itself and not its subordinate. This is very simple. But the controversy is created by the words "not subordinate" used in Section 41(b) of the Act. The question not free from doubt, has not yet been judicially resolved. That is why the Supreme Court in **Cotton Corporation of India Limited v. United Industrial Bank Limited:** AIR 1983 SC 1272 characterised this controversy as "an unresolved controversy." The Calcutta High Court in **Ram SadanBiswas v. Mathura Mohan Hazra,** AIR 1925 Cal 233 and the Patna High Court in **RadhaMadhabJiu Thakur v. Rajendra Prasad Bose:** AIR 1933 Pat 250 had no hesitation in holding that the prohibition under Clause (b) of Section 41 of the Specific Relief Act does not apply to the grant of injunction to restrain a party from prosecuting a proceeding before itself.
>
> 5. The rationale of these decisions is two fold. Firstly every court has inherent jurisdiction to protect itself from abuse of its own process and the need to prevent it by an injunction. Secondly, the court from which the injunction is asked for can regulate the proceedings before itself by an appropriate injunction. It is for these reasons that the prohibition enacted by Clause (b) of Section 41 cannot be applied where a court grants injunction in respect of the proceedings before itself. Suppose a court makes an order or decree which is subsequently discovered to be the result of fraud or abuse and the party affected adversely seeks an injunction to restrain the opposite party from taking advantage of the order obtained by fraud or abuse of the court's process. If Section 41(b) were applied to such cases the results would be disastrous. This is the rationale behind the exclusion of the same court from the scope of the application of Clause (b) of Section 41 of the Act."

56. We respectfully follow and are in agreement with the views expressed in the said judgments.

57. Injunction/sanction order once issued in exercise of inherent powers should be respected and applied by the subordinate or the same Court i.e. different Benches of the same Court. Even under Section 317 of the Code of Criminal Procedure, 1973, if an accused is represented by a pleader, his personal presence can be dispensed with under exceptional circumstances, if required and necessary. If an accused is not represented by a counsel, then procedure under Section 317(2) has been specifically carved out.

Bias

58. The appellant has made allegation of bias. This contention has to be rejected as a wrong order or an order, which cannot be sustained or even failure to abide by principles of natural justices as *audi alteram partem,* does not show or establish bias. We may note that the word "bias" has not been used in the grounds of appeal, but the word "prejudice" has been used. It is alleged that in the present case there was pre judgment without hearing the appellant. The word "bias" can have various connotations and meanings and on this aspect we would like to follow and apply the decision of the Supreme Court in **G.N. Nayak Vs. Goa University**2002 (2) SCC 712 in which it has been held as follows:-

> "32. This brings us to the issue of bias.
>
> 33. Bias may be generally defined as partiality or preference. It is true that any person or authority required to act in a judicial or quasi-judicial matter must act impartially. "If however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the Judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions and the processes of education, formal and informal, create attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudices."
>
> 34. It is not every kind of bias which in law is taken to vitiate an act. It must be a prejudice which is not founded on reason, and actuated by self-interest - whether pecuniary or personal. Because of this element of personal interest, bias is also seen as an extension of the principles of naturals justice that no man should be a judge in his own cause. Being a state of mind, a bias is sometimes impossible to determine. Therefore, the courts have evolved the principle that it is sufficient for a litigant to successfully impugn an action by establishing a reasonable possibility of bias or proving circumstances from which the operation of influences affecting a fair assessment of the merits of the case can be inferred.
>
> 35. *In A.K. Kraipak* v. *Union of India* the Selection Committee had been constituted under Regulation 3 of the Indian Forest

> Service (Initial Recruitment) Regulations, 1966 for the purpose of making selections to any State cadre of the All-India Forest Service. The Chief Conservator of Forests was selected. Setting aside the selection, this Court held that the Chief Conservator of Forests being himself one of the candidates seeking to be selected to the All-India Forest Service should not have been included as a member of the Selection Board because of the possibility of bias.
>
> 36. As we have noted, every preference does not vitiate an action. If it is rational and unaccompanied by considerations of personal interest, pecuniary or otherwise, it would not vitiate a decision. For example, if a senior officer expresses appreciation of the work of a junior in the confidential report, it would not amount to bias nor would it preclude that senior officer from being part of the Departmental Promotion Committee to consider such junior officer along with others for promotion."

(See **State of Punjab Vs. V.K. Khanna (2001)** 2 SCC 330 wherein distinction has been drawn between intention and motive. Also see **Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant,** (2001) 1 SCC 182.)

59. As far as principles of natural justice are concerned, the same cannot be put in a strait jacket. In certain situation, they have been read into under Articles 14 of the Constitution. In **Bar Council of India Vs. High Court of Kerala (2004)** 6 SCC 311 it has been observed:-

> 45. Principles of natural justice are required to be observed by a court or tribunal before a decision is rendered involving civil consequences. They may only in certain situations be read into Article 14 of the Constitution of India when an order is made in violation of the rules of natural justice. Principles of natural justice, however, cannot be stretched too far. Their application may be subject to the provisions of a statute or statutory rule.
>
> 46. Before a contemner is punished for contempt, the court is bound to give an opportunity of hearing to him. Even such an opportunity of hearing is necessary in a proceeding under Section 345 of the Code of Criminal Procedure. But if a law which is otherwise valid provides for the consequences of such a finding, the same by itself would not be violative of Article 14 of the

Constitution of India inasmuch as only because another opportunity of hearing to a person, where a penalty is provided for as a logical consequence thereof, has been provided for. Even under the penal laws some offences carry minimum sentence. The gravity of such offences, thus, is recognised by the legislature. The courts do not have any role to play in such a matter.

47. Rule 11 framed by the Kerala High Court is legislative in character. As validity of the said rule has been upheld, it cannot be said that the same by itself, having not provided for a further opportunity of hearing the contemner, would attract the wrath of Article 14 of the Constitution of India.

48. In **Mohinder Singh Gill v. Chief Election Commr.** this Court observed: (SCC pp. 432-33, para 43)

"43. Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes it, applies when people are affected by acts of authority. It is the hone of healthy government, recognised from earliest times and not a mystic testament of judge-made law. Indeed, from the legendary days of Adam - and of Kautilya's Arthasastra - the rule of law has had this stamp of natural justice which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case-law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system."

49. In **N.K. Prasada v. Govt.** of India this Court observed: (SCC p. 308, paras 24-25)

"24. The principles of natural justice, it is well settled, cannot be put into a straitjacket formula. Its application will depend upon the facts and circumstances of each case. It is also well settled that if a party after having proper notice chose not to appear, he at a later stage cannot be permitted to say that he had not been given a fair opportunity of hearing. The question had been

considered by a Bench of this Court in **Sohan Lal Gupta v. Asha Devi Gupta** of which two of us (V.N. Khare, C.J. and Sinha, J.) are parties wherein upon noticing a large number of decisions it was held: (SCC p. 506, para 29)

'29. The principles of natural justice, it is trite, cannot be put in a straitjacket formula. In a given case the party should not only be required to show that he did not have a proper notice resulting in violation of principles of natural justice but also to show that he was seriously prejudiced thereby'.

25. The principles of natural justice, it is well settled, must not be stretched too far."

(See also **Mardia Chemicals Ltd. v. Union of India** and **Canara Bank v. Debasis Das**.)

50. In **Union of India v. Tulsiram Patel** whereupon reliance has been placed by Mr Reddy, this Court held: (SCC p. 477, para 97) "97. Though the two rules of natural justice, namely, nemo judex in causa sua and audi alteram partem, have now a definite meaning and connotation in law and their content and implications are well understood and firmly established, they are nonetheless not statutory rules. Each of these rules yields to and changes with the exigencies of different situations. They do not apply in the same manner to situations which are not alike. These rules are not cast in a rigid mould nor can they be put in a legal straitjacket. They are not immutable but flexible. These rules can be adapted and modified by statutes and statutory rules and also by the constitution of the Tribunal which has to decide a particular matter and the rules by which such Tribunal is governed."

51. The ratio of the said decisions, therefore, does not support the proposition canvassed by Mr Reddy.

52. Furthermore, the contemner could also get an opportunity of hearing while purging his conduct. Rule 11 of the Rules, therefore, is not also ultra vires Article 14 of the Constitution."

Aforesaid has been examined and has to be read along with our observations/ findings recorded below under the heading "the First Direction, Issue of Notice/ Hearing and Procedure".

60. We do not agree with the appellant that he was/is entitled to ignore the impugned order as a nullity and void abinito and in spite of the direction was/is entitled to appear or argue in person. The appellant cannot be a self adjudicator and claim that he is entitled to ignore the order. Even if an order is bad or wrong, it must be challenged and a prayer for stay/interim order can be made. In a hierarchical system, an order can be challenged and set aside by the appellate forum. Self opinion or understanding cannot and should not become a basis for ignoring an order or questioning the same in collateral or other proceedings.

61. There is some controversy and dispute whether the learned single Judge had rejected the prayer for dasti copy of the impugned order. It appears that no such request was made when the order was dictated, but was made subsequently. The contention of the learned counsel for the appellant is that the request was rejected. However, the impugned order itself records that a copy of the order be given dasti to the appellant. In such cases, the order should be given to the party, his counsel or his family member. It should be also given before the order is implemented as the party concerned has right to file and challenge the order in appeal and ask for stay. It is stated that the order was made available to the appellant only at 10 p.m. at night. We agree with the appellant that the order should have been given immediately.

62. The first direction mentioned above given in the impugned order has been set aside. On the basis of the said direction, it was submitted that bias is proved. As Judges we do face dilemmas while dealing with self represented litigants and sometimes we feel exacerbated with the fact that some of them may be suffering from some mental ailment or disorder. Often we feel deeply uncertain how to deal with the said litigants. Sometimes we feel motivated to help them and the desire can be strong. Sometimes we also feel uncomfortable while dealing with what we perceive as individuals who require attention. These are difficult issues and errors and mistakes can be made, though we should avoid them especially when it involves question of liberty and freedom. Mental sickness sometimes can be confused with personality traits, such as an obsession with litigation or a blind conviction that one is always right. Carl Jung had coined the terms "introversion" and "extroversion". However, the trait theory is now accepted. The personality traits differ with degrees and with situation/conditions.

63. In **State of West Bengal Vs Shivananda Pathak,** (1998) 5 SCC 513 it has been observed as under:-

> "27. Judges, unfortunately, are not infallible. As human beings, they can commit mistakes even in the best of their judgments reflective of their hard labour, impartial things and objective assessment of the problem put before them. In the matter of interpretation of statutory provisions or while assessing the evidence in a particular case or deciding questions of law or facts, mistakes may be committed bona fide which are corrected at the appellate stage. This explains the philosophy behind the hierarchy of courts. Such a mistake can be committed even by a judge of the High Court which are corrected in the letters patent appeal, if available."

OTHER ALLEGATIONS MADE BY THE RESPONDENT

64. The respondent i.e. the Bakshi Group has made several allegations and has submitted that Deepak Khosla has been indulging in vexatious litigation or as a vexatious litigant, he is trying to delay the adjudication of the core dispute. Their allegations are as under:-

(i) Khosla family has not made any investment in Montreaux Resorts Pvt. Ltd. They have received Rs. 1.5 crores from the Bakshi Group for sale of majority stake. Vikram Bakshi has paid substantial amounts to land owners for sale of land in the name of Montreaux Resorts Pvt. Ltd. and for its business.

(ii) Deepak Khosla is facing three contempt proceedings. Crl. Cont. No.2/2009 initiated suo motu by Gita Mittal J. by order dated 28th January, 2009; C.C.P. (O) 15/2010 initiated by Valmiki Mehta, J. vide order dated 28th September, 2010 and 3rd February, 2010 in AA No.217/2009 and OMP No.660/2010; and Criminal Cont. Pet. No.5/2010.

(iii) Earlier contempt proceedings were initiated against Deepak Khosla by the Chairman of the Company Law Board in Criminal Reference No.7/2010. These proceedings were subsequently dropped after Deepak Khosla had tendered unconditional apology.

(iv) Deepak Khosla had filed CA No.1290/2009 in Company Appeal No.6/2008 seeking permission to audio/video record the proceedings, which was disallowed. Deepak Khosla in the said application had referred to the decision of the Gujarat High Court in the case of **Ajit D. Padiwal vs. State of Gujarat,** 1996 Lab.I.C. 389, that audio/video recording without permission of Court constitutes contempt.

(v) Deepak Khosla has made derogatory remarks against Judges, who have decided or passed orders against him/ khosla group. An adverse order invariably results in allegation of bias or loss of confidence in the Judge.

(vi) Deepak Khosla variegates and punctuates his arguments with derogatory references and remarks on the counsel who appear against him.

(vii) Several Courts have observed, advised and even warned Deepak Khosla about the abrasive and curt manner of addressing arguments, filing of repetitive petitions/ applications, derogatory remarks etc. Reference is made to the orders dated 29th January, 2010 and 3rd February, 2010 passed in Arbitration Petition No. 217/2009, OMP No.660/2009 and order dated 17.1.2011 in Cont. Case (C) No. 190/2010 **Deepak Khosla Vs. Delhi High Court & Anr.** It is stated that costs imposed by the Court in several orders have not been paid. Thus repeated warnings have gone unheeded.

(viii) Our attention is also drawn to the averments/language used in the pleadings made by Deepak Khosla against the judges, opposing advocates and the Bakshi Group. Voluminous and copious pleadings with sermons, derogatory and denunciatory language repeatedly used by Deepak Khosla in the pleadings have been highlighted. Moving applications for dismissal or expunging the remarks/ comments would be futile and cumbersome and lead to another unending round of litigation on an ancillary aspect. Whenever this was pointed out and objected to in the form of an application/orally and questioned, Deepak Khosla takes umbrage, terming the allegations as scandalous and

attributes motives to the advocates.

66. The appellant has not addressed arguments on the merits of the allegations, though the learned counsel for the appellant was asked to respond. In the written submissions, which were filed on 28th March, 2012, when arguments had virtually concluded, it was stated as under:-

> "b. Further, that before the Court, the matter is a limited one, an appeal to set aside the impugned order
>
> i. The Appellant therefore, is not dealing with the merits of the case, they are complex and require specific addressing and are beyond the scope of this matter
>
> ii. The Appellant seeks that that portion of the matter, should it be required to be taken up, be referred to the Bench of the Chief Justice of this Court, in order that it be dealt with following due procedure"

67. Ms. Indira Unninayar, Advocate appearing for the appellant clearly stated that she has instructions not to state or urge anything on merits. The instructions obviously were given by the appellant in person. In the written submissions dated 31st March, 2012, after the arguments were concluded on 28th March, 2012, it is stated as under:-

> "**Issue 13** - Whether this court, in its appellate jurisdiction, can entertain allegations by the opposite parties of vexatious litigation, in this appeal itself?
>
> a) It has been held that contempt of courts is a proceeding between the court and contemnor. It is submitted that, during the course of these proceedings, should other parties/parties bring before the court other aspects dealing with merits of the case, those would require to be looked into separately. Also, the scope of this matter is limited to declaring the impugned order void. Therefore, it is urged that the aspect of the matter dealing with merits, multiplicity of litigation, closure to various matters, etc. would require it to be referred to another bench, say the Bench of the Hon'ble Chief Justice to adjudicate upon it, and evolve solutions. It is urged that that aspect is beyond the scope of the present appeal before this court.
>
> b) It is also urged that the tape recordings, heard in chambers,

not be considered, as the appellant has not had a chance to have a detailed hearing of it, although his counsel has heard it in chambers along with the opposite side, the amicus, and this Bench."

68. The appellant cannot choose and decide what part of the issue/ matter in appeal should be heard by this Bench. The appellant himself in the index had stated that this matter should be listed before the Division Bench-VIII. Thereafter, on 6th January, 2012, a detailed order was passed recording statement made by Mr. Prashant Bhushan, Advocate on instructions that this Bench could hear the matter. The bifurcation of subject matter/issues cannot be done at the wish or on a statement of the appellant. We may also note that the appellant on selective basis had answered the factual merits. With regard to the audio recording it is stated that the appellant has a constitutional right to audio record the proceedings in the Court and this does not require permission. With regard to the other allegations, the appellant has remained quiet. This aspect has been kept in mind while passing the order giving final directions. We have avoided references, not quoted specific instances/pleadings and not given our comments on the allegations made by the respondents in view of the order of remit we have passed. Observations/comments on merits can and may cause prejudice.

69. The contention that the appellant in person has not heard the audio files/recordings relating to the court proceedings is specious and should be rejected. Counsel for the appellant had heard the audio recording of the proceedings. She is aware of the contents. Wife and father of the appellant were also present (in part) when audio recording were heard. It is impossible to conceive and believe that the appellant does not know the contents of the said audio files. The appellant had asked for transcript of the audio files, but this has no relevance on the question of formation of believe whether or not a prima facie case exists or not.

The First Direction, Issue of Notice/ Hearing and Procedure

70. An injunction or sanction of this nature, as noticed above, has serious consequences. In the present case, the Court i.e. the learned single Judge suo motu has taken cognizance. In these circumstances, we feel that it would have been appropriate and proper to first issue notice specifically pointing out instances and allegations against the person concerned and why and for what reasons, a prima facie and tentative

opinion has been formed. The person concerned should respond in writing. Oral hearing to the litigant in person, in such circumstances, is beset with difficulties. Normally, therefore, written submissions rather than oral hearing may be mandated. Of course, representation through an advocate is always permissible. Court may permit oral hearing through a friend/ third person in terms of Section 32 of the Advocates Act. In some cases, the Court may also give oral hearing to the litigant in person. However, the same for obvious reasons is not and cannot be mandatory.

71. During the course of proceedings before us, the Bakshi Group has filed details of litigations/proceedings which have been initiated by the Khosla Group from 2008 onwards in this Court. The number is 67. These are original or substantive proceedings. This number does not include applications for interim directions/orders and other interlocutory prayers/directions. The Khosla Group has initiated as many as 8 proceedings against the advocates appearing for Bakshi Group primarily on the ground that they have wrongly claimed or stated that Vikram Bakshi was/is Director of the company or/ and they can appear on behalf of the said company on the basis of authorization given by Vikram Bakshi/the Bakshi Group. The Khosla Group has filed as many as 16 contempt cases, some of which have been disposed of. 14 applications under Section 340 Cr.P.C. have been filed by Khosla Group against Bakshi Group or others. Most of the applications are based on the cause of action that Vikram Bakshi was/is wrongly claiming himself to be a director; the minutes of the AGM held on 30th September, 2006 are forged etc. The details of these 67 cases is submitted by the Bakshi Group during the course of hearing is not being reproduced this order for the sake of brevity.

72. As noticed, there are number of proceedings/cases pending both in the High Court and in District Courts. Issue of this nature and whether or not Deepak Khosla is entitled to appear as a self represented litigant or for others, if taken up for consideration in different forums/ courts, would lead to and cause it's own problems and difficulties. Apart from the possibility of conflicting orders, there would be delay, confusion and judicial time will be spent in several courts dealing with an identical/ similar question/issue. It is, therefore, advisable that this aspect be considered and decided before one Bench in the High Court rather than in different benches/courts. Further, this question should be decided first and immediately before Deepak Khosla can be permitted to appear and is given an audience. Keeping these aspects in mind, we feel that it will

be appropriate that the entire aspect and issue is decided by the learned single Judge as expeditiously as possible and till the decision is taken, there should be stay of further proceedings in different matters before the High Court and in the District Courts. This direction will not apply and prevent Deepak Khosla for filing any writ petition under Article 226 or moving an application for bail/anticipatory bail. This will also not apply to any proceedings pending before the Supreme Court or Courts outside Delhi.

73. In view of the aforesaid, we hold as under and issue the following directions:-

(i) The High Court has inherent power distinct and separate from power of contempt to injunct/sanction vexatious or frivolous litigation, vexatious/habitual litigants, contumelious litigant and issue appropriate directions, including prohibiting the said litigant from appearing and arguing matters in person and for others and from initiating or filing proceedings, except with permission of the Court.

(ii) The two directions given in the impugned order dated 4th January, 2012 are set aside.

(iii) Order dated 4th January, 2012 will be treated as a show cause notice. The learned single Judge will examine other allegations, which have been made by the respondents and issue a supplementary show cause notice, if deemed appropriate and necessary.

(iv) The appellant will be entitled to respond and file reply to the show cause notice. He will not be orally heard or given audience. He can, however, appoint an advocate to appear for him and make oral submissions.

(v) Till the decision, there will be stay of the pending proceedings or initiation of new proceedings before the High Court and in the District Courts. This direction will not apply and prevent Deepak Khosla from filing writ petitions under Article 226 and moving any application for bail/anticipatory bail, if required and necessary. Deepak Khosla, however, will not be permitted and allowed to appear for any third party till the decision. This will not apply to any proceedings before the Supreme Court or in any courts outside Delhi. In case immediate orders are required, the parties (including the respondents) can approach the learned single Judge for appropriate directions or permission to continue with the pending proceedings or initiate new proceedings.

(vi) An order disposing of the show cause notice will be passed expeditiously as soon as possible. In such matters, it is apparently desirable that the proceeding should be concluded as soon as possible as it causes prejudice to the parties in litigation.

The appeal and all pending applications are accordingly disposed of. In the facts of the case, there will be no order as to costs.

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KRISHAN ….PETITIONER

VERSUS

R.K. VIRMANI, AIR CUSTOMS OFFICER ….RESPONDENT

(MUKTA GUPTA, J.)

CRL. REV. P. NO. : 516/2008 DATE OF DECISION: 24.04.2012

Customs Act, 1962—Section 108—Indian Evidence Act, 1872—Section 25 Confession made before customs officer—Held to be confession made to person other than a police officer and thus not hit by Section 25 Evidence Act—Further held, at pre charge stage, the discretion to produce a witness lies with the prosecution and not court or the accused as the court has to satisfy itself about existence of prima facie case, as such statement of co-accused is admissible without examining the co-accused as a witness if the

person before whom the confession is made is examined under Section 244 Cr.P.C.—However, confession of co-accused is admissible only where two accused are tried jointly—Since in the present case the co-accused was not being tried jointly with the petitioner and there was no other evidence, charge could not be framed against the petitioner for offence under Section 135A of Customs Act.

The contention of learned counsel for the Petitioner at this stage is that the statement was not recorded under Section 244 Cr. P. C at the pre-trial stage and hence, inadmissible as evidence for framing charges. The reliability of the statement will have to be examined during trial. At this stage, it is sufficient to hold that the statement is admissible without examining the co-accused as a witness if the person before whom the confession is made is examined under Section 244 Cr.PC. As can be observed from the conjoint reading of the judgments in **Percy Rustomji Basta** (supra), **Ramesh Chandra v. the State of West Bengal** (supra), **Naresh J. Shukawani (Supra**.) and **Paramjit Singh (Supra**.), a statement recorded by Customs officer under section 108 of the Customs Act, 1962 is admissible in evidence and not hit by provisions of Article 20(3) of the Constitution or Section 25 of the Evidence Act. Further, such statement is presumed to be truthful as it is recorded under a proceeding which is judicial in nature and if upon such statement a prima facie case can be made out for framing the charge, by virtue of **R.S. Nayak** (Supra) and **Mathura Das** (supra), the Magistrate is well within his powers to order framing of charges.

(Para 17)

However, the moot question is whether the statement of Virender Singh Batra recorded under Section 108 Customs Act duly proved by PW1 Subhash Narayan is admissible for the further reason that he is not jointly tried with the Petitioner. I find force in the contention of learned counsel for the Petitioner. A confession of the co-accused is admissible only under Section 30 of the Evidence Act. One

of the essential requirements of the said provision is that the two accused should be tried jointly. Since the confession of the co-accused is not admissible as he is not being jointly tried with the Petitioner and besides this piece of evidence there is no other evidence, no charge can be framed against the Petitioner for offence under Section 135A of the Customs Act. **(Para 19)**

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Naveen Malhotra, Mr. Nitendra, Kumar, Advocates.

FOR THE RESPONDENT : Mr. Satish Aggrawala, Advocate.

CASES REFERRED TO:

1. *Mohtesham Mohd. Ismail* vs. *Spl. Director, Enforcement Directorate & Anr.* 2007 (11) SCALE 741.
2. *Anand Kumar* vs. *Naresh Arora,* 2006 (3) JCC 1491.
3. *Mathura Dass & Ors.* vs. *State* 2003(2) JCC 639.
4. *Paramjit Singh* vs. *Commissioner of Customs & Others* 2002 (2) JCC 916.
5. *Ripen Kumar* vs. *Department of Customs,* 2001 Cr.LJ 1288.
6. *The Assistant Collector of Central Excise, Rajamundry* vs. *Duncan Agro Industries Ltd.* 2000 CriLJ 4035.
7. *Naresh J. Shukawani* vs. *Union of India* 1996 (83) ELT 258 (SC).
8. *Poolpandi etc.etc.* vs. *Superintendent, Central Excise and others etc.etc.,* 1992 CriLJ 2761).
9. *R.S. Nayak* vs. *A.R. Antulay,* AIR 1986 SC 2045.
10. *Percy Rustomji Basta* vs. *State of Maharashtra,* 1971 (1) SCC 847.
11. *Ramesh Chandra Mehta* vs. *the State of West Bengal,* AIR 1970 SC 940.

RESULT: Petition disposed of.

MUKTA GUPTA, J.

1. By this petition the Petitioner seeks setting aside of order dated 20th June, 2008 whereby the Learned ACMM, New-Delhi ordered framing of charges against the Petitioner under Section 135 A of the Customs Act, 1962 and the consequential order dated 18th August, 2008 framing charge in case No. 507/1 titled as **R.K. Virmani Vs. Shri. Krishan**.

2. Learned counsel for the Petitioner contends that the statement of the Petitioner recorded under Section 108 of the Customs Act is exculpatory in nature and the statement of Virender Singh Batra, recorded under Section 108 of the Customs Act, 1962 cannot be relied upon for the purpose of framing charges as he was not examined as a witness in terms of Section 244 Cr.P.C in the complaint case. Reliance is placed on **Mohtesham Mohd. Ismail Vs. Spl. Director, Enforcement Directorate & Anr.** 2007 (11) SCALE 741. Relying on **Ripen Kumar Vs. Department of Customs,** 2001 Cr.LJ 1288 and **Anand Kumar Vs. Naresh Arora,** 2006 (3) JCC 1491 it is further contended that the testimony of Subhash Narain (PW1) recorded during the pre-trial stage cannot be relied upon as his testimony is not complete. Further since Virender Singh Batra is not being tried jointly, his statement is not admissible under Section 30 of the Evidence Act.

3. Learned Counsel for the Respondent contends that only a prima facie case needs to be made out against the Petitioner at the stage of framing of charge. He further contends that the statement of Virender Singh Batra recorded under Section 108 of the Customs Act, 1962 can be read as evidence against the Petitioner for prima facie making out a case against him and thus, there is sufficient evidence at this stage for framing charge against the Petitioner.

4. I have heard the learned counsels for the parties. Briefly the facts giving rise to the present petition are that on 15th October, 1992, on the basis of a secret information, one Virender Singh Batra was apprehended by the Respondent, R.K. Virmani while he was in flight no. BA 035 on seat no.33G. He was found in possession of foreign currency equivalent to Rs.18,01,236.35, which he had not declared before the customs officials. His statement was recorded under Section 108 Customs Act, 1962 by one Shri Subhash Narain wherein, he admitted the recovery and

further stated that he was helped in carrying this foreign currency out of India by Shri Krishan, the Petitioner herein, who was working as Aero Bridge Operator at IGI Airport for a consideration of Rs. 5000/-. Statement of the Petitioner was also recorded under Section 108 of the Customs Act, 1962 wherein he denied delivery of the said currency to Virender Singh Batra. Thereafter, on 5th November, 1993, a complaint was filed by the Respondent before the Ld. ACMM, New-Delhi against the Petitioner for offences punishable under Sections 135 (1) (a) and 135 A Customs Act, 1962. In the said complaint, statements of two witnesses namely PW1 Subhash Narain and PW2 R.K. Virmani were recorded during pre-charge evidence under Section 244 CrPC. Subsequently, on 20th June, 2008 the Learned ACMM, New-Delhi ordered the framing of charge under Section 135 A Customs Act, 1962 and as a consequence of which, charges against the Petitioner under Section 135 A Customs Act, 1962 was framed vide order dated 18th August, 2008.

5. Before dealing with the first contention of the Petitioner that the statement of Virender Singh Batra, recorded under Section 108 Customs Act, cannot be looked at for the purpose of framing charges as he was not examined under Section 244 Cr.P.C., it would be necessary to reproduce Section 108 of the Customs Act:

> "SECTION 108. Power to summon persons to give evidence and produce documents. – (1) Any Gazetted Officer of customs shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making under this Act.
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> (2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.
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> (3) All persons so summoned shall be bound to attend either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required :

Provided that the exemption under section 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section.

(4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code, 1860 (45 of 1860).

6. From the perusal of the section, it is evident that the inquiry under Section 108 Customs Act is deemed to be a judicial proceeding by virtue of sub-section 4 and the person who is summoned under this section is bound to appear and state the truth while giving evidence. If he does not do so he makes himself liable for prosecution under Sections 193 and 228 IPC. Their Lordships in **Percy Rustomji Basta v. State of Maharashtra,** 1971 (1) SCC 847 held:

"22. We are not inclined to accept the contention of Mr Chari that in the circumstances mentioned above any threat has proceeded from a person in authority to the appellant, in consequence of which the statement Ex. T was given. Section 108 of the Act gives power to a Customs Officer of a gazetted rank to summon any person to give evidence in any inquiry in connection with the smuggling of any goods. The inquiry made under this section is by virtue of sub-section (4) deemed to be judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code. A person summoned under Section 108 of the Act is bound to appear and state the truth when giving the evidence. If he does not answer he would render himself liable to be prosecuted under Section 228 IPC. If, on the other hand, he answers and gives false evidence, he would be liable to be prosecuted under Section 193 IPC for giving false evidence in a judicial proceeding. In short, a person summoned under Section 108 of the Act is told by the statute itself that under threat of criminal prosecution he is bound to speak what he knows and state it truthfully. But it must he noted that a compulsion to speak the truth, even though it may amount to a threat, emanates in this case note from the officer who recorded the statement, but from the provisions of the statute itself. What is necessary to constitute a threat under Section 24 of the Evidence Act is that it must emanate from the person in authority.

In the case before us there was no such threat emanating from PW 5, who recorded the statement of PW 19, who was guiding the proceedings. On the contrary the officers recording the statement were only doing their duty in bringing to the notice of the appellant the provisions of the statute. Even if PW 5 had not drawn the attention of the appellant to the fact that the inquiry conducted by him is deemed to be a judicial proceeding, to which Section 193 IPC applies, the appellant was bound to speak the truth when summoned under Section 108 of the Act with the added risk of being prosecuted, if he gave false evidence."

7. In **Ramesh Chandra Mehta v. the State of West Bengal,** AIR 1970 SC 940, the Constitution Bench while examining the admissibility of a statement recorded under Section 171A of the Sea Customs Act, 1878 (now repealed) corresponding to Section 108 of the Customs Act, 1962 held:

"24. In certain matters the Customs Act of 1962 differs from the Sea Customs Act of 1878. For instance, under the Sea Customs Act search of any place could not be made by a Customs Officer of his own accord: he had to apply for and obtained a search warrant from a Magistrate. Under Section 105 of the Customs Act, 1962, it is open to the Assistant Collector of Customs himself to issue a search warrant. A proper officer is also entitled under that Act to stop and search conveyances: he is entitled to release a person on bail, and for that purpose has the same powers and is subject to the same provisions as the officer in charge of a police station is. But these additional powers with which the Customs Officer is invested under the Act of 1962 do not, in our judgment, make him a police officer within the meaning of Section 25 of the Evidence Act. He is, it is true, invested with the powers of an officer in charge of a police station for the purpose of releasing any person on bail or otherwise. The expression "or otherwise" does not confer upon him the power to lodge a report before a Magistrate under Section 173 of the Code of Criminal Procedure. Power to grant bail, power to collect evidence, and power to search premises or conveyances without recourse to a Magistrate, do not make him an officer in charge of a police station. Proceedings taken by him are for the purpose of holding an enquiry into suspected

cases of smuggling. His orders are appealable and are subject also to the revisional jurisdiction of the Central Board of Revenue and may be carried to the Central Government. Powers are conferred upon him primarily for collection of duty and prevention of smuggling. He is for all purposes an officer of the revenue.

25. For reasons set out in the judgment in Criminal Appeal No. 27 of 1967 and the judgment of this Court in **Badku Joti Savant** case, 1966-3SCR698= (AIR 1966 SC 1746) we are of the view that a Customs Officer is under the Act of 1962 not a police officer within the meaning of Section 25 of the Evidence Act and the statements made before him by a person who is arrested or against whom an inquiry is made are not covered by Section 25 of the Indian Evidence Act."

8. Thus, it is evident that a statement made by a person, who is subsequently made an accused, before a Customs Officer under Section 108 of the Customs Act is a confession made to a person other than a police officer and thus not hit by the bar of admissibility under Section 25 of the Evidence Act.

9. The next issue that arises for consideration is whether it is essential to examine the maker of the confession or the person before whom this confession by co-accused has been made can prove the confession. The law on the point is well settled. An accomplice is a competent witness against the co-accused. In case the accomplice is cited as a witness then it is essential to examine him under Section 244 Cr.P.C. However if the confession of the co-accused made to any person has to be proved, then the confession so recorded has to be exhibited like any other document under Section 244 Cr.P.C. At this stage it would also be relevant to reproduce Section 244 Cr.PC:-

"Sec. 244 Evidence for prosecution. (1) When, in any warrant-case instituted otherwise than on a police report, the accused appears or is brought before a Magistrate, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution.

(2) The Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to attend or to produce any document or other thing".

10. Sub-Section (1) of Section 244 Cr.P.C. employs the words 'shall' and 'may'. So when these two words are used together in Sub-Section (1) of Section 244 Cr.P.C., in the sense that they are generally used, denote that words "the Magistrate shall proceed to hear" would mean that the Magistrate is under a duty to hear the witnesses at the pre-charge stage. However, these witnesses are the ones that 'may' be produced by the prosecution in support of their case thus, the prosecution is under no duty to produce all its witnesses at this stage. Further under Sub-Section 2 of Section 244 Cr.P.C. the Magistrate is under no obligation to summon any witness on his own. It is only on the application of the prosecution that the witnesses are produced at this stage. Thus, it is clear that at the pre-charge stage the discretion to produce a witness lies with the prosecution and not the court or the accused. Further the prosecution at this stage needs to satisfy the court of the existence of a 'prima facie; case for the purpose of framing charges.

11. Their Lordships in **R.S. Nayak vs. A.R. Antulay,** AIR 1986 SC 2045 observed:

"44. .....The Code contemplates discharge of the accused by the Court of Sessions under Section 227 in a case triable by it; cases instituted upon a police report are covered by Section 239 and cases instituted otherwise than on police report are dealt with in Section 245. The three sections contain some what different provisions in regard to discharge of the accused. Under Section 227, the trial Judge is required to discharge the accused if he 'considers that there is no sufficient ground for proceeding against the accused.' Obligation to discharge the accused under Section 239 arises when "the Magistrate considers the charge against the accused to be groundless." The power to discharge is exercisable under Section 245(1) when "the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction." It is a fact that Sections 227 and 239 provide for discharge being ordered before the recording of evidence and the consideration as to whether charge has to be framed or not is required to be made on the basis of the record of the case, including documents and oral hearing of the accused and the prosecution or the police report, the documents sent along with it and examination of the accused and after affording an

opportunity to the two parties to be heard. The stage for discharge under Section 245, on the other hand, is reached only after the evidence referred to in Section 244 has been taken. Notwithstanding this difference in the position there is no scope for doubt that the stage at which the Magistrate is required to consider the question of framing of charge under Section 245(1) is a preliminary one and the test of "prima facie" case has to be applied. In spite of the difference in the language of the three sections, the legal position is that if the trial Court is satisfied that a prima facie case is made out, charge has to be framed".

12. It was further observed by this Court in **Mathura Dass & Ors. vs. State** 2003(2) JCC 639 as:-

"7. After considering the submissions made by learned counsel for the parties and examining the material on record, this Court is of the considered view that a Judge, at the time of framing of charge, is not to act merely as a post-office or mouth-piece of the prosecution, but has powers to sift and weigh the evidence but for a limited purpose only. This exercise has to be undertaken by him only with a view to find out as to whether a prima facie case is made out or not. The existence of a prima facie case may be found even on the basis of strong suspicion against an accused. The assessment, evaluation and weighing of the prosecution evidence in a criminal case at the final stage is on entirely different footing than it is at the stage of framing a charge. At the final stage if two views are possible, one of which suggests that the accused may be innocent, then the view favorable to the accused has to be accepted whereas at the stage of framing of the charge, the view which is favorable to the prosecution, has to be accepted for the purpose of framing charge so that in the course of the trial, the prosecution may come out with its Explanations in regard to the draw-backs and weaknesses, if any, being pointed but by an accused."

13. Thus, if the prosecution is able to prove the existence of a prima facie case on production of 'a few' and not 'all' witnesses, charge has to be framed against the accused. Further, from perusal of **Mathura Dass & Ors.**(supra) it can be seen that at the stage of framing charges, if two views are possible, one that favours the prosecution has to be

taken. In the present case though the accomplice Virender Singh Batra has been cited as a witness, however he has not been examined under Section 244 Cr.P.C. Thus, there is no evidence in the form of accomplice evidence before the Court to form a prima facie opinion that charge can be formed against the Petitioner.

14. In **Naresh J. Shukawani Vs. Union of India** 1996 (83) ELT 258 (SC) it was observed that the statement made before the Customs officials is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973 and therefore, it is a material piece of evidence collected by Customs officials under Section 108 of the Customs Act. It was further stated by the Hon'ble Court that if such a statement incriminates the accused, inculpating him in the contravention of the provisions of the Customs Act, it can be considered as a substantive evidence to connect the accused with the contravention of the provisions of this Act. Para 4 of the said judgment is thus reproduced as:-

"4. It must be remembered that the statement made before the Customs officials is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973. Therefore, it is a material piece of evidence collected by Customs officials under Section 108 of the Customs Act. That material incriminates the petitioner inculpating him in the contravention of the provisions of the Customs Act. The material can certainly be used to connect the petitioner in the contravention inasmuch as Mr. Dudani's statement clearly inculpates not only himself but also the petitioner. It can, therefore, be used as substantive evidence connecting the petitioner with the contravention by exporting foreign currency out of India. Therefore, we do not think that there is any illegality in the order of confiscation of foreign currency and imposition of penalty. There is no ground warranting reduction of fine."

15. The learned Counsel for the Petitioner has placed reliance on **Mohtesham Mohd. Ismail Vs. Spl. Director, Enforcement Directorate & Anr.** (2007) 8 SCC 254 in support of his contention that the statement recorded u/s 108 Customs Act cannot be looked at the stage of framing charge as the same was not recorded under Section 244 Cr.P.C at the pre-trial stage. However, on perusal of the said judgment especially para 20, it is evident that the Hon'ble Supreme Court has stated that such statements are, although, not inadmissible, they should be scrutinized by

the Court in the same manner as confessions made by an accused person to any non-police personnel. Thus, according to the Hon'ble Supreme Court it should also pass the test of Section 24 of the Evidence Act. It was held:-

> "20. In **The Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd.** 2000 CriLJ 4035, this Court held:
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> ...The inculpatory statement made by any person under Section 108 is to non-police personnel and hence it has no tinge of inadmissibility in evidence if it was made when the person concerned was not then in police custody. Nonetheless the caution contained in law is that such a statement should be scrutinised by the court in the same manner as confession made by an accused person to any non-police personnel. The court has to be satisfied in such cases, that any inculpatory statement made by an accused person to a gazetted officer must also pass the tests prescribed in Section 24 of the Evidence Act. If such a statement is impaired by any of the vitiating premises enumerated in Section 24 that statement becomes useless in any criminal proceedings."

16. This Court in **Paramjit Singh vs. Commissioner of Customs & Others** 2002 (2) JCC 916 further observed that the statement of any person called for enquiry by the customs officer under the Customs Act can be recorded by such officer and such a statement is admissible in evidence by virtue of Section 30 of the Evidence Act and the protection under Article 20 (3) of Constitution of India is not available at the stage of recording of such statement the person giving the statement is not an accused. Their Lordships thus observed:-

> "5. As per settled law, statement of any person called for enquiries during investigation by the authorities under the Customs Act, can be recorded by the customs officer. Such statement is admissible in evidence. Protection under Article 20(3) of the Constitution of India is not available at that stage (see **Poolpandi etc.etc. v. Superintendent, Central Excise and others etc.etc.,** 1992 CriLJ 2761). The confession of the co-accused in the case would also be admissible by virtue of Section 30 of the Evidence Act. As per statement of witnesses, the petitioner absconded after the seizure. His conduct would be relevant."

17. The contention of learned counsel for the Petitioner at this stage is that the statement was not recorded under Section 244 Cr. P. C at the pre-trial stage and hence, inadmissible as evidence for framing charges. The reliability of the statement will have to be examined during trial. At this stage, it is sufficient to hold that the statement is admissible without examining the co-accused as a witness if the person before whom the confession is made is examined under Section 244 Cr.PC. As can be obs rved from the conjoint reading of the judgments in **Percy Rustomji Bas a** (supra), **Ramesh Chandra v. The State of West Bengal** (supra), **Nares J. Shukawani** (Supra.) and **Paramjit Singh (Supra**.), a statement re orded by Customs officer under section 108 of the Customs Act, 1962 is admissible in evidence and not hit by provisions of Article 20(3) of the Constitution or Section 25 of the Evidence Act. Further, such statement is presumed to be truthful as it is recorded under a proceeding which is judicial in nature and if upon such statement a prima facie case can be made out for framing the charge, by virtue of **R.S. Nayak** (Supra) and **Mathura Das** (supra), the Magistrate is well within his powers to order framing of charges.

18. Thus, though Virender Singh Batra was not called as a witness, his statement, recorded under Section 108 Customs Act, can definitely be looked at the stage of framing charges by virtue of the judgments aforementioned. Further the said statement of Virender Singh Batra stands proved by the testimony of PW1 Subhash Narayan who in his statement under Section 244 Cr.P.C., stated that he recorded the statement of Virender Singh Batra and exhibited the same. Also PW2 in his testimony under Section 244 Cr.P.C. stated that Virender Singh Batra, during his interrogation, stated that the packets containing the foreign exchange apprehended from him were handed over to him by the Petitioner.

19. However, the moot question is whether the statement of Virender Singh Batra recorded under Section 108 Customs Act duly proved by PW1 Subhash Narayan is admissible for the further reason that he is not jointly tried with the Petitioner. I find force in the contention of learned counsel for the Petitioner. A confession of the co-accused is admissible only under Section 30 of the Evidence Act. One of the essential requirements of the said provision is that the two accused should be tried jointly. Since the confession of the co-accused is not admissible as he is not being jointly tried with the Petitioner and besides this piece of evidence there is no other evidence, no charge can be framed against the

Petitioner for offence under Section 135A of the Customs Act.

20. Hence the order dated 20th June, 2008 directing framing charge and the consequent order dated 18th August, 2008 framing charge against the Petitioner for offence under Section 135A Customs Act are set aside. Petition is disposed of accordingly.

ILR (2012) V DELHI 181
FAO (OS)

ROHIT SHEKHAR ….APPELLANT

VERSUS

NARAYAN DUTT TIWARI & ANR. ….RESPONDENTS

(A.K. SIKRI, ACJ. & RAJIV SAHAI ENDLAW, J.)

FAO (OS) NO. : 547/2011 DATE OF DECISION: 27.04.2012

Constitution of India, 1950—Article 21; Civil Procedure Code, 1908—Section 36, 51—Indian Evidence Act, 1872 Section 114: Whether a person can be physically compelled to give a blood sample for DNA profiling in compliance with a civil court order in a penalty action and it the same is permissible how is the court to mould its order and what would be the modalities for drawing the involuntary sample—Held-yes the Single Judge is entitled to take police assistance and use of reasonable force for compliance of order in case of continuous defiance of the order. Compelled extraction of blood samples in the course of medical examination dose not amount to conduct that shocks the conscience and the use of force as may be reasonably necessary is mandated by law and hence, meets the threshold of procedure established by law. Further, Human Right

Law justifies carrying out of compulsory mandatory medical examination which may be bodily invasive and that the right to privacy is not an absolute right and can be reasonably curtailed. Judgment of the Court can never be challenged under article 14 or 21. Appeal allowed.

It is also not as if use of force and police for that purpose is unknown to Civil Jurisprudence. Such force, through the machinery of police is always used for execution of orders/ decrees upon resistance by the judgment debtor/persons against whom such orders are made. Use of police for the purpose of enforcing interim orders (see **Kailash Chander Sharma v. Nirmala Wati** 92 (2001) DLT 103), for restoring status quo ante and even for execution of local commissions is common (see **Indian Express Newspapers (Bombay) P. Ltd. v. T.M. Nagarajan** MANU/DE/0382/1987). The jurisprudence has been evolving. Finding the interim orders in the cases of infringement of trademarks to be defeated, the Courts have relied on John Doe orders which are implementable against unknown persons also and where the Commissioners are authorized to visit places of unnamed defendants and wherefrom the infringing goods may be found. We are unable to appreciate as to why when in execution of a decree or an order of possession it is permissible for the police to physically lift and remove him from the property to which he wants to cling or to demolish the house of the judgment debtor (see **Ram Awatar Agarwal v. Corpn. of Calcutta** (1999) 6 SCC 532), it should be held to be impermissible to compel a person to undergo a medical test or to give a bodily sample for such test.

(Para 27)

We are also of the view that the plea of non-implementability and non-enforceability of such a direction ought to have been taken, when the appellant had sought the injunction and if not taken then, was barred by the principles of constructive res judicata. It is a settled principle of law that the principles of res judicata and constructive res judicata

apply to the successive stages of the same proceedings also. The Supreme Court, as far back as in **Satyadhyan Ghosal v. Deorajin Debi** AIR 1960 SC 941 observed that the principle of res judicata applies also as between the two stages in the same litigation to the extent that the Court having at an earlier stage decided the matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. Again in **Arjun Singh v. Mohindra Kumar** AIR 1964 SC 993, while reiterating the same principle, distinction was carved out between different kinds of interlocutory orders. It was observed that while interlocutory orders of injunction or receiver, which are designed to preserve the *status quo* pending the litigation and to ensure that the parties might not be prejudiced by the delay in the proceedings, are capable of being altered or varied by subsequent applications for the same relief though normally only on proof of new facts or new situations which subsequently emerge as they do not impinge upon the legal rights of the parties, other interlocutory orders designed to ensure the just, smooth, orderly and expeditious disposal of the suit even though not deciding any matter in issue viz. on applications under Order IX, Rule 7 attract the principle of res judicata or principle analogous thereto; repeated applications seeking the same relief are not permitted. **(Para 29)**

Seen in the aforesaid light it will be found that the opposition by the respondent no.1 to DNA testing was considered and decided when the application of the appellant for the said relief was considered. The application (I.A. No. 10394/2011) moved by the respondent no.1 and which has been allowed was thus by way of re-agitating the same issues and ought not to have been entertained much less allowed. We may further observe that the injunction directing DNA testing falls in the category of an order in aid of disposal of the suit and decided the rights of the parties to the suit i.e. the right asserted by the appellant to have such DNA testing done and the right asserted by the respondent no.1 to not submit thereto. Once such rights had been adjudicated by the Suit

Court and the appeal thereagainst had been dismissed and the application for stay having been rejected by the Apex Court, it was not open to the Suit Court to again entertain the said question. If such practices were to be permitted, it will have dangerous consequences. It is rarely that entire suit is decided by the same Judge. If it were to be permissible for each successive Judge presiding over a Court to take a different view, it will not only lead to the litigants and the counsels urging the same issues repeatedly each time on change of Roster but also be contrary to Rule of Law. A Division Bench of this Court in **Swaran Singh v. Surinder Kumar** 179 (2011) DLT 136 observed that even if the principles of res judicata were to be not attracted, the principle of issue estoppel precludes the Court from entertaining a second application (in that case under Order VII, Rule 11 of the CPC) based on the same factual matrix and no orders negating and nullifying the previous order can be made on change of Roster. The Supreme Court in **Gajraj v. Sudha** (1999) 3 SCC 109 held repeated applications under Order I, Rule 10 of the CPC to be not maintainable. **(Para 31)**

We may highlight that as per the dicta of the Supreme Court noticed by the learned Single Judge also, a direction for DNA testing can be issued only after the test of eminent need is satisfied. The order dated 23rd December, 2010 directed DNA testing of the respondent no.1 only after holding the said test to be satisfied in the facts of the present case. The impugned judgment though also holding that the test of eminent need is satisfied has declined to enforce the order. It is thus not as if the order for DNA testing is made or has been made in the present case on the asking or in a routine manner for the consequence only of adverse inference to flow from non-compliance thereof. We find inherent contradiction in the Court on the one hand holding eminent need for such a test and in the same breath allowing the need to remain unsatiated. We also find the drawing of adverse inference from refusal to comply with the direction for medical examination to be not sufficient to

satiate the need found by the Court. A legal fiction under Section 114 of the Evidence Act, as adverse inference is, is not reality but which the said provision requires the Court to accept as reality. The Court is not bound to or obliged to draw such adverse inferences (see **Emperor v. Sibnath Banerjee** AIR 1943 FC 75, **Dhanvantrai Balwantrai Desai v. State of Maharashtra** AIR 1964 SC 575 and **Fakir Mohd. (Dead) by LRs v. Sita Ram** AIR 2002 SC 433). A presumption is not in itself evidence but only makes a prima facie case for parties in whose favour it exists (see **Sodhi Transport Co. v. State of U.P.** (1986) 2 SCC 486). As far back as in **Damisetti Ramchendrudu v. Damisetti Janakiramanna** AIR 1920 PC 84 it was held that presumption cannot displace adequate evidence. The Supreme Court also in **Mohanlal Shamji Soni v. Union of India** 1991 Supp (1) SCC 271 held that it is the rule of law in evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue and the Court ought to take an active role in the proceedings in finding the truth and administering justice. Recently in **Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria (Dead)** 2012 (3) SCALE 550 it was reiterated that the truth is the guiding star and the quest in the judicial process and the voyage of trial. The trend world over of full disclosure by the parties and deployment of powers to ensure that the scope of factual controversy is minimized was noticed. We are therefore of the opinion that adverse inference from non-compliance cannot be a substitute to the enforceability of a direction for DNA testing. The valuable right of the appellant under the said direction, to prove his paternity through such DNA testing cannot be taken away by asking the appellant to be satisfied with the comparatively weak 'adverse inference'. **(Para 34)**

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Ms. Amit Sibal, Mr. Vedanta Varma, Mr. Giriraj Subramanium & Ms. Pragya Ohri, Mr. Vibhor Kush, Advocates.

FOR THE RESPONDENT : Mr. Bahar U. Barqui, Mr. Pramod Kumar Sharma, Mr. Jamal Akhatar, Advocates for R-1. Mr. Gaurav Mitra with the Mr. Mohit Chadha, Advocate for R-2.

CASES REFERRED TO:

1. *Maria Margarida Sequeria Fernandes* vs. *Erasmo Jack de Sequeria (Dead)* 2012 (3) SCALE 550.
2. *Swaran Singh* vs. *Surinder Kumar* 179 (2011) DLT 136.
3. *Indian Council for Enviro-Legal Action* vs. *Union of India* (2011) 8 SCC 161.
4. *Shimnit Utsch India Pvt. Ltd.* vs. *West Bengal Transport Infrastructure Development Corporation Ltd.* (2010) 6 SCC 303.
5. *Selvi* vs. *State of Karnataka* (2010) 7 SCC 263.
6. *Bhabani Prasad Jena* vs. *Convenor Secretary, Orissa State Commission for Women* AIR 2010 SC 2851.
7. *K.A. Ansari* vs. *Indian Airlines Ltd.* (2009) 2 SCC 164.
8. *Smt. Karisiddamma* vs. *Smt. Sanna Kenchamma* MANU/KA/0628/2009.
9. *Ajay Mohan* vs. *H.N. Rai* (2008) 2 SCC 507.
10. *Suresh Jindal* vs. *BSES Rajdhani Power Limited* (2008) 1 SCC 341.
11. *Bhanu Kumar Jain* vs. *Archana Kumar* (2005) 1 SCC 787.
12. *State of Haryana* vs. *State of Punjab* (2004) 12 SCC 673.
13. *State of Maharashtra* vs. *Dr. Praful B. Desai* (2003) 4 SCC 601.
14. *Regina (Quintavalle)* vs. *Secretary of State for Health* [2003] 2 A.C. 687.

15. *Sharda* vs. *Dharmpal* AIR 2003 SC 3450.
16. *Fakir Mohd. (Dead) by LRs* vs. *Sita Ram* AIR 2002 SC 433).
17. *Kailash Chander Sharma* vs. *Nirmala Wati* 92 (2001) DLT 103).
18. *Gajraj* vs. *Sudha* (1999) 3 SCC 109.
19. *Ram Awatar Agarwal* vs. *Corpn. of Calcutta* (1999) 6 SCC 532).
20. *Zahurul Islam* vs. *Abul Kalam* (1995) Supp (1) SCC 464.
21. *Goutam Kundu* vs. *State of West Bengal* (1993) 3 SCC 418.
22. *Sri-la-Sri Sivasubramanyananda Swami* vs. *Sri-la-Sri Arunachalasamy Chidambaram* (1993) 1 MLJ 274.
23. *Mohanlal Shamji Soni* vs. *Union of India* 1991 Supp (1) SCC 271.
24. *Triveniben* vs. *State of Gujarat* (1989) 1 SCC 678.
25. *Attorney-General* vs. *Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248.
26. *Indian Express Newspapers (Bombay) P. Ltd.* vs. *T.M. Nagarajan* MANU/DE/0382/1987).
27. *Sodhi Transport Co.* vs. *State of U.P.* (1986) 2 SCC 486).
28. *H.M. Kamaluddin Ansari & Co.* vs. *Union of India* (1983) 4 SCC 417.
29. *Jaipur Mineral Development Syndicate* vs. *CIT* (1977) 1 SCC 508.
30. *Y.B. Patil* vs. *Y.L. Patil* (1976) 4 SCC 66.
31. *M.V.S. Manikayala Rao* vs. *M. Narasimhaswami* AIR 1966 SC 470.
32. *Dhanvantrai Balwantrai Desai* vs. *State of Maharashtra* AIR 1964 SC 575.
33. *Arjun Singh* vs. *Mohindra Kumar* AIR 1964 SC 993.
34. *Satyadhyan Ghosal* vs. *Deorajin Debi* AIR 1960 SC 941.

35. *Emperor* vs. *Sibnath Banerjee* AIR 1943 FC 75.
36. *Damisetti Ramchendrudu* vs. *Damisetti Janakiramanna* AIR 1920 PC 84.

RESULT: Appeal Allowed.

RAJIV SAHAI ENDLAW, J.

1. The challenge in this appeal is to the judgment dated 23rd September, 2011 of the learned Single Judge allowing I.A. No. 10394/2011 of the respondent no.1 (defendant no.1 in the Suit) in CS(OS) No. 700/2008 filed by the appellant. Notice of the appeal was issued and the counsels have been heard.

2. CS(OS) No. 700/2008 is filed by the appellant for declaration, that he is the natural born son of the respondent no.1 and the respondent no.2 Dr. Ujjwala Sharma, and that the respondent no.1 is the father of the appellant and for perpetual injunction restraining respondent no.1 from denying in public or otherwise the fact that he is the father of the appellant. The said suit is pending consideration.

3. During the pendency of the suit, the appellant filed I.A. No. 4720/2008 under Order XXXIX Rules 1 & 2 of the Civil Procedure Code, 1908 (CPC) for direction to the respondent no.1 to submit himself for a DNA test and/or any other test required to determine the parentage of the appellant. The said application was contested by the respondent no.1. The learned Single Judge before whom the suit was then pending, vide order/judgment dated 23rd December, 2010 allowed the said application and directed the parties to appear before the Joint Registrar on 8th February, 2011; the Joint Registrar was directed to arrange for the DNA testing of the respondent no.1 by the Centre for Cellular & Molecular Biology (Constituent Laboratory of the Council of Scientific Industrial Research, Government of India); the respondent no.1 was directed to, on the date and time to be designated by the Joint Registrar, furnish the samples for such testing; the said Institute was directed to furnish the report to the Court within six weeks of receiving the samples.

4. The respondent no.1 preferred an appeal being FAO(OS) No. 44/2011 against the aforesaid order/judgment dated 23rd December, 2010. The said FAO(OS) was dismissed by the Division Bench of this Court on 7th February, 2011.

5. The respondent no.1 preferred a Special Leave Petition being SLP(Civil) No. 5756/2011 against the order dated 7th February, 2011 of the Division Bench. In the said SLP, the respondent no.1 sought ad interim ex parte stay of the operation of the orders of this Court. The Supreme Court, though on 18th March, 2011 issued notice of the SLP, but rejected the prayer for interim relief. The SLP is stated to be still pending.

6. The Joint Registrar of this Court, in accordance with the order dated 23rd December, 2010 (supra) of which there was no stay, directed the respondent no.1 to appear for collection of blood samples. The respondent no.1 however did not appear and on the contrary, filed I.A. No. 10394/2011 (supra) against order whereon the present appeal is preferred. The respondent no.1 in the said application sought a direction that he should not be pressurized, compelled or forced in any manner to involuntarily provide blood and/or other tissue sample(s) for DNA testing. The respondent no.1 on being asked to file an affidavit stating reasons for not furnishing the blood sample, in his affidavit dated 21st July, 2011 though admitted that there was no medical reason prohibiting him from giving sample for DNA testing but stated that he cannot be compelled to do so against his will. The learned Single Judge before whom the suit was now pending has vide order/judgment dated 23rd September, 2011 impugned in this appeal held the refusal of the respondent no.1 to submit the blood sample to be wilful, *mala fide*, unreasonable and unjustified. However after holding so, it has been held that the respondent no.1 cannot be physically compelled or be physically confined for submitting a blood sample for DNA profiling, in implementation of the order/judgment dated 23rd December, 2010. The learned Single Judge has further held that the weight to be attached to such refusal, shall be considered while evaluating the evidence produced by the parties.

7. The appellant impugns the said order/judgment contending:-

A. that thereby the entire process of DNA testing, in pursuance to the earlier order dated 23rd December, 2010 of the learned Single Judge, order dated 7th February, 2011 of the Division Bench and rejection of the interim relief by the Supreme Court, have been reversed and rendered null and void;

B. that the relief claimed by the respondent no.1, in view of the earlier orders/judgments dated 23rd December, 2010, 7th February, 2011 & 18th March, 2011 (supra) was barred by *res judicata*;

C. that the respondent no.1 was abusing the process of this Court;

D. that the impugned order/judgment by directing trial to continue, seeks to judge the suit on the basis of oral evidence instead of on the basis of DNA evidence;

E. that the learned Single Judge while considering the fundamental right of the respondent no.1, has ignored the right of the appellant to know his paternity;

F. that the respondent no.1 being of advanced age, there is a possibility of crucial evidence disappearing;

G. that an adverse inference can never have the same effect as a conclusive scientific determination of paternity.

8. In view of the aforesaid, it becomes relevant to discuss the earlier orders of the Single Judge and of the Division Bench of this Court and interim stay whereof, though sought was rejected.

9. The order dated 23rd December, 2010 of the learned Single Judge directing DNA test, observes/finds/holds:-

a. a distinction has to be drawn between 'legitimacy' and 'paternity' of the child;

b. Section 112 of the Indian Evidence Act, 1872 is intended to safeguard the interest of the child by securing his/her legitimacy and not to paternity;

c. that a child has a right to know the truth of his/her origin;

d. the right of a child to know his biological roots can be enforced through reliable scientific tests and if the interest of the child is best sub-served by establishing paternity of someone who is not the husband of his mother, the Court should not shut that consideration altogether; Indian law casts an obligation upon a biological father to maintain his child and does not disregard rights of an illegitimate child to maintenance;

e. though the Supreme Court in **Goutam Kundu v. State of**

West Bengal (1993) 3 SCC 418 had advised against conduct of scientific tests of the nature of giving blood samples for the purpose of DNA testing in a routine manner but did not altogether ban their conduct upon third party;

f. that the Courts in **Sharda v. Dharmpal** AIR 2003 SC 3450 and **Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women** AIR 2010 SC 2851 have held that there is no violation of the right to life, or privacy of a person, in directing a DNA test to be undergone by him - to undergo such test is not an invasion of his right to life;

g. **Bhabani Prasad Jena** (supra), affirms the power of Court to direct a DNA test though cautions that the said power should be exercised after weighing all "pros and cons" and satisfying that the "test of 'eminent need'" for such an order is fulfilled;

h. documents on the suit file established that respondent no.2 and her husband were estranged in 1970 and subsequently their marriage was dissolved – they had also filed affidavits in this regard and which could not at that stage of proceedings be disbelieved;

i. the husband of the respondent no.2 had also placed on record the DNA test report of himself and of the appellant to demonstrate that he could not be the father of the appellant;

j. the presumption of legitimacy of a child born during the subsistence of a lawful wedlock provided in Section 112 of the Evidence Act is directed towards safeguarding the interest of the child and protecting it from being bastardized in the event that his paternity is in question; however that is not the issue in the present case;

k. that the rationale laid down in the decisions, where it was the father who was resisting parenthood at the cost of bastardizing the child, does not apply where the child on attaining adulthood moves the Court to determine his parentage – the question of 'protective jurisdiction' of the Court or applicability of Section 112 of the Evidence Act then does not arise;

l. the appellant, being over 29 years of age, capable of taking his decisions, the question of his welfare being adversely affected did not arise;

m. that though the respondent no.1 could not be directed to undergo DNA test on mere asking of the appellant and on the assumption that he is the father of the appellant but the other material on record established a strong prima facie case suggesting "eminent need" to issue the direction for DNA test.

10. The Division Bench of this Court vide order/judgment dated 7th February, 2011 dismissed the appeal against the order dated 23rd December, 2010 (supra), additionally observing /finding/holding:-

I. that accuracy of a DNA test was not even imagined at the time when the law was formulated; that the affidavits of the respondent no.2 as well as her husband that the said husband had at the relevant time no sexual access to the respondent no.2 was sufficient to negate the argument of the counsel for the respondent no.1 of such access and was sufficient in law to rebut the presumption under Section 112 of the Indian Evidence Act;

II. that the protective jurisdiction of the Court under Section 112 was not imperiled since declaration was sought by the child about his true paternity;

III. that under Order XVIII Rule 16 of the CPC the Court is empowered to take evidence without necessarily waiting for the normal trial and the principle thereof applied to the facts of the present case also, for on the demise of the respondent no.1 the vital evidence would disappear;

IV. that there is a *prima facie* case in favour of the appellant; the appellant would suffer irreparable injury if immediate orders for DNA testing were not made and the balance of convenience is also in favour of the appellant.

11. The learned Single Judge, in the impugned judgment, has framed the following question:

"Whether a person can be physically compelled to give a blood

sample for DNA profiling in compliance with a civil Court order in a paternity action? If it were held that the same was permissible, how is the Court to mould its order and what would be the modalities for drawing the involuntary sample?"

12. The impugned judgment though running into 109 pages, but the ratio thereof is, that though a matrimonial Court and the Civil Court has the implicit and the inherent power to order a person to submit himself for medical examination and to issue a direction to hold a scientific, technical and expert investigation but if despite the order of the Court, the respondent refuses to submit himself to medical examination, the Court is entitled only to take the refusal on record to draw an adverse inference therefrom. Reliance in this regard is placed on **Sharda** (supra). It is also observed that physical confinement for forcible drawing of blood sample or sample of any other bodily substances is not envisaged in any statutory provision governing civil legislation under any tenet of justice. The learned Single Judge has observed that mandatory testing upon an unwilling person would entail an element of violence and intrusion of a person's physical person and may leave irreparable scars and is unwarranted and impermissible under Article 21 of the Constitution of India. It was thus concluded that the respondent no.1 could not be physically confined for the purpose of giving a blood sample and to ensure compliance of the order dated 23rd December, 2010.

13. The Apex Court undoubtedly in **Sharda** (supra) has held that "if despite an order passed by the Court, a person refuses to submit himself to such medical examination, a strong case for drawing an adverse inference" within the meaning of Section 114 of the Evidence Act would be made out. However, what we are concerned with here is, whether the order of the Court directing such DNA testing is an un-enforceable and un-implementable order, the only consequence of voluntary non-compliance whereof is to enable the Court to draw adverse inference. We find the aspect of enforceability/implementability of the order for medical examination to have not been the subject matter of **Sharda** or the other judgments (supra), cited by the counsel for the respondent no. 1 before us also.

14. The Supreme Court in **H.M. Kamaluddin Ansari & Co. v. Union of India** (1983) 4 SCC 417 has held that orders of the Court are intended to be complied with and the Court would not pass an ineffective

injunction order and the Court never passes an order for the fun of passing it and orders are passed only for the purpose of being carried out.

15. In our view, to say, that the exercise earlier undertaken by the Court, was an empty one and in futility - that though the Court could issue a direction for DNA testing but not implement or enforce the same, has the tendency of making the law and the Court, a laughing stock. The perception of "the law" as Mr. Bumble (in Oliver Twist) said "is a ass - a idiot" will be cemented, if the Courts themselves hold their own orders to be un-implementable and un-enforceable. It is the duty of every Court to prevent its machinery from being made a sham, thereby running down the Rule of Law and rendering itself an object of public ridicule. The House of Lords, in **Attorney-General v. Guardian Newspapers Ltd.** [1987] 1 W.L.R. 1248 observed that public interest requires that we have a legal system and Courts which command public respect and if the Courts were to make orders manifestly incapable of achieving their avowed purpose, law would indeed be an ass. It was further held that the Court should not make orders which would be ineffective to achieve what they set out to do.

16. The Supreme Court also, in **K.A. Ansari v. Indian Airlines Ltd.** (2009) 2 SCC 164 has held that difficulty in implementation of an order passed by the Court, howsoever, grave its effect may be, is no answer for its non- implementation. In **Deep Chand v. Mohan Lal** (2000) 6 SCC 259 it was held that the purpose of execution proceeding is to enable the decree-holder to obtain the fruits of his decree and even if there is any ambiguity, interpretation which assists the decree-holder should be accepted; the execution of decree should not be made futile on mere technicalities. It was further observed that keeping in view the prolonged factum of litigation resulting in the passing of a decree in favour of a litigant, a rational approach is necessitated and the policy of law is to give a fair and liberal, and not a technical construction, enabling the decree-holder to reap the fruits of his decree.

17. We may at this stage notice that under Section 36 of the CPC, the provisions relating to execution of decree, apply to the execution of orders also; if any precedent is needed, reference can be made to **M.V.S. Manikayala Rao v. M. Narasimhaswami** AIR 1966 SC 470.

18. The Courts have always attempted against rendering the orders

and decrees of the Court to be merely good on paper and otherwise ineffective to settle the rights of the parties. Attempts have always been made to take a view/interpretation which renders a decree of the Court to be executable rather than inexecutable. The Courts cannot hold a decree or order passed after long deliberations as in the present case also, to be merely paper decree/order incapable of deciding in fact what it was intended to decide or incapable of changing the position which it intended to change. The Court cannot take a role of a silent spectator and see its order being frustrated by a party. The power of enforcement of orders cannot be reduced into an empty one.

19. It cannot also be lost sight of that the order directing the respondent no.1 to undergo the DNA testing was an order in exercise of powers by the Court under Order XXXIX Rules 1 & 2 of the CPC and not in exercise of powers as under Order XII Rule 8 or under Order XI or Order XVI of the CPC, for non-compliance whereof adverse inference is permitted to be drawn. A Court of law cannot sit still with folded hands and countenance its injunction being treated with indifference or scant courtesy by the party against whom it is directed and who is bound to obey its terms. This is particularly so when such injunction has been confirmed in appeal and stay thereof been rejected by the Supreme Court.

20. What also surprises us is that the order of injunction aforesaid, has been held by the learned Single Judge to be un-implementable and un-enforceable for the reason of implementation thereof being fraught with physical coercion and intrusion on the rights of the respondent no.1 under Article 21 of the Constitution and being not envisaged in any statutory provision governing civil litigation. However, the impugned order itself, as also the earlier order dated 23rd December, 2010 holds, a direction for such DNA testing to be not violative of Article 21. The Supreme Court in **Selvi v. State of Karnataka** (2010) 7 SCC 263 upheld the authority of Civil Court to order a medical examination in exercise of the inherent powers vested in it by Section 151 of the CPC, though held that the same reasoning cannot be applied in the criminal context (para 175). Rather (in para 203) it was held that compelled extraction of blood samples in the course of a medical examination does not amount to "conduct that shocks the conscience" and that "use of force as may be reasonably necessary is mandated by law and hence it meets the threshold of procedure established by law". The learned Single

Judge has in paras 74, 78, 79 and 80 of the impugned judgment also held that the right of privacy is subject to such action as may be lawfully taken for protection of rights of others; that the level of privacy protection depends on the context; that Human Rights law justifies carrying out of compulsory and mandatory medical examination which may be bodily invasive and that the right to privacy is not an absolute right and can be reasonably curtailed. The learned Single Judge having held so, we are unable to fathom as to how the same factors could be an impediment to the enforceability and implementability of the order. What is not an impediment to the making of the order, cannot become an impediment to the enforceability of the order and would tantamount to saying that the Court order is violative of the rights of the litigant. The Constitution Bench of Supreme Court in **Triveniben v. State of Gujarat** (1989) 1 SCC 678 and recently reiterated in **Indian Council for Enviro-Legal Action v. Union of India** (2011) 8 SCC 161 held that a judgment of Court can never be challenged under Article 14 or Article 21. It is thus not open to the respondent to urge that the earlier order in the suit directing DNA testing was violative of his rights.

21. As far as the aspect of there being no statutory provision(s) for implementability/enforceability of such an order is concerned, we had during the hearing also invited the attention of the counsels to Section 51 of the CPC dealing with "Powers of Court to enforce execution". The same, after prescribing the various modes of execution, in Clause (e) provides for execution "in such other manner as the nature of the relief granted may require". The Supreme Court in **State of Haryana v. State of Punjab** (2004) 12 SCC 673 has held that the residuary powers under Section 51(e) allow a Court to pass orders for enforcing a decree in a manner which would give effect to it. It cannot also be lost sight of that at the time the civil procedure was codified in the year 1908, the tests such as of DNA were not even comprehensible much less available. However now that such tests, which are an aid in adjudication are available, the Courts cannot allow such advancements to bypass the Courts. The Supreme Court in **State of Maharashtra v. Dr. Praful B. Desai** (2003) 4 SCC 601 on the principle of interpretation of an ongoing statute (in that case Cr.P.C.) relied on the commentary titled "Statutory Interpretation", 2nd Edition of Francis Bennion laying down:

> "It is presumed the Parliament intends the Court to apply to an ongoing Act a construction that continuously updates its wordings

to allow for changes since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law.

In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in law, in social conditions, technology, the meaning of words and other matters.....That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will foresee the future and allow for it in the wording.

An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials."

22. Similarly in **Suresh Jindal v. BSES Rajdhani Power Limited** (2008) 1 SCC 341, it was held that creative interpretation of the provisions of the statute demands that with the advance in science and technology, the Court should read the provisions of a statute in such a manner so as to give effect thereto.

23. The House of Lords recently in **Regina (Quintavalle) v. Secretary of State for Health** [2003] 2 A.C. 687 held that the laws have to be construed in the light of contemporary scientific knowledge and in order to give effect to a plain parliamentary purpose, the statute may be held to cover a scientific development not known when the statute was passed. Notice may be taken of the amendment of the year 1976 to Section 75 of the CPC enabling the Court to issue commissions

to hold a scientific, technical or expert investigation. The same is indicative of the legislative intent to keep pace with scientific advancements in the matter of judicial adjudication.

24. Even the Constitution of India, while laying down the Fundamental Duties, by Article 51-A (h) and (j) declares it to be the duty of every citizen of India to develop a scientific temper and the spirit of inquiry and reform and to strive towards excellence, to reach higher levels of achievement. What we wonder is that when modern tools of adjudication are at hand, must the Courts refuse to step out of their dogmas and insist upon the long route to be followed at the cost of misery to the litigants. The answer obviously has to be no. The Courts are for doing justice, by adjudicating rival claims and unearthing the truth and not for following age-old practices and procedures when new, better methods are available.

25. We, in this context find the judgment of the Court of Appeal (Civil Division) in **Re G (Parentage: Blood Sample)** [1997] 1 F.L.R. 360 holding that the Court should find proven forensically what the person by his refusal had prevented from being established scientifically, to be apposite. It was further held therein:

> **"Justice is best served by truth. Justice is not served by impeding the establishment of truth.** No injustice is done to him by conclusively establishing paternity. If he is the father, his position is put beyond doubt by the testing, and the justice of his position is entrenched by the destruction of the mother's doubts and aspersions. If he is not the father, no injustice is done by acknowledging him to be a devoted stepfather to a child of the family. Justice to the child, a factor not to be ignored, demands that the truth be known when truth can be established, as it undoubtedly can. Whilst, therefore, I do not in any way wish to undermine the sincerity of the father's belief that contact is of a continuing good to the child and that it will be reduced if the mother's beliefs prevail, that contact is best when taking place against the reality of fact, **and fact can be established by these tests being undertaken**."

Thorpe LJ in his opinion, agreeing with Waite LJ that the appeal should be allowed, said:

"A putative father may seek to avoid his paternity which science could prove; alternatively, to cling on to a status that science could disprove. In both cases selfish motives or emotional anxieties and needs may drive the refusal to co-operate in the scientific tests which the court has directed.

26. Though in the light of what we have held, it is not strictly relevant, but we are unable to restrain ourselves from recording what the Court of Appeal (Civil Division) observed in **Re H and A (Children) (Paternity: Blood Tests)** [2002] EWCA Civ 383:-

"Over thirty years ago in his speech in S v Mc C Lord Hodson said:

"The only disadvantage to the child which is put forward as an argument against the use of a blood test, not for therapeutic purposes but to ascertain paternity, is that the child is exposed to the risk that he may lose the protection of the presumption of legitimacy.

Without seeking to depreciate the value of this presumption it is, I think, fair to say that whatever may have been the position in the past the general attitude towards illegitimacy has changed and the legal incidents of being born a bastard are now almost non-existent. I need not dilate upon this, for I recognise that it is impossible to say that there is no stigma of bastardy even though it be no more than the indirect stigma of the imputation of unchastity to the mother of the child so described. On the other hand, it is difficult to conceive of cases where, assuming illegitimacy in fact, it is to the advantage of the child that this legal status of legitimacy should be preserved only perhaps to be displaced by firm evidence of illegitimacy decided later in his or her life from a blood test.

The interests of justice in the abstract are best served by the ascertainment of the truth and their must be few cases where the interests of children can be shown to be best served by the suppression of truth. Scientific evidence of blood groups has been available since the early part of this century and the progress of serology has been so rapid that in many cases certainty or near certainty can be reached in the ascertainment of paternity.

Why should the risk be taken of a judicial decision being made which is factually wrong and may later be demonstrated to be wrong?"

Those principles have been consistently applied in subsequent cases, including **Re H (A Minor) (Blood Tests: Parental Rights)** [1996] WLR 506 and **Re T (A Child) (DNA Tests: Paternity)** [2001] 3 FCR 577 . The judge sought to distinguish those two authorities in his concluding paragraph, which I have cited above. It draws the distinction that in those two cases there were serious doubts as to the husband's procreative capacities. I do not consider that that factual distinction begins to displace the points of principle to be drawn from the cases, **first that the interests of justice are best served by the ascertainment of the truth and second that the court should be furnished with the best available science and not confined to such unsatisfactory alternatives as presumptions and inferences.** It seems to me obvious that all that Lord Hodson expressed in the passage that I have cited applies with even greater force and logic in a later era. **First there have been huge scientific advances with the arrival of DNA testing. Scientists no longer require blood, thus removing what for some is the unbearable process of its extraction. Of even greater importance is the abandonment of the legal concept of legitimacy achieved by the Family Law Act 1987.**"

It was further observed that paternity of any child is to be established by science and not by legal presumption or inference or by a long and acrimonious trial.

27. It is also not as if use of force and police for that purpose is unknown to Civil Jurisprudence. Such force, through the machinery of police is always used for execution of orders/decrees upon resistance by the judgment debtor/persons against whom such orders are made. Use of police for the purpose of enforcing interim orders (see **Kailash Chander Sharma v. Nirmala Wati** 92 (2001) DLT 103), for restoring status quo ante and even for execution of local commissions is common (see **Indian Express Newspapers (Bombay) P. Ltd. v. T.M. Nagarajan** MANU/DE/0382/1987). The jurisprudence has been evolving. Finding the interim orders in the cases of infringement of trademarks to be defeated, the

Courts have relied on John Doe orders which are implementable against unknown persons also and where the Commissioners are authorized to visit places of unnamed defendants and wherefrom the infringing goods may be found. We are unable to appreciate as to why when in execution of a decree or an order of possession it is permissible for the police to physically lift and remove him from the property to which he wants to cling or to demolish the house of the judgment debtor (see **Ram Awatar Agarwal v. Corpn. of Calcutta** (1999) 6 SCC 532), it should be held to be impermissible to compel a person to undergo a medical test or to give a bodily sample for such test.

28. The Supreme Court in **Zahurul Islam v. Abul Kalam** (1995) Supp (1) SCC 464 held that decrees have to be executed, if necessary with the police help. A Division Bench of Madras High Court in **Sri-la-Sri Sivasubramanyananda Swami v. Sri-la-Sri Arunachalasamy Chidambaram** (1993) 1 MLJ 274 had the occasion to examine whether the Civil Courts can issue directions to the police officials for execution and implementation of the orders of the Civil Court. Relying on **Jaipur Mineral Development Syndicate v. CIT** (1977) 1 SCC 508, it was held that the Civil Courts in exercise of its inherent power and in the absence of any express or implied prohibition are entitled to pass orders as may be necessary to prevent abuse of the process of the Court and to avoid gross miscarriage of justice. It was accordingly held that a litigant who has secured an order from the Court is entitled to full benefit thereof and the Court is entitled to resort to law enforcement machinery to see that its orders are obeyed. It was further held that no technicality can prevent the Court from doing justice in exercise of its inherent powers. To the same effect is the judgment of the Karnataka High Court in **Smt. Karisiddamma v. Smt. Sanna Kenchamma** MANU/KA/0628/2009.

29. We are also of the view that the plea of non-implementability and non-enforceability of such a direction ought to have been taken, when the appellant had sought the injunction and if not taken then, was barred by the principles of constructive res judicata. It is a settled principle of law that the principles of res judicata and constructive res judicata apply to the successive stages of the same proceedings also. The Supreme Court, as far back as in **Satyadhyan Ghosal v. Deorajin Debi** AIR 1960 SC 941 observed that the principle of res judicata applies also as between the two stages in the same litigation to the extent that the Court having at an earlier stage decided the matter in one way will not allow the parties

to re-agitate the matter again at a subsequent stage of the same proceedings. Again in **Arjun Singh v. Mohindra Kumar** AIR 1964 SC 993, while reiterating the same principle, distinction was carved out between different kinds of interlocutory orders. It was observed that while interlocutory orders of injunction or receiver, which are designed to preserve the *status quo* pending the litigation and to ensure that the parties might not be prejudiced by the delay in the proceedings, are capable of being altered or varied by subsequent applications for the same relief though normally only on proof of new facts or new situations which subsequently emerge as they do not impinge upon the legal rights of the parties, other interlocutory orders designed to ensure the just, smooth, orderly and expeditious disposal of the suit even though not deciding any matter in issue viz. on applications under Order IX, Rule 7 attract the principle of res judicata or principle analogous thereto; repeated applications seeking the same relief are not permitted.

30. The Supreme Court **Y.B. Patil v. Y.L. Patil** (1976) 4 SCC 66 opined that once an order made in course of a proceeding becomes final, it would be binding at subsequent stage of that proceeding. In **Bhanu Kumar Jain v. Archana Kumar** (2005) 1 SCC 787 it was clarified that the principles of constructive res judicata also apply with full force at subsequent stage of the same proceedings. The Supreme Court in **Ajay Mohan v. H.N. Rai** (2008) 2 SCC 507 held that a mere amendment of the plaint does not entitle the plaintiff to injunction under Order XXXIX, Rules 1 & 2 of the CPC which had been denied on an earlier occasion.

31. Seen in the aforesaid light it will be found that the opposition by the respondent no.1 to DNA testing was considered and decided when the application of the appellant for the said relief was considered. The application (I.A. No. 10394/2011) moved by the respondent no.1 and which has been allowed was thus by way of re-agitating the same issues and ought not to have been entertained much less allowed. We may further observe that the injunction directing DNA testing falls in the category of an order in aid of disposal of the suit and decided the rights of the parties to the suit i.e. the right asserted by the appellant to have such DNA testing done and the right asserted by the respondent no.1 to not submit thereto. Once such rights had been adjudicated by the Suit Court and the appeal thereagainst had been dismissed and the application for stay having been rejected by the Apex Court, it was not open to the Suit Court to again entertain the said question. If such practices were to

be permitted, it will have dangerous consequences. It is rarely that entire suit is decided by the same Judge. If it were to be permissible for each successive Judge presiding over a Court to take a different view, it will not only lead to the litigants and the counsels urging the same issues repeatedly each time on change of Roster but also be contrary to Rule of Law. A Division Bench of this Court in **Swaran Singh v. Surinder Kumar** 179 (2011) DLT 136 observed that even if the principles of res judicata were to be not attracted, the principle of issue estoppel precludes the Court from entertaining a second application (in that case under Order VII, Rule 11 of the CPC) based on the same factual matrix and no orders negating and nullifying the previous order can be made on change of Roster. The Supreme Court in **Gajraj v. Sudha** (1999) 3 SCC 109 held repeated applications under Order I, Rule 10 of the CPC to be not maintainable.

32. Yet another principle may be noted. The Supreme Court recently in **Shimnit Utsch India Pvt. Ltd. v. West Bengal Transport Infrastructure Development Corporation Ltd.** (2010) 6 SCC 303 reiterated that law on the binding effect of an order passed by a Court of law is well settled; if an order has been passed by a Court which had jurisdiction to pass it, then the error or mistake in the order can be got corrected from a higher Court and not by ignoring the order or disobeying it expressly or impliedly. Halsbury's Laws of England opining that the fact that an order ought not to have been made is not sufficient excuse for disobeying it and disobedience to it constitutes a contempt was cited with approval.

33. We also find the action of the respondent no.1 of filing I.A. 10394/2011 to be contumacious. For this reason also, we are of the opinion that police force against him is justified.

34. We may highlight that as per the dicta of the Supreme Court noticed by the learned Single Judge also, a direction for DNA testing can be issued only after the test of eminent need is satisfied. The order dated 23rd December, 2010 directed DNA testing of the respondent no.1 only after holding the said test to be satisfied in the facts of the present case. The impugned judgment though also holding that the test of eminent need is satisfied has declined to enforce the order. It is thus not as if the order for DNA testing is made or has been made in the present case on the asking or in a routine manner for the consequence only of adverse

inference to flow from non-compliance thereof. We find inherent contradiction in the Court on the one hand holding eminent need for such a test and in the same breath allowing the need to remain unsatiated. We also find the drawing of adverse inference from refusal to comply with the direction for medical examination to be not sufficient to satiate the need found by the Court. A legal fiction under Section 114 of the Evidence Act, as adverse inference is, is not reality but which the said provision requires the Court to accept as reality. The Court is not bound to or obliged to draw such adverse inferences (see **Emperor v. Sibnath Banerjee** AIR 1943 FC 75, **Dhanvantrai Balwantrai Desai v. State of Maharashtra** AIR 1964 SC 575 and **Fakir Mohd. (Dead) by LRs v. Sita Ram** AIR 2002 SC 433). A presumption is not in itself evidence but only makes a prima facie case for parties in whose favour it exists (see **Sodhi Transport Co. v. State of U.P.** (1986) 2 SCC 486). As far back as in **Damisetti Ramchendrudu v. Damisetti Janakiramanna** AIR 1920 PC 84 it was held that presumption cannot displace adequate evidence. The Supreme Court also in **Mohanlal Shamji Soni v. Union of India** 1991 Supp (1) SCC 271 held that it is the rule of law in evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue and the Court ought to take an active role in the proceedings in finding the truth and administering justice. Recently in **Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria (Dead)** 2012 (3) SCALE 550 it was reiterated that the truth is the guiding star and the quest in the judicial process and the voyage of trial. The trend world over of full disclosure by the parties and deployment of powers to ensure that the scope of factual controversy is minimized was noticed. We are therefore of the opinion that adverse inference from non-compliance cannot be a substitute to the enforceability of a direction for DNA testing. The valuable right of the appellant under the said direction, to prove his paternity through such DNA testing cannot be taken away by asking the appellant to be satisfied with the comparatively weak 'adverse inference'.

35. The impugned judgment refers extensively to the law in this regard in other countries. We are however of the opinion that once the Supreme Court in the judgments supra has held the Civil Court entitled to issue such a direction, the law in other jurisdictions pales into insignificance.

36. We therefore allow this appeal and set aside the order dated

23rd September, 2011. We further clarify that the observations/findings therein on any of the aspects which we find to be unnecessary and for which reason we have not gone into the challenge thereto shall not be binding at a subsequent stage of the proceedings. We further deem it necessary to now clarify the procedure to be followed for compliance of the direction contained in the order dated 23rd December, 2010. Upon the respondent no.1 continuing to defy the order, the Single Judge shall be entitled to take police assistance and use of reasonable force for compliance thereof. The respondent no.1 to also pay costs of this appeal quantified at Rs. 25,000/- to the appellant.

ILR (2012) V DELHI 205
RFA (OS)

JAGESHWAR PARSHAD SHARMA ….APPELLANT

VERSUS

RAGHUNATH RAI & ORS. ….RESPONDENTS

(S. RAVINDRA BHAT & S.P. GARG, JJ.)

RFA (OS) NO. : 54/1999 DATE OF DECISION: 27.04.2012

Transfer of Property Act, 1882—Section 48—Respondents filed suit for specific performance of agreement to sell executed by appellant in their favour and consequent decree for possession and damages—Suit decreed by Ld. Single Judge—Aggrieved, appellant preferred appeal urging equitable mortgage of the suit premises had existed in favour of Punjab National Bank prior to execution of agreement to sell which was thus, hit by Section 48 of the Act and could not be enforced over claim of Bank—Held:- Prior mortgage or encumbrance cannot deprive the vendee of a right to decree for specific performance and that such

mortgage only become a liability or encumbrance on the property which the subsequent purchaser has to satisfy.

Further, a prior mortgage does not constitute a bar to granting a decree for specific performance. Being an encumbrance, the mortgage would attach itself and the mortgagee creditor's options can never be limited or diminished. The mortgagee's right to foreclosure would be as regards the property, not the debtor. There is thus no legal bar, or any principle in equity constituting a vendor mortgagor's right to enter into agreements, to sell such mortgaged property, even if the vendee is made aware of the prior charge. It has been held in **Raghunath Vs. J.P. Sharma** AIR 1999 Del 383 and **R. Velammal Vs. R. Daya Siga Mani** AIR 1993 Mad 100 that prior mortgage or encumbrance cannot deprive the vendee of a right to decree for specific performance and that such mortgage only became a liability or encumbrance to the property which the subsequent purchaser has to satisfy. This aspect was correctly decided by the impugned judgment in the following terms:

> "63. Assuming that an equitable mortgage had been created by defendant No. 1 in favor of defendant No. 2 as alleged. Equitable mortgage had not extinguished the rights of defendant No.1 in the property. He had still interest and could sell the property with or without encumbrance. In this case he had agreed to transfer it without any encumbrance. The agreement to sell for this reason is not null and void. The plaintiffs being the purchasers for valuable consideration under the agreement to sell have right to claim specific performance and as such have locus standi to file the present suit. This issue is decided against defendants."

Apart from the above aspects, no other argument was made on behalf of the appellant to challenge the impugned judgment. **(Para 15)**

Important Issue Involved: Prior mortgage or encumbrance cannot deprive the vendee of a right to decree for specific performance and that such mortgage only become a liability or encumbrance to the property which the subsequent purchaser has to satisfy.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Sh. Rakesh Prabhakar, Advocate.

FOR THE RESPONDENT : Sh. L.S. Solanki, Advocate, for Respondent Nos. 1 and 2

CASES REFERRED TO:

1. *Raghunath* vs. *J.P. Sharma* AIR 1999 Del 383.
2. *R. Velammal* vs. *R. Daya Siga Mani* AIR 1993 Mad 100.
3. *Rojasara Ramjibhai Dahyabhai* vs. *Jani Narotamdas Lallubhai (dead by LRs.)* AIR 1986 SC 1912).
4. *Dattatreya Shanker Mote & Ors.* vs. *Anand Chintaman Datar & Ors* 1974 (2) SCC 799.
5. *Mrs. Chandnee Widya Vati Madden* vs. *Dr. C.L. Katial & Others* [1964]2 SCR 495.
6. *Motilal* vs. *Nanhelal* AIR 1937 PC 287.

RESULT: Appeal dismissed.

S. RAVINDRA BHAT, J. (OPEN COURT)

1. The Appellant challenges a judgment and order of a learned Single Judge of this Court, decreeing OS No. 1394/79. The appellant was arrayed as defendant in the respondents' suit which sought decree of specific performance of the agreement to sell (hereafter "the agreement") dated 6.6.1977 (executed by the appellant in their favour) and consequential decree for possession (of ground floor part) and also for damages.

2. The plaintiffs had contended that the Defendant No. 1 (hereafter "the appellant") executed the agreement to sell the property No. 227 in Block E, Greater Kailash, New Delhi measuring 208 sq. yards in their favor for a consideration of Rs. 2,00,000/-. They had paid Rs. 1,00,000/-

(Rs. 21,000/- as earnest money and Rs. 79,000/- as advance part payment) to him on 9.6.1977 at the time of execution and presentation for registration of the agreement before the Sub-Registrar. The appellant had delivered vacant physical possession of the first and second floors of the said property to them. The sale was to be completed by the appellant within 81 days of obtaining the No Objection Certificate from the competent authority under the Urban Land (Ceiling and Regulation) Act (for short "ULCRA") and from the Income Tax authorities. This was not done; on 15.11.1977 he sought extension of time for 90 days for completing the sale which was consented to by the plaintiffs vide their letter dated 19.11.1977, but still sale had not been completed. The suit also alleged that under the agreement, he had to furnish documents to enable them to raise a loan from the Life Insurance Corporation of Rs. 1,00,000/- to pay the balance sale consideration. The Appellant agreed to clear the water and electricity dues and property taxes and convey to the plaintiffs a clear title free from encumbrance/liabilities whatsoever. The plaintiff respondent expressed their readiness and willingness to perform their part of the obligations. They alleged that the Appellant, however defaulted and breached his obligations.

3. The Defendants filed separate written statements. The Second defendant (the Punjab National Bank, hereafter "PNB") claimed that the Appellant had created an equitable mortgage in its favor in respect of the suit property for credit facilities given to M/s. Anil Industries of which the appellant and his brother S.K. Sharma were partners and there was an outstanding liability amounting to Rs. 12,95,889.02 as on 31.12.1979 towards that facility, that the suit is bad in law, plaintiffs have no locus standi to file the suit and the agreement was null and void and not binding, being in violation of the mortgage created in its favor. The plaintiffs, however, claimed ignorance of such mortgage and asserted that what was represented to it was that the property was free from encumbrances.

4. The appellant, in the written statement, contended that the plaintiff had no cause of action and was disentitled to claim specific performance as the No Objection Certificate required was not given. There was consequently no failure on his part. It was also stated that at the time of execution of the agreement to sell, the existence of the equitable mortgage on the property to PNB was informed to the plaintiff in March, 1978 and that inspite of his best efforts and due to the circumstances beyond his

control, he could not get the title deeds of the property released from the bank. It was alleged that the plaintiff was offered a refund of the sum of '1.00 lakh given as advance and earnest money, subject the return of possession of first floor and second floor. The first defendant also counter claimed for recovery of Rs. 79,750/-on account of damages for use and occupation of the first and second floors by the plaintiffs at the rate of Rs. 2250/-per month for the period up to 6.2.1980.

5. On the pleadings of the parties the following issues were framed:

1. Whether the suit has not been properly valued for court fee and whether the court fee paid is not sufficient and proper?

2. Whether the agreement to sell dated 6.6.1977 had come to an end as alleged in paras Nos. 3-4 of the written statement of Defendant No. 1, if so to what effect?

3. Whether the defendant No. 1 had represented to the plaintiff that the property in suit was free from all sorts of encumbrances, liens and charges etc., if so, to what effect?

4. Whether the plaintiff has been ready and willing to perform his part of the agreement?

5. Whether the defendant No. 1 has been ready and willing to perform his part of the agreement ?

6. Whether defendant No. 1 is entitled to claim from the plain tiff the charges for use and occupation for the fist floor and 2nd floor of the suit property and if so at what rate and for what period?

7. Whether the defendant No.1 can claim the charges mentioned in issue No. 6 above without payment of Court fee, if so, to what effect?

8. Whether the plaintiff is entitled to claim for damages from defendant No. 1, if so, to what amount?

9. Whether the plaintiff has no locus standi to file the suit and the agreement in question in null and void as alleged by defendant No. 2 in preliminary objection No. 2 and paras 6 and 7 on merits of his written statement?

10. Whether the defendant No. 2 has first charge over the property in suit and what is the effect of the equitable mortgage?

11. To what relief is the plaintiff entitled?

6. The parties led oral and documentary evidence; the plaintiffs examined nine witnesses. The first defendant examined three witnesses. PNB remained absent after filling the written statement and did not lead any evidence.

7. The learned single judge, by the impugned judgment and order, decreed the suit, holding that the plaintiff had proved that it was ready and willing to perform its part of the bargain, and that there was no impediment, legal or otherwise for the court to issue a decree of specific performance.

8. The appellant's only contention before this Court was that the impugned judgment is unsustainable because the prior mortgage with PNB constituted a legal impediment for the court to issue a decree of specific performance. He relied on Section 48 of the Transfer of Property Act, 1882, in this regard, which reads as follows:

> "48. Priority of rights created by transfer.-Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created."

It was contended that since an equitable mortgage in favour of the PNB existed, which was prior in point of time, as a result, the agreement to sell was hit by Section 48 and could not be enforced, over the prior claim of the Bank. It was submitted that the contract for sale of the property was subject to the vendor/ first defendant getting rid of his liabilities, and redeeming the mortgage. Since that could not be done, the contract for sale of the property could not be fulfilled. Counsel submitted that the Trial Court fell into error in holding that this argument was not proved, even though the documentary material, in the form of the agreement to sale, and the first defendant's evidence, established that.

9. This court has considered the submissions and the materials on record. Before analyzing the appellant's submissions, it would be necessary

to reproduce the Agreement to sell, which was produced and marked in evidence as Ex. P-1. It reads as follows:

"1. That the Purchasers will pay a sum of Rs. 21,000/- (Rupees twenty on thousand only) as earnest money to the seller at the time of execution of this Agreement and a further sum of Rs. 79,000/- (Rupees seventy nine thousand only) as a further advance payment at the time of presentation for registration of this Agreement in the Office of Sub-Registrar, Asaf Ali Road, New Delhi. In the form of collateral securities the Seller shall handover the vacant physical possession of the First and Second floors of the said building.

2. That the Seller shall obtain a No Objection from the Competent Authority set up under the Urban Land (Ceiling & Regulation) Act, 1976.

3. That the Seller shall also obtain the required Income Tax clearance Certificate vide Proforma 34-A under section 230A of the Income Tax Act.

4. That the Seller shall clear off all the dues and demands in respect of Electric and Water Charges, Fire & Scavenges tax, House-tax or any other Levy or Penalty pertaining to the said property and thus make the property absolutely free from all encumbrances, liens, claims, demands, dues, executions, mortgages, agreements to sell, prior sales, appurtenances, easements, privileges etc. etc.

5. That the Seller shall pay all the expenses in respect of this Deal, such as Stamp Paper, Corporation Duty, Stamps and any other incidental charges.

6. That the Purchasers will be entitled to do the renovation, painting & polishing in the premises handed over to them even during the tenure of this Agreement at their own will and cost.

7. That the Purchasers are likely to approach the Life Insurance Corporation of India for the grant of a loan against this property for the payment of balance amount of sale price to the seller and to make this loan feasible the seller shall handover all the original sale deeds and other relevant papers to the Purchasers at the

time of grant of such loan by the Life Insurnce Corporation of India to the purchasers.

8. Should the Purchasers fail to pay the balance sale proceed within 21 days after the Seller's intimation to them about the receipt of No Objection and the Income Tax clearance Certificate the Seller reserves the right to forfeit the earnest money of Rs. 21,000/- and cancel the deal. But the amount of Rs. 79,000/- received by him as further advance along with the expenses in curred by the purchasers on renovation, painting & polishing, as agreed upon, shall be returned to the Purchasers forthwith

10. That the Seller shall keep the possession of the ground floor till the final sale deed is made but shall allow the purchasers or their authorized agents to do the work of renovation or painting & polishing at reasonable hours.

11. That the seller shall obtain the required No Objection and the I.T.C. within 75 days from the date of execution of this Agreement.

XXXXXX XXXXXXX XXXXXX

13. That the Seller shall intimate the Purchasers about the receipt of No Objection and the Income Tax Clearance Certificate by him by a registered acknowledgment due letter and the Purchasers shall be required to make the balance payment within 21 days from the receipt of such intimation.

xx xx xx xx

15. The stipulated period for the finalisation of the Sale Deed is eighty one days."

10. After considering the provisions of the Contract Act, the learned Single Judge held that:

"18. It is not the case of the defendant that the contract was void or voidable at the time of execution of the agreement to sell at the instance of the defendant No. 1 for any of the grounds enumerated in the Contract Act.

19. The terms agreed upon also do not show that it was also a

contingent contract giving the option to the seller to avoid the contract on the happening or non happening of any event. The conditions to be fulfillled by the defendant/seller are also not impossible of performance. As such the defendant could not avoid the agreement on his own ipsi dixit for non performance of the terms on his part as agreed for the alleged reasons.

20. In the agreement to sell defendant had agreed to do certain acts and things. There is mostly always an implied covenant on the part of the vendor to do all things necessary to give effect to the agreement, including the obtaining of the permission or clearances for the transfer of the property. The law is well settled that if the vendor agrees to sell the property which can be transferred only with the sanction of some Government authority, the court has jurisdiction to order the vendor to apply to such authority within specified period, and if the sanction is forthcoming to convey the property to the purchaser within a certain time. (See **Motilal Vs. Nanhelal** AIR 1937 PC 287: **Mrs. Chandnee Widya Vati Madden Vs . Dr. C.L. Katial & Others** [1964]2 SCR 495 : and **Rojasara Ramjibhai Dahyabhai Vs. Jani Narotamdas Lallubhai (dead by LRs.)** AIR 1986 SC 1912).

21. It is not the case of the defendant that though he had applied for "No Objection" and Income Tax Clearance but the same were disallowed/refused. Permission was applied under ULCRA which was granted on 2.5.1978 vide order Ex. P-4. This fact has inter alias been proved by the Competent Authority himself (Shri A.C. Kher as P.W.7 and the material on record shows that this was granted in the presence of the defendant who himself had collected it from there. Denial of knowledge even of this permission by defendant No. 1 is sneer concoction, falsehood and mala fide. If he did not know the fact of this permission, he would have pursued the matter further with the Competent Authority which obviously he did not do. Obviously, this is a false plea taken to avoid the agreement. Similarly the defendant had either obtained the Income Tax clearance or he had not applied for the same. It does not appear nor it is shown that there would have been any difficulty in obtaining this Income Tax clearance if the defendant had made any attempt to obtain

it. Again if there was mortgage on the property, it was within his power to discharge the same when he had undertaken to convey title to the plaintiff free from all sorts of encumbrances etc. One cannot be allowed to take benefit of his own faults and omissions. Contracts solemnly entered into cannot be avoided on the ipsi dixit of one of the party to the prejudice of the other. There will be no frustration of the contract when the parties are put to observe what they were required to do under the contract and which they do not want to perform.

22. The plaintiffs had admittedly paid 50% of the sale consideration at the time of execution of the agreement and the balance 50% amount of Rs. 1.00 lakh was payable after the seller's intimation to them by registered post about the receipt of "No Objection" and the Income Tax Clearance Certificate (ITC) under Clause B and such "No Objection" and "ITC" were to be obtained by the seller within 75 days from the date of execution of this agreement (Clause 11). Besides this the defendant had to pay off all the Municipal dues and taxes etc. and to convey a valid title free from all encumbrances whatsoever as provided in Clause 4. Under section 55(1)(g) of the Transfer of Property Act (for short "TPA") also he was obliged to perform and discharge these obligations undertaken by him for which he had even sought time and which was granted by plaintiffs on 19.11.1977 (Ex. P3). It is not the case of the defendant nor shown that there was any breach on the part of the plaintiffs in this respect.

23. The agreement to sell in question thus did not come to an end as alleged in paras 3 and 4 of the written statement of the defendant No. 1. This issue is thus decided against defendant No.1."

Next, dealing with the question whether the previous mortgage had been disclosed to the plaintiff/respondent, after considering the evidence, it was held that:

"30. Though defendant No.1 as D.W.1 has stated that he had taken loan from Punjab National Bank and the sale deeds were deposited there and that he had told the plaintiff at the time of entering into the agreement that the property stood mortgaged with that Bank but he has been challenged on this in his cross

examination by the plaintiffs. He has stated that Mr. B.R. Kataria, an officer of the Punjab National Bank and on other officer of that Bank had appeared before the Sub-Registrar at the time of the registration of the agreement to sell with the original sale deed of the property. But neither the written request that would have been made to this effect to the Bank to produce the original nor Mr. Kataria or any other person from that Bank has been produced as witnesses to prove this fact. His self-serving statement in the absence of such corroborating evidence which could be produced, cannot be believed in preference to the statements of P.W. 5 and P.W. 9. Further his statement that he neither appeared before the Competent Authority nor produced before him, the original sale deed at the time of obtaining permission is not correct. Shri A.C. Kher, who was the Competent Authority and granted the permission (Ex. P. 4) has appeared as P.W. 7 and proved Ex.P-5, copy of order sheet dated 27.4.1978 wherein the fact of production of the original sale deed for his perusal is recorded. In his statement as P.W. 7 also he has so deposed which was the normal practice to see the original title deeds. He is a responsible senior Government Officer and is an independent witness. He has no interest to depose favoring one and disfavoring the other. There is no reason to disbelieve him. Moreover, there is no reason nor any Explanationn that if the property was subject to equitable mortgage, why it was not incorporated in the agreement itself.

31. In view of this discussion, I find and it is so held that defendant No. 1 had not disclosed to the plaintiffs at the time of entering into or execution and registration of the agreement to sell that the property in question was encumbranced by way of equitable mortgage with the Punjab National Bank. I also hold that defendant No. 1 had manipulated in collusion with the staff of the Punjab National Bank in surreptitiously obtaining from them if so deposited there and producing the original sale deeds of the property in question before the plaintiffs, the property dealer, the Sub-Registrar and before the Competent Authority. It is further held that he had represented to the plaintiffs that the Municipal dues and taxes were the only outstanding liability against this property. This issue is decided accordingly and in favor of

the plaintiffs."

11. The Defendants' argument about the Plaintiff not being ready and willing to perform his part of the bargain was rejected by the Trial Court. It was held that the first defendant was aware that the Plaintiff had applied for a loan from the Life Insurance Corporation to pay the balance consideration. The advance of Rupees one lakh had been paid to the first defendant. The first plaintiff was examined as PW-9; in addition to his evidence, P.W. 6 Shri M.L. Ahuja from the concerned branch of LIC deposed that the plaintiff had applied for a loan of Rs.1 lakh for the purchase of this property and intimation of sanction of loan was sent and original title deeds were called from him which were not submitted. He also proved relevant correspondence Ex. P-9 to P-15 exchanged between LIC and the plaintiff. The LIC did not release the amount due to the fact that the title deeds had not been furnished (as they were deposited by the first defendant). Having regard to these, and the other materials, which were not disputed by the Appellant, the Trial Court concluded that the plaintiffs had proved readiness and willingness to perform their part of the bargain.

12. The Court, in addition, concluded that the PNB staff had colluded with the first defendant, in allowing him access to the title documents, which resulted in the former entering into an agreement to sell the property with the plaintiff, and that the first plaintiff was not aware of this. Consequently, it was held that the PNB could not enforce its mortgage against the property, to the plaintiffs' detriment, as it was estopped in that regard. The Court also enjoined the PNB with appropriate directions, in its decree. PNB did not appeal against the decree, and has not even participated in the present proceedings.

13. As observed earlier, the endeavour of the appellant was to submit that the impugned judgment was unsustainable as it preferred to decree the suit for specific performance, over the pre-existing mortgage in favour of the PNB. The first defendant's submission was that the agreement of sale was void, and unenforceable on that count. The appellant also relied on Section 48.

14. First, the argument regarding applicability of Section 48, Transfer of Property Act. Speaking about this provision, the Supreme Court held in **Dattatreya Shanker Mote & Ors V. Anand Chintaman Datar & Ors** 1974 (2) SCC 799, that:

"The principle underlying Section 48 is one expressed in the maxim of Equity : "Qui prior est tempore potior est jure (first in time is stronger in right). This principle, applied to ranking between rival equitable claims, is applied by Section 48 to contending claims of otherwise equal legal validity. The effect of Section 100 is that while a charge, which is not a "transfer" of property, gets recognition as a legally enforceable claim, that enforceability is subjected by the proviso to the requirements of a prior notice in order to give it precedence over a legally valid transfer of property. The rights of the appellants chargeholders could only be exercised, on facts found, subject to the priority obtained by the respondent mortagagee's rights. This clear result of the law, as contained in Section 100 of the Act, cannot be defeated by invoking either the terms of or the principles underlying Section 48 of the Act read with the first part only of Section 100 of the Act."

15. Further, a prior mortgage does not constitute a bar to granting a decree for specific performance. Being an encumbrance, the mortgage would attach itself and the mortgagee creditor's options can never be limited or diminished. The mortgagee's right to foreclosure would be as regards the property, not the debtor. There is thus no legal bar, or any principle in equity constituting a vendor mortgagor's right to enter into agreements, to sell such mortgaged property, even if the vendee is made aware of the prior charge. It has been held in **Raghunath Vs. J.P. Sharma** AIR 1999 Del 383 and **R. Velammal Vs. R. Daya Siga Mani** AIR 1993 Mad 100 that prior mortgage or encumbrance cannot deprive the vendee of a right to decree for specific performance and that such mortgage only became a liability or encumbrance to the property which the subsequent purchaser has to satisfy. This aspect was correctly decided by the impugned judgment in the following terms:

"63. Assuming that an equitable mortgage had been created by defendant No. 1 in favor of defendant No. 2 as alleged. Equitable mortgage had not extinguished the rights of defendant No.1 in the property. He had still interest and could sell the property with or without encumbrance. In this case he had agreed to transfer it without any encumbrance. The agreement to sell for this reason is not null and void. The plaintiffs being the purchasers for valuable consideration under the agreement to sell have right to claim specific performance and as such have locus standi to file the present suit. This issue is decided against defendants."

Apart from the above aspects, no other argument was made on behalf of the appellant to challenge the impugned judgment.

16. The Court does not find any infirmity with the findings or conclusions returned by the impugned judgment, which does not call for interference. The appeal, RFA 54/1999 is accordingly dismissed.

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W.P. (C)

INDERJEET ARYA & ANR. ….APPELLANTS

VERSUS

ICICI BANK LTD. ….RESPONDENT

(SANJAY KISHAN KAUL & RAJIV SHAKDHER, JJ.)

W.P. (C) NO. : 7253/2011 DATE OF DECISION: 02.05.2012

Sick Industrial Companies (Special Provisions) Act, 1985—Section 22—Whether the action filed in DRT by respondent in which the petitioner are also arrayed would fall under the category of "suit"—Whether protection u/s 22(1) should be accorded to a guarantor qua an action filed by a Bank under the RDDB Act—Held—The word suit cannot be understood in its broad and generic sense to include any action before a legal forum involving an adjudicatory process. If that were so, the legislature which is deemed to have knowledge of existing statute would have made the necessary provision like it did in inserting in the first limb of s. 22 of SICA where the expression "proceedings for

winding up of an industrial company or execution, distress etc." is followed by the expression or "the like" against the properties of the industrial company. There is no such broad suffix placed alongside the term "suit". The term suit would this have to be confined in the context S. 22(1) to those actions with are dealt with under the Code and not in the comprehensive or overarching sense so as to apply to any original proceedings before any legal forum. The term "suit" would only apply to proceedings in a civil Court and not actions for recovery proceedings filed by banks and financial institutions before a Tribunal such as DRT.

Thus, in our view, having regard to the facts set out hereinabove, the word 'suit' cannot be understood in its broad and generic sense to include any action before a legal forum involving an adjudicatory process. If that were so, the legislature which is deemed to have knowledge of existing statute would have made the necessary provision, like it did, in inserting in the first limb of section 22 of SICA, where the expression proceedings for winding up of an industrial company or execution, distress, etc. is followed by the expression or "the like" against the properties of the industrial company. There is no such broad suffix placed alongside the term 'suit'. The term suit would thus have to be confined, in the context of sub section (1) of section 22 of SICA, to those actions which are dealt with under the Code and not in the comprehensive or overarching sense so as to apply to any original proceedings before any legal forum as was sought to be contended before us. The term, 'suit' in our opinion would apply only to proceedings in a civil court and not actions for recovery proceedings filed by banks and financial institutions before a Tribunal, such as, the 'DRT'. **(Para 23)**

(B) Debt Recovery Tribunal Rules, Rule 5A, Limitation Act, 1963—Section 5—Held—Rule 5A gives leeway to the

DRT to entertain an application for review only if it is filed latest by the sixtieth day from the date of the order. Sub Rule 2 expressly imposes a bar on DRT in entertaining review application after expiry of 60 days. RBD and the rules made thereunder, being a special statute prescribes its own period of limitation, leaving no scope for entertaining applications for review beyond the stated period. No possibility for invoking Section 5 of Limitation Act for condonation.

It is trite to say that statute of limitation bars or runs against the remedy, but does not impair the right, obligation or cause of action. (see **Bombay Dyeing & Mfg. Co. Ltd. Vs. State of Bombay,** 1958 SCR 1122 (para 12, page 1124).

14.1 It is pertinent to note that before us, no challenge is laid to the Rule 5A of the DRT Rules. Rule 5A gives a leeway to the DRT to entertain an application for review, only if, it is filed latest, by the sixtieth day from the date of the order of which review is sought. There is in sub rule (2) of Rule 5A, an express bar imposed on the DRT in entertaining review applications after the expiry of sixty (60) days. The RDB and the Rules made thereunder, being a special statute prescribes its own period of limitation, leaving no scope for entertaining applications for review beyond the stated period. There is, therefore, possibly no scope even for entertaining an application for condonation of delay by invoking Section 5 of the Limitation Act, 1963 (in short Limitation Act). The language of Sub Rule (2) of Rule 5A appears to make this abundantly clear by providing : *"no application for review shall be made after the expiry of a period of sixty days from the date of the order and no such application shall be entertained unless it is accompanied by an affidavit verifying the application."*

14.2 We are also conscious of the provisions of Section 24 of the RDDB Act, which provides, that the provisions of the Limitation Act shall as far as may be applied to an application made to a Tribunal. Undoubtedly, the application adverted

to in the said provision refers to the OA filed by a bank/ financial institution to seek recovery of its debt and not interlocutory applications, such as, one for review. It is, therefore, perhaps the legislature's intention to apply the provisions of the Limitation Act to a limited extent and *"as far as may be"* to the original action for recovery of debt. This would not translate, perhaps, in the provisions of Section 5 of the Limitation Act being made applicable to an application for review of an order passed in an OA. It is interesting to note that there is no provision for review in the RDDB Act.

The power to review orders has been provided in the Rules enacted by Central Government in exercise of its power under Section 36 of the RDDB Act. Therefore, if one were to apply the provisions of Section 29(2) of the Limitation Act, it appears that RDDB, which is a special statute, seeks to provide exclusion of Section 5 of the Limitation Act qua application for review of orders passed by the DRT. (See observations of the Supreme Court in the case of **Union of India Vs. Popular Construction Co.** (2001) 8 SCC 470) **Chhatisgarh State Electricity Board Vs. Central Electricity Regulatory Commission and Others** (2010) 5 SCC 23.

14.3. We are, therefore, leaving the issue open to be decided in an appropriate case, since in this case, in any event, petitioners have not taken the trouble of filing an application for condonation of delay under section 5 of the Limitation Act. Therefore, having regard to the entirety of the facts and circumstances emerging in this case, we are not inclined to interfere with the impugned orders. It is precisely for this reason that judgments in the case of **Collector, Land Acquisition, Anantnag & Anr. Vs. MST. Katiji & Ors.,** (1987) 2 SCC 107, **Ram Nath Sao Vs. Gobardhan Sao & Ors.,** (2002) 3 SCC 195 and **N.Balakrishnan Vs. M.Krishnamurthy,** (1998) 7 SCC 123 which relate to principles to be applied while considering the plea made to condone the delay does not require a discussion by us. We also find that the petitioners cannot be

aggrieved by continuation of the legal proceedings, since the DRT has granted a stay against execution of the decree, if any, obtained against them pending the decision in the case of Zenith Steels Tubes and Industries Ltd.

(Para 14)

[An Ba]

APPEARANCES:

FOR THE APPELLANTS : Ms. Maneesha Dhir, Ms. Jayashree Shukla, Mr. Gaurav Srivastava & Mr. Abhirup Das Gupta, Advocates.

FOR THE RESPONDENT : Mr. Sumit Bansal & Ateev Mathur, Advocates.

CASES REFERRED TO:

1. *Asset Reconstruction Co. India Pvt. Ltd.* vs. *Shamken Spinners Ltd. & Ors.*, (2011) 164 COMPCAS 344 (Delhi).
2. *Intercraft Ltd.* vs. *Cosmique Global,* 173 (2010) DLT 116.
3. *Chhatisgarh State Electricity Board* vs. *Central Electricity Regulatory Commission and Others* (2010) 5 SCC 23.
4. *Nahar Industrial Enterprise Limited* vs. *Hong Kong and Shanghai Banking Corporation,* JT 2009 (10) SC 199.
5. *Bhoruka Textiles* vs. *Kashmiri rice Industries,* (2009) 7 SCC 521.
6. *Nahar Industrial Enterprises* vs. *HSBC* JT 2009 (8) SC 199.
7. *K.S.L. Industries Ltd.* vs. *Arihant Threads Ltd. & Ors.* JT 2008 (9) SC 381.
8. *Zenith Steel Tubes & Industries Ltd. & Anr.* vs. *Sicom Ltd.* (2008) 1 SCC 533.
9. *Paramjeet Singh Patheja* vs. *ICDS Ltd.* (2006) 13 SCC 322.
10. *Montari Industries Ltd.* vs. *State Bank of Patiala* Misc. Appeal No. 9/2004 decided on 17.11.2004.

11. *Bhavnagar University* vs. *Palitana Sugar Mill (P) Ltd. and Ors.*, (2003) 2 SCC 111].

12. *Kailash nath Agarwal & Ors.* vs. *Pradeshiya Industrial & Investment Corporation of U.P. Ltd. & Anr.* (2003) 4 SCC 305.

13. *Ram Nath Sao* vs. *Gobardhan Sao & Ors.*, (2002) 3 SCC 195.

14. *Union of India* vs. *Popular Construction Co.* (2001) 8 SCC 470).

15. *M/s Patheja Bros. Forgings & Stamping & Anr. Vs ICICI Ltd. & Ors.* (2000) 6 SCC 545.

16. *Industrial Credit and Investment Corpn. Of India Ltd.* vs. *Grapco Industries Ltd.* [1999 (4) SCC 710].

17. *Real Value Appliances Ltd.* vs. *Canara Bank & Ors.*, (1998) 5 SCC 554].

18. *N.Balakrishnan* vs. *M.Krishnamurthy*, (1998) 7 SCC 123.

19. *V.R. Ramaraju* vs. *Union of India and Ors.*, (1997) 89 Comp. Cas 609).

20. *Industrial Development Bank of India* vs. *Surekha Coated tubes and Sheets Ltd.*, 1994 II AD (Delhi) 119.

21. *Collector, Land Acquisition, Anantnag & Anr.* vs. *MST. Katiji & Ors.*, (1987) 2 SCC 107.

22. *Bombay Dyeing & Mfg. Co. Ltd.* vs. *State of Bombay*, 1958 SCR 1122 (para 12, page 1124).

RESULT: Appeal dismissed.

RAJIV SHAKDHER, J.

1. The present writ petition is directed against the judgment of the Debt Recovery Appellate Tribunal (in short DRAT) dated 29.08.2011 passed in miscellaneous appeal no. 306/2011 in OA No. 118/2009 and the orders dated 30.05.2011 and 03.05.2010 passed by the Debt Recovery Tribunal – II, Delhi (in short DRT).

2. In so far as the first order of the DRT is concerned, i.e., order dated 03.05.2010, the petitioners are aggrieved by the fact that the DRT has directed sine die adjournment of proceedings only qua the principal

debtor, which is, Rajat Pharma Chem Ltd. (in short, RPL) and not extended the said direction in their favour. The petitioners aver that they are the guarantors to the debt owed by the aforementioned principal debtor. Though we must point out here that one of the defences taken before the DRT, by RPL, is that, it is not the principal debtor and that another entity, being State Trading Corporation of India Ltd. (in short, STC) is the principal debtor, given the nature of the transaction. This is an aspect we have touched upon in the latter part of our judgment. We would, however, in our judgment refer to RPL as the principal debtor. Furthermore, it is their case that the DRT's order dated 03.05.2010, which was passed in IA No. 1046/2009, combined the relief to the principal debtor though relief was sought qua the principal debtor as also the guarantors.

2.1 The second order of the DRT dated 30.05.2011, is assailed on the ground that the petitioner's application for clarification/ modification / review of the DRT's earlier order dated 03.05.2010, has not been allowed.

3. In order to adjudicate upon the present writ petition it is necessary to notice some broad facts, insofar as they, are relevant to the present proceedings.

3.1 RPL is, evidently engaged in the business of manufacturing, trading and export of generic pharmaceuticals formulations and products. Petitioner no. 1, is the Chairman-cum-director of RPL, while petitioner no. 2 is its director.

3.2 It appears that the Bank of Rajasthan, prior to its amalgamation with the respondent, instituted recovery proceedings in the DRT, which was registered as OA No. 118/2009. In the said proceedings, STC is impleaded as defendant no. 1, while RPL, alongwith its director-guarantors is arrayed as defendant nos. 2, 3 & 4 respectively. By way of the said recovery proceedings, Bank of Rajasthan (now the respondent bank) seeks recovery of Rs 26,55,35,824.50/-, which includes interest, in the sum of Rs 2,79,43,736/- , till the date of institution of the action in DRT. Future interest, at the rate of 18% per annum, payable from the due date of the respective bills till their actual realization, is also sought.

3.3 It is, broadly, the say of the respondent in the OA filed before the DRT that, RPL alongwith the petitioners had sought a usance bill

discounting facility, which was sanctioned by it, vide its letter dated 09.03.2006. RPL in turn had placed the said sanction accorded by the respondent bank, before its board of directors, which approved the same by way of a resolution of even date, i.e., 09.03.2006. To secure the respondent bank's interest various security documents were executed both by RPL as well as the petitioners. This facility allowed RPL to draw a loan to the extent of Rs 15 crores.

3.4 It appears that RPL had sought enhancement of this loan facility to the extent of Rs 25 crores, which was conveyed by the respondent bank evidently vide letter dated 30.10.2006. As in the first instance, the decision was placed by RPL, before its board of directors. The board of directors, evidently, vide their resolution dated 10.11.2006, accepted the terms and conditions conveyed by the respondent bank vide its sanction letter dated 30.11.2006. Once again, various security documents were executed, both by RPL as well as the petitioners.

4. It is pertinent to note that STC got roped-in the recovery proceedings, initiated by the respondent/bank, on account of the fact that against goods purportedly supplied by RPL to STC for export to the ultimate foreign buyers, bills of exchange were raised, which were payable apparently within 180 days from the date of their acceptance. In the OA, filed by the respondent/bank, it is averred that the bills of exchange were accepted by STC, which in turn, had been discounted by RPL, with the respondent/ bank. On the bills of exchange becoming overdue, payments were sought by the respondent/bank both from RPL as well as STC, and upon, their failure to make the payment, the respondent bank issued legal notices dated 02.01.2009 to the petitioners as well as STC and RPL. The STC, in response to the legal notice, sent a reply dated 05.02.2009, inter alia refuting its liability to pay monies against outstanding bills of exchange on the ground that they were accepted on a back-to-back basis against export bills presented to the foreign buyers, and that, the respondent bank would receive payment only if, STC received payments from the foreign buyers. A reply dated 27.02.2009, to the legal notice, was also sent by RPL wherein, it refuted the liability inter alia on the ground that STC was the principal debtor since it had accepted the bills of exchange.

4.1 It appears, RPL apprehending institution of recovery proceedings, took the next best step which was to seek registration of its reference under Section 15 of the Sick Industrial Companies (Special Provisions)

Act, 1985 (in short "the SICA") with the Board for Industrial and Financial Reconstructions (in short "the BIFR"). The reference was filed on 02.04.2009. The BIFR vide its communication dated 09.04.2009, intimated its registration and accorded it as case no. 14/2009.

4.2 As expected, the respondent/ bank followed the legal notices, with the institution of an original application (OA) No.118/2009 in the DRT, on 13.05.2009.

4.3 It may be pertinent to note at this stage, that since STC in turn, had been issued cheques in their favour by RPL, on dishonor of the cheques, instituted proceedings under Section under Section 138 of the Negotiable Instruments Act, 1881 (in short N.I. Act). As a matter of fact proceedings under Section 138 of the N.I. Act were lodged before the Metropolitan Magistrate, in Delhi. Against summons issued by the Magistrate, proceedings under Section 482 of the Criminal Procedure Code, 1973 (in short Cr.P.C.) were taken out being Crl. M.C. No. 1951/ 2009. Incidentally, these proceedings came up before one of us (Rajiv Shakdher, J), when by an order dated 24.07.2009, the criminal complaint was ordered to be returned to be filed in the competent court on the ground of lack of territorial jurisdiction. We are not informed as to whether any challenge has been laid to the said order passed by this court. We, however, notice from the record filed before us, that an application under Section 22(3) of the SICA was filed before the BIFR. In this application, suspension of the contract between STC and RPL was sought, which according to RPL formed the basis of the cheques issued in favour of STC. The BIFR, however, by an order dated 10.09.2009 rejected the application. Against these proceedings, an appeal was filed before the Appellate Authority for Industrial & Financial Reconstruction (in short AAIFR). The said appeal bearing No. 249/2009 is pending adjudication.

4.4 In the recovery proceedings notices were issued by the DRT to all defendants, which included the petitioners, on 20.11.2009.

4.5 On 14.12.2009, the petitioners alongwith RPL preferred an application under Section 22 of SICA. This application was registered as IA No.1046/2009. The substantive reliefs sought in the said application are as follows:

"(a) Allow the present application;

(b) Dismiss the instant OA as the same has been filed without the prior permission of the AAIFR/BIFR in terms of Section 22(1) of SICA.

(c) Sine die adjourn the proceedings in the above matter under Section 22(1) of SICA."

4.6 IA No. 1046/2009 came to be listed before the DRT on 22.12.2009. The DRT, after noting the submissions of the counsel for the parties, directed the respondent/bank to file a reply based on the request of its counsel. The application alongwith the main proceedings, i.e., the OA No. 118/2009, was listed for disposal and further directions on 22.02.2010. What is important, however, is that, in the OA, the following directions were passed by the DRT.

"IA No. 1046/2009

Xxxx

Xxxx

OA No. 118/09

On Behalf of defendant no. 1, sh. Harsh Parikh seeks more time to file written statement in view of the subsequent facts happened after filing of the present OA. Defendant no. 1 is hereby granted further opportunity to file its written statement within a period of 30 days. Defendant no. 2 to 4 are also directed to file written statement within the said period." (emphasis supplied)

4.7 In the interregnum, another secured creditor of RPL, i.e., Dena Bank initiated proceedings under The Securitisation and Reconstruction of Financial Assests and Enforcement of Security Interest Act, 2002 (in short SARFAESI Act). In pursuit of the same, symbolic possession of the properties belonging to the RPL was taken over by the Dena Bank. RPL, appears to have laid a challenge to the said proceedings both before the BIFR as well as the DRT, Mumbai. The BIFR, however, by an order dated 23.12.2009 came to the conclusion that the reference before it had abated in view of Dena Bank having filed an action under Section 13(4) of SARFAESI. The said order of the BIFR, was challenged by RPL before the AAIFR in an appeal filed under Section 25 of the SICA, on 19.01.2010. The said appeal is registered as appeal no. 21/2010.

4.8 The DRT, Mumbai by an order dated 18.02.2010, stayed the action taken by the Dena Bank under SARFAESI Act, till final disposal of the securitization application (in short S.A.) filed by RPL.

4.9 Evidently, RPL had also filed some additional documents with the DRT, on 22.02.2010, in support of its application under Section 22 of SICA being: IA No. 1046/2009. The additional documents being: a copy of RPL's appeal no. 21/2010 filed before AAIFR; DRT, Mumbai order dated 18.02.2010 passed in SA no. 12/2009; and lastly, DRT's judgment in the case of **Montari Industries ltd. vs State Bank of Patiala** Appeal No. 9/2004 decided on 17.11.2004.

5. The DRT, at the hearing held on 03.05.2010, in so far as, IA No. 1046/2009 was concerned passed the following order:

"....IA No. 1046/09

5. The above-stated application has been moved on behalf of the defendant no. 2 for suspension of the proceedings stating the ground that a reference was filed by the company in the BIFR which was rejected and an appeal against the order passed by the BIFR has been admitted in the AAIFR and notice was issued to the bank, therefore, the proceedings are liable to be suspended.

6. I have considered the submissions. In my opinion, the proceedings are liable to be suspended, in view of the bar created under section 22 of the SICA Act. The proceedings are therefore sine-die adjourned qua defendant no. 2. The parties to inform the outcome of the appeal.

7. I.A. stands disposed off."

5.1 Thereafter, the matter was, it appears, posted before the Ld. Asstt. Registrar of the DRT, on 25.05.2010 when, at the request made by the counsel for RPL and the petitioners, the matter was placed before the Presiding Officer of the DRT on 31.05.2010 for further directions. Since the order is crucial for adjudication of the present case and being not too lengthy, we propose to extract it for sake of convenience :

"Dated 25/05/2010

Present:

Mr Ajay Rewal, Ld. Counsel for the applicant bank.

Mr Suresh Arora, Ld. Counsel for the defendant no. 1.

Mr Abhiroop Das Gupta, Ld. Counsel for the defendant no. 2 to 4

IN THIS MATTER TOTAL NO OF DEFENDANTS ARE D-4.

Today the matter was listed for filing the WS by the defendants. Ld. Counsel for the defendant no. 2 to 4 stated that the order of Hon'ble AAIFR is placed in the file and further he request that matter may kindly be placed before the Hon'ble Presiding Officer for clarification of the order dated 03/05/10 of Hon'ble Presiding Officer. There are no direction for filing the WS of defendant no. 3 and 4 for which the matter is placed for clarification.

Ld. Counsel for the defendant no.1 states that he has recently engaged and further submits that he has filed an application alongwith Vakalatnama vide diary no. 472 dated 25/05/10 for supplying the legible paper book of OA and seeks 4 weeks time for filing the WS after supply the legible paper book of the OA.

Let, the matter be placed before the Hon'ble Presiding Officer on 31/05/10 for further directions."
(emphasis supplied)

5.2 The matter, thereafter, evidently was placed in court on 31.05.2010 when, it was adjourned to 04.06.2010, as the Presiding Officer was on leave. There was no appearance either on behalf of RPL or on behalf of the petitioners. On 04.06.2010, the Presiding Officer after issuing direction qua other aspects, listed the matter for further proceedings on 06.07.2010. On 06.07.2010 once again, there was no appearance on behalf of either RPL or the petitioners. The matter came to be listed on 26.07.2010. The situation was no different, as on 26.07.2010, once again there was no appearance on behalf of either RPL or petitioners. The matter was posted for further proceedings by the Presiding Officer on 23.08.2010 at the joint request of counsels who were present before him. The matter was then listed for hearing on 23.08.2010. On the said date, it appears one Sh. Apporva appeared on behalf of RPL and the petitioners. Since the Presiding Officer was on leave, the matter was posted on 07.11.2010. Even though it is not clear from the record filed with us, as

to why the matter came to be filed on 07.09.2010 what is however not in dispute that proceedings were held before the Presiding Officer of the DRT on 07.09.2010, when Ms Jayashree Shukla appeared for RPL and the petitioners. On the said date, after issuing directions on other aspects, the matter came to be listed for disposal on 15.10.2010.

5.3 It is in the interregnum, that is, on 08.10.2010, after nearly five (5) months had elapsed from the date of passing of the order dated 03.05.2010, that an application, which was compendiously referred to as an application for clarification/ modification/ review, came to be filed on behalf of the petitioners under Rule 5A of the Debts Recovery Tribunal (Procedure) Rules, 1993 (in short, Rules). It is important to note that Rule 5A gives a window of sixty (60) days for filing a review and no more.

5.4 The aforementioned application seeking review of order dated 03.05.2010, came to be numbered as IA No. 6425/2010. The application was finally heard and disposed of on 30.05.2011. In addition, the DRT also disposed of IA No. 1013/2010, filed by the respondent, seeking a direction from the DRT to close the right of RPL and the petitioners to file their respective written statements on the ground that, even though they had entered appearance on 20.11.2009, the same had not been filed till date. In so far as this application was concerned, the DRT after recording submissions, directed the petitioners to file their written statement before the next date of hearing, failing which, their right to file written statement would be deemed to be closed. As regards IA No. 6425/2010 was concerned, the learned Presiding Officer, disposed of the same with the following directions:

> "15. In my opinion, this review petition is time barred. The impugned order was passed on 3rd May, 2010 and, therefore, this application should have been filed within 30 days from the date of passing of the order. On this ground only, the application is not tenable and liable to be dismissed..
>
> 16. Besides, there are conflicting view of the Hon'ble Apex Court as to whether the guarantors are protected under Section 22 of the SICA in an OA filed by the bank. The matter is pending before a larger Bench for adjudication. However, on this ground the proceedings in the OA cannot be allowed to remain suspended sine die. The execution of the decree may, however,

be kept suspended until this law is established by the Hon'ble Apex Court as to whether the guarantors are entitled to protection under Section 22 of the SICA in addition to the borrower company whose reference is pending before BIFR or an appeal is pending before AAIFR.

17. With these directions the IA stands disposed off."

5.5 The petitioners being aggrieved, preferred an appeal with the DRAT. In the appeal, the petitioners prayed for the following substantive reliefs.

"(a) Quash/set aside the impugned order dated 30.05.2011;

(b) Sine die adjourn the proceedings qua the Appellants in view of section 22(1) of SICA;"

5.6 The DRAT, however, by virtue of the impugned order came to the conclusion that, since, no explanation whatsoever was given for filing the review application beyond the period of limitation, the order of the DRT dated 30.05.2011 did not call for its interference. As regards the DRT's direction with regard to closure of the right of the petitioners to file the written statement was concerned, the DRAT observed that since, the proceedings only qua RPL had been suspended, the petitioners right to file written statement ought not to have been closed. Therefore, the DRAT proceeded to set aside that part of the order, and accorded time to the petitioners, to file their written statement by 30.09.2011, failing which their right would stand closed.

6. Aggrieved by the aforesaid, the petitioners before us, as noticed above, have impugned the orders of the DRAT as well as those passed by the DRT.

7. By our order dated 30.09.2011 read with order dated 11.01.2012, we had stayed the proceedings before the DRT. In support of the writ petition arguments were addressed by Ms Jayashree Shukla and Ms Maneesha Dhir. The respondent was represented by Mr Sumit Bansal and Mr Ateev Mathur.

7.1 Messr Shukla and Dhir in their submissions seemed to have side stepped the issue of limitation and concentrated their entire energy on the aspect of grant of protection under Section 22 of SICA to the petitioners in their capacity as the guarantors of the debt owed by RPL.

The learned counsels in support of their submissions relied upon the following judgments:

M/s Patheja Bros. Forgings & Stamping & Anr. Vs ICICI Ltd. & Ors. (2000) 6 SCC 545; **Montari Industries Ltd. vs State Bank of Patiala** Misc. Appeal No. 9/2004 decided on 17.11.2004; **Paramjeet Singh Patheja vs. ICDS Ltd.** (2006) 13 SCC 322; **Kailash nath Agarwal & Ors. vs Pradeshiya Industrial & Investment Corporation of U.P. Ltd. & Anr.** (2003) 4 SCC 305 and **Zenith Steel Tubes & Industries Ltd. & Anr. Vs Sicom Ltd.** (2008) 1 SCC 533.

8. It is important to note that a compilation of the said judgments were handed over to us at the hearing held on 13.03.2012, by Ms Shukla when arguments were concluded. The matter was listed on 26.03.2012 to enable counsels to file their written synopsis. On 26.03.2012 alongwith the synopsis, a compilation was filed which included in addition to the judgments already filed, eight (8) additional judgments, though it was made clear to the counsels that after arguments had been concluded no further judgments would be taken on record.

SUBMISSIONS OF COUNSELS

9. In their submissions both Ms Jayashree Shukla and Ms Maneesha Dhir contended as follows:

(i) Section 22 of SICA provides protection not only to a sick industrial company which, in this case is the principal debtor, i.e., RPL but also the guarantors. The petitioners being guarantors ought to have been accorded the same protection which the DRT afforded to RPL.

(ii) The judgment of the Supreme Court passed in **Patheja Bros. Forging and Stamping & Anr.** (supra) makes this amply clear, and that, if there was any doubt the same was reiterated by the Supreme Court in the case of **Paramjit Singh Patheja** (supra). A special emphasis was laid by Ms Dhir on the observations made in paragraph 43 (iii) at page 346 of the judgment of the supreme Court in **Paramjit Singh Patheja** (supra). It was contended by the learned counsels for the petitioners that in **Kailash Nath Agarwal** (supra) the Supreme Court was dealing with proceedings taken out against the guarantors under U.P. Public Money (Recovery of Dues) Act, 1972 (in short UPPM Act). It is in that context that the Court held that the term "suit" referred to in section 22(1) of the SICA did not take within its ambit the proceedings

taken out to enforce rights under the UPPM Act against the guarantors. The learned counsel contended that the recovery proceedings taken out under the Recovery of Debts Due to Banks & Financial Institutions Act, 1993 (in short RDDB Act) would surely be covered under the term *'suit'*, as it fulfilled the test laid down in **Paramjit Singh Patheja** (supra). The learned counsel for the petitioners thus submitted, that the fact that, the Supreme Court in **Zenith Steels Tubes and Industries Ltd.** (supra), had referred the matter to a larger bench to reconcile the views of the court taken in **Patheja Bros, Forging and Stamping & Anr.** (supra) and **Paramjit Singh Patheja** (supra) would have no impact in the present case in view of the fact that the recovery proceedings filed by the respondent required adjudication before a legal forum, unlike the proceedings initiated under the UPPM Act and hence, would fall within the ambit of the term suit referred to in Section 22(1) of SICA.

10. As against this, Mr Bansal contended that the petitioners, who are guarantors, can obtain protection of Section 22 of SICA only if, the action filed by the respondent comes within the ambit of the term, *'suit'*. The action filed by the respondent being in the nature of *"proceedings"* and not a suit, the protection under Section 22 of the SICA would not be available – the petitioners being guarantors. Mr Bansal contended that, the term suit would not include the proceedings of the nature taken out by the respondent/bank, and that, the legislature consciously had used two different expressions 'suit' and 'proceedings' in the same sub-section i.e., sub-section (1) of Section 22 of SICA. To drive home his point, Mr Bansal contended that a suit is an action which is ordinarily presented before a civil court and not before a tribunal, such as the DRT. For this purpose, he relied upon the judgment of the Supreme Court in **Nahar Industrial Enterprises vs HSBC** JT 2009 (8) SC 199. Special emphasis was sought to be laid on the observations made by the Supreme Court in paragraph 113 of the said judgment. Mr Bansal, thus submitted, that even though a tribunal may have the trappings of a Court, it was still not a civil court. Mr Bansal went on to say that, the provisions of SICA would not apply to an action taken out before the DRT. The action before the DRT is initiated under the provisions of the RDDB Act which, by virtue of being enacted later in point of time, would override all other laws. Reliance in this regard was placed on Section 34 of the RDDB Act. It was thus contended that, Section 22(1) of SICA would have no application. As a matter of fact, in support of this submission, Mr Bansal

relied upon the judgment of the Supreme Court in the case of **K.S.L. Industries Ltd. vs Arihant Threads Ltd. & Ors.** JT 2008 (9) SC 381. In particular, emphasis was laid on paragraphs 19-25, 66, 67 and 112 of the said judgment. It is important to note that because of a difference of opinion between the members of the Bench, the issue raised in the said judgment, was referred for consideration to a larger bench.

REASONS

11. We have heard learned counsels for the parties and perused the record filed before us. To our minds, there are two issues which arise for consideration: Issue no. 1 pertains to limitation, while issue no. 2 relates to the aspect as to whether protection under Section 22(1) of SICA should be accorded to a guarantor qua an action filed by a Bank under the RDDB Act.

12. From the discussion hereinabove, what has clearly emerged is that the petitioners had notice of the proceedings before the DRT since 20.11.2009. At the hearing held on 22.12.2009 before the DRT, the petitioners alongwith RPL were clearly directed to file their written statement within a period of thirty (30) days. On the said date, the main proceedings i.e., OA alongwith IA No.1046/2009, filed under section 22(1) of SICA, by RPL alongwith petitioners, was fixed for disposal on 22.02.2010. Though, on record, the proceeding of 22.02.2010 evidently has not been filed. What has been brought on record, is a compilation of the documents filed on the said date. These documents, which have been noticed hereinabove by us, were perhaps filed only to reiterate that proceedings under SICA, before the AAIFR, were pending at the relevant point in time. The first impugned order of the DRT came to be passed on 03.05.2010. By virtue of the order dated 03.05.2010, the DRT disposed of IA No.1046/2009 confining the protection to RPL by adjourning the proceedings sine die qua the said defendant. It is important to note that there was no confusion, as is averred in the writ petition filed before us, in view of the fact that in the earlier proceeding held on 22.12.2009, the Presiding Officer of DRT clearly noticed that the said application (i.e., IA No.1046/2009) was filed on behalf both, RPL and the petitioners. On this day, direction was issued to the petitioners to file their respective written statements. The matter, it appears thereafter, was placed before the learned Assistant Registrar on 25.05.2010, when on the say so of the counsel for the petitioners, that there was no direction in the order dated

03.05.2010 to them to file a written statement, and hence a clarification was required. It is in this background that the learned Assistant Registrar of the DRT placed the matter before the Presiding Officer of the DRT on 31.05.2010. On 31.05.2010, the matter had to be adjourned as the Presiding Officer was on leave. It was, therefore, listed for further proceedings on 04.06.2010. On 04.06.2010, the counsel for petitioners chose not to appear. The DRT, after issuing directions on other interlocutory applications, listed the matter on 06.07.2010. Once again, on 06.07.2010, there was no appearance by the counsels for the petitioners on the said date. The matter was directed to be listed on 26.07.2010. The counsel for the petitioners played truant even on the said date, though counsel for STC was present. The DRT, directed the matter to be listed on 23.08.2010. After a gap of nearly three (3) months, for the first time on 23.08.2010, counsel for the petitioners and RPL emerged on the scene. Since the Presiding Officer of DRT was on leave, the matter was adjourned to 07.11.2010. As indicated above by us, the matter was listed before the DRT on 07.09.2010. Though there is no proceeding on record to show how the matter came to be posted on 07.09.2010, a perusal of the order of 06.07.2010 seems to indicate that the Registrar may have issued a date for listing the matter before the Presiding Officer in view of IA No.472/2010 (not concerning the petitioners) being listed before him on, 14.07.2010. The petitioners in their petition have averred that they were 'shocked' on noticing that the OA was listed before the Presiding Officer on 07.09.2010. In our view, the purported shock received by the petitioners could have been avoided if alacrity had been shown by the petitioners in following the matter. Nevertheless, on 07.09.2010 directions were issued for listing of the OA on 15.10.2010. The petitioners having realized that they had overshot the period of limitation of sixty (60) days provided under Rule 5A of the DRT Rules, came up with an ingenious argument that since the Assistant Registrar was not clear as to whether there was a direction issued to the petitioners to file a written statement, they had tarried along in the hope that such a clarification would be made by the Presiding Officer and therefore, no application for review was filed. In our view, this explanation is a complete hogwash and therefore, unacceptable. The impugned order dated 03.05.2010 was passed in the presence of counsels for the petitioners. Our analysis above have shown that there was a subsisting direction, issued on 22.12.2009, calling upon the petitioners to file their respective written statements, which had already remained outstanding for five (5)

months. Furthermore, the proceedings of 22.09.2009, would show quite clearly that, the DRT was conscious of the fact that IA No.1046/2009 had been filed by the petitioners and RPL. The petitioners have sought to make much of the observation in the DRT's order dated 03.05.2010, that the said application, I.A 1046/2009 has been moved on behalf of RPL. Similarly, the submission alluding to the purported confusion as to whether petitioners were required to file their written statement (since no protection had been granted to them), are clearly manufactured at the stage of the first appeal filed before the DRAT and in the writ petition, as there is no reference to this aspect of the matter in the application for review i.e., IA No.6425/2010. The application for review being barred by limitation, was clearly liable to be dismissed, as noticed by the DRT. However, having regard to the reference made to a larger bench of the Supreme Court in the case of **Zenith Steels Tubes and Industries Ltd.,** the DRT granted a limited protection to the guarantors against execution of the decree, if any, obtained, till the decision in that case of the Supreme Court. This protection was extended to RPL as well.

13. In appeal, the DRAT correctly noticed these facts and by the impugned order, dismissed the same. Under Article 226 of the Constitution of India, this court could have interfered if the DRAT or the DRT had exercised jurisdiction either with material irregularity or exercised jurisdiction where none was conferred on it or had acted perversely in law on facts placed before it. We find no such error in the judgment.

14. It is trite to say that statute of limitation bars or runs against the remedy, but does not impair the right, obligation or cause of action. (see **Bombay Dyeing & Mfg. Co. Ltd. Vs. State of Bombay,** 1958 SCR 1122 (para 12, page 1124).

14.1 It is pertinent to note that before us, no challenge is laid to the Rule 5A of the DRT Rules. Rule 5A gives a leeway to the DRT to entertain an application for review, only if, it is filed latest, by the sixtieth day from the date of the order of which review is sought. There is in sub rule (2) of Rule 5A, an express bar imposed on the DRT in entertaining review applications after the expiry of sixty (60) days. The RDB and the Rules made thereunder, being a special statute prescribes its own period of limitation, leaving no scope for entertaining applications for review beyond the stated period. There is, therefore, possibly no scope even for entertaining an application for condonation of delay by invoking Section

5 of the Limitation Act, 1963 (in short Limitation Act). The language of Sub Rule (2) of Rule 5A appears to make this abundantly clear by providing : *"no application for review shall be made after the expiry of a period of sixty days from the date of the order and no such application shall be entertained unless it is accompanied by an affidavit verifying the application."*

14.2 We are also conscious of the provisions of Section 24 of the RDDB Act, which provides, that the provisions of the Limitation Act shall as far as may be applied to an application made to a Tribunal. Undoubtedly, the application adverted to in the said provision refers to the OA filed by a bank/financial institution to seek recovery of its debt and not interlocutory applications, such as, one for review. It is, therefore, perhaps the legislature's intention to apply the provisions of the Limitation Act to a limited extent and *"as far as may be"* to the original action for recovery of debt. This would not translate, perhaps, in the provisions of Section 5 of the Limitation Act being made applicable to an application for review of an order passed in an OA. It is interesting to note that there is no provision for review in the RDDB Act.

The power to review orders has been provided in the Rules enacted by Central Government in exercise of its power under Section 36 of the RDDB Act. Therefore, if one were to apply the provisions of Section 29(2) of the Limitation Act, it appears that RDDB, which is a special statute, seeks to provide exclusion of Section 5 of the Limitation Act qua application for review of orders passed by the DRT. (See observations of the Supreme Court in the case of **Union of India Vs. Popular Construction Co.** (2001) 8 SCC 470) **Chhatisgarh State Electricity Board Vs. Central Electricity Regulatory Commission and Others** (2010) 5 SCC 23.

14.3. We are, therefore, leaving the issue open to be decided in an appropriate case, since in this case, in any event, petitioners have not taken the trouble of filing an application for condonation of delay under section 5 of the Limitation Act. Therefore, having regard to the entirety of the facts and circumstances emerging in this case, we are not inclined to interfere with the impugned orders. It is precisely for this reason that judgments in the case of **Collector, Land Acquisition, Anantnag & Anr. Vs. MST. Katiji & Ors.,** (1987) 2 SCC 107, **Ram Nath Sao Vs. Gobardhan Sao & Ors.,** (2002) 3 SCC 195 and **N.Balakrishnan Vs. M.Krishnamurthy,** (1998) 7 SCC 123 which relate to principles to be applied while considering the plea made to condone the delay does not require a discussion by us. We also find that the petitioners cannot be aggrieved by continuation of the legal proceedings, since the DRT has granted a stay against execution of the decree, if any, obtained against them pending the decision in the case of Zenith Steels Tubes and Industries Ltd.

15. For the reasons, as indicated by us hereinabove, Issue no.1 is decided in favour of the respondent and against the petitioners.

Issue No.2

16. The other aspect of the matter as to whether the action filed in the DRT by the respondent in which the petitioners are also arrayed would fall within the ambit of the term, 'suit', requires us to examine the statement of objects and reasons and some relevant provisions of SICA, as also, the view expressed by various courts with respect to the very same term.

17. The statement of objects and reasons of SICA recognizes firstly, the ill effects of sickness in industrial companies, such as, loss of production, loss of employment, loss of revenue as also the blockage of investable funds of banks and financial institutions. These being the concerns, and therefore, in order to fully utilize industrial assets, afford maximum protection to employees and optimize the use of funds invested by banks and financial institutions; the revival and rehabilitation of potentially viable sick industrial companies, was thought imperative. It is also recognized that it is equally imperative, to salvage productive assets and realize amounts due to banks and financial institutions to the extent possible from non-viable sick industrial companies through liquidation of those companies.

17.1 Therefore, the ethos behind the Act is to ensure, if possible, the revival and rehabilitation of a potentially viable sick industrial company, as also, where the same cannot be achieved, to salvage productive assets and realize the amounts due to banks and financial institutions by liquidating such non- viable sick industrial companies. The stress, it is to be noted is on the 'sick industrial companies'.

17.2 The protection to a sick industrial company therefore gets accorded under SICA immediately on registration of a reference. [See **Real Value Appliances Ltd. Vs. Canara Bank & Ors.,** (1998) 5 SCC 554]. After a reference is filed under section 15 of the SICA, which is mandatory the protection under section 22 of SICA gets triggered. The scheme of the Act, as it obtains, provides for an enquiry under section 16 by the BIFR followed by the powers that a board may exercise under section 17 of SICA, for completion of such an enquiry. The provisions for preparation and sanction of a scheme are contained in Section 18, while Section 19 provides for grant of reliefs and concessions or even eliciting sacrifices from banks and financial institutions and various other entities such as, the Central Government, State Govt., as also state level institutions and authorities. Once a scheme is sanctioned, it is binding upon all concerned.

17.3 In the event, the BIFR is unable to prepare a sanctioned scheme, it can under section 20 of SICA recommend winding up of the sick industrial company. The recommendation of winding up is placed before the concerned High Court for appropriate orders. This recommendation, however, is not binding on the High Court. (See **V.R. Ramaraju Vs. Union of India and Ors.,** (1997) 89 Comp. Cas 609). It is between these two ends of the spectrum that Section 22 of SICA comes into play. Section 22 provides for suspension of legal proceedings and contracts. Since we are concerned with the provisions of sub section (1) of section 22, the same are extracted hereinbelow :-

> "22. Suspension of legal proceedings, contracts, etc. – (1) Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of Association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof [and no suit for the

> recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company] shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority."

17.4 A reading of section 22 would show that while, the reference is pending before the BIFR, at various stages, which commences with its registration, the legislature provides for suspension of certain kinds of actions. This protection extends to the appellate stage as well, that is, when an appeal under section 25 relating to the industrial company is pending before the AAIFR. A careful perusal of sub section (1) of Section 22 would show that, it suspends proceedings such as winding up of the industrial company, *"execution"*, *"distress"* or *"the like"* against the *"properties of the industrial company"* or, even initiation of steps for appointment of a receiver qua the properties of the industrial company. The use of the expression 'industrial company as against 'sick industrial company' is significant as there may arise a situation which requires protection to be accorded to an industrial company prior to it being formally declared as a Sick Industrial Company by the BIFR, which is really the period between registration of reference and a declaration of sickness by the BIFR. Therefore, this limb of sub section (1) of section 22 is restricted to actions of the like nature described above, against the industrial company or its properties.

17.5 The second limb of sub section (1) of section 22 which begins with "and no suit" concerns itself with actions for recovery of money or for enforcement of security once again against the industrial company. The second sub part so to say of this limb which speaks of "or of any guarantee in respect of any loans or advances granted to the industrial company" creates the difficulty, presently faced in the writ petition.

17.6 It may be relevant to note that the term used in this sub part of sub section (1) of section 22 is "guarantee" and not "guarantor". One possible explanation could have been, taking into account the overall scheme of SICA, which is, to rehabilitate and resuscitate viable sick industrial companies, and if, necessary to liquidate assets of sick industrial companies where they become non viable, to read the term 'guarantee' to mean perhaps a guarantee extended by an entity in which the industrial

company has an interest as it could impact directly affairs of the industrial company since the industrial company's interest in such an entity would ordinarily be shown as an asset in its balance sheet. But this debate can no longer be taken forward for the reason that the Supreme Court in the case of **"Patheja Brothers Forgings and Stamping"**(supra) has categorically interpreted the term "guarantee" as that which relates to a guarantor who has furnished a guarantee as a security in lieu of loans and advances granted to an industrial company. It is important to note that Patheja Brothers Forging and Stamping dealt with a case where the suit was filed in a civil court both against the sick industrial company in its capacity as a principal debtor and the individual guarantors. The Supreme Court, interpreting the provision of sub section (1) of section 22 came to the conclusion by process of strict interpretation, that protection was also available to guarantor(s) of loans advanced to a sick industrial company.

18. In **Paramjit Singh Patheja** (supra): the facts obtaining were somewhat different. In the said case, the appellant before the Supreme Court was a guarantor qua a debt owed by one Patheja Forging and Autoparts Manufacturers Limited. Both, the guarantors and the aforementioned company were sued in an arbitration proceedings initiated by the respondent/creditor. The aforementioned company got itself registered with the BIFR. In the meanwhile, an award was rendered by the Arbitrator despite, being informed about the registration of the reference by the aforementioned company. On the basis of the award, which was passed both against the aforementioned company and the appellant/guarantor before the Supreme Court, an insolvency notice was taken out under section 9(2) of the Presidency Towns Insolvency Act, 1909 (in short the Insolvency Act).

18.1 It is pertinent to note at this stage, that section 9(2) of the Insolvency Act provides that a debtor commits an act of insolvency if a creditor who has obtained a *"decree"* or an "*order"* against him for payment of money, issues him a notice, in the prescribed form, to pay the amount and, the debtor, fails to do so, within the time specified in the notice. It is in this context that, the appellant/guarantor challenged the insolvency notice, by moving a notice of motion before the Bombay High Court. The Single Judge in the Bombay High Court differed with the view taken earlier (by another Single Judge of that court) that an award is neither a decree nor an order for the purposes of the provisions of the Insolvency Act. A reference was made by the learned Single Judge to the

Division Bench. The Division Bench answered the reference in the affirmative by holding that an award was a decree for the purposes of section 9 of the Insolvency Act, and therefore, an insolvency notice could be issued on the basis of an award passed by an Arbitrator.

18.2 It is in this context that the Supreme Court framed two questions of law for the purposes of adjudication, in the appeal, which was filed before it. These being :-

(i) whether an arbitrator's award is a decree for the purposes of section 9 of the Insolvency Act; and

(ii) Whether an insolvency notice can be issued on the basis of such an award.

18.3 After a detailed discussion, the court came to the conclusion that the award is not a decree and hence, insolvency notice under section 9(2) of the Insolvency Act could not be taken out on the basis of an arbitration award. In the process of its reasoning, the Supreme Court examined whether the arbitrator was a court and whether the award was a decree. In this context, that the court examined several judgments. The following observations highlight what the court was grappling with :-

> "17. We are of the view that the Presidency Towns Insolvency Act, 1909 is a statute weighed down with the grave consequence of "civil death" for a person sought to be adjudged an insolvent and therefore the Act has to be construed strictly. The Arbitration Act was in force when the PTIA came into operation. Therefore it can be seen that the lawmakers were conscious of what a "decree", "order" and an "award" are. Also the fundamental difference between "courts" and "arbitrators" was also clear as back as in 1909.
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> XXXXXXX
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> 21. The words "court", "adjudication" and "suit" conclusively show that only a court can pass a decree and that too only in a suit commenced by a plaint and after adjudication of a dispute by a judgment pronounced by the court. It is obvious that an arbitrator is not a court, an arbitration is not an adjudication and, therefore, an award is not a decree."

18.4 The Supreme Court, therefore, confined itself to the issue that

the award could not be executed by issuance of a insolvency notice, (see observations in para 43(ii) at page 346). Thus, the observations made in para 43(iii), on which great stress has been laid by the learned counsel for the petitioners have to be read in the context of the facts obtaining in the said case. For the sake of convenience, the conclusions given in paragraphs 43 and 44 of the said judgment are extracted hereinafter :-

"43. For the foregoing discussion we hold:

(i) That no insolvency notice can be issued under Section 9(2) of the Presidency Towns Insolvency Act, 1909 on the basis of an arbitration award.

(ii) That execution proceedings in respect of the award cannot be proceeded with in view of the statutory stay under Section 22 of the SICA Act. As such, no insolvency notice is liable to be issued against the appellant.

(iii) Insolvency notice cannot be issued on an arbitration award.

(iv) An arbitration award is neither a decree nor an order for payment within the meaning of Section 9(2). The expression "decree" in the Court Fees Act, 1870 is liable to be construed with reference to its definition in CPC and hold that there are essential conditions for a "decree":

(a) that the adjudication must be given in a suit,

(b) that the suit must start with a plaint and culminate in a decree, and

(c) that the adjudication must be formal and final and must be given by a civil or Revenue Court.

An award does not satisfy any of the requirements of a decree. It is not rendered in a suit nor is an arbitral proceeding commenced by the institution of a plaint.

(v) A legal fiction ought not to be extended beyond its legitimate field. As such, an award rendered under the provisions of the Arbitration and Conciliation Act, 1996 cannot be construed to be a "decree" for the purpose of Section 9(2) of the Insolvency Act.

(vi) An insolvency notice should be in strict compliance with the

requirements in Section 9(3) and the rules made thereunder.

(vii) It is a well-established rule that a provision must be construed in a manner which would give effect to its purpose and to cure the mischief in the light of which it was enacted. The object of Section 22, in protecting guarantors from legal proceedings pending a reference to BIFR of the principal debtor, is to ensure that a scheme for rehabilitation would not be defeated by isolated proceedings adopted against the guarantors of a sick company. To achieve that purpose, it is imperative that the expression "suit" in Section 22 be given its plain meaning, namely, any proceedings adopted for realisation of a right vested in a party by law. This would clearly include arbitration proceedings.

(viii) In any event, award which is incapable of execution and cannot form the basis of an insolvency notice.

44. In the light of the above discussion, we further hold that the insolvency notice issued under Section 9(2) of the PTI Act, 1909 cannot be sustained on the basis of arbitral award which has been passed under the Arbitration and Conciliation Act, 1996. We answer the two questions in favour of the appellant."

18.5. It is well settled law that a judgment is a precedent for what it decides and not what logically follows from it. [See observations in **Bhavnagar University Vs. Palitana Sugar Mill (P) Ltd. and Ors.,** (2003) 2 SCC 111]. Therefore, in our view, to conclude from the said judgment that each and every kind of action is contemplated to be included in the term "suit" is not what to our minds is the ratio of the judgment. The Supreme Court was dealing with a specific issue as to whether an award was a decree or an order within the meaning of the provisions of Section 9(2) of the Insolvency Act.

19. In **Kailash Nath Aggarwal** (supra): the enforcement of debt against the guarantors was initiated by Pradeshiya Industrial Investment Corporation of UP Limited (in short, PICUP) for loans granted to the principal debtor, one, Shaifali Papers Limited, by triggering the provisions of the UPPM Act. Importantly, the Supreme Court noted two significant aspects pertaining to SICA. The first being: the interpretation accorded by the Supreme Court to the expression "proceedings" in the first part of section 22(1) of SICA in the case of **Maharashtra Tubes Ltd. Vs.**

S.I.I Corporation of Maharashtra Limited (supra). The Supreme Court also noticed the fact that the aforesaid judgment was rendered prior to 1994, i.e., before the amendment of sub section (1) of section 22 when the second part of section 22 which reads as follows : "and no suit for recovery of money or enforcement of any security against the industrial company or any guarantee in respect of any loans or advances granted to the industrial company;" was introduced. In this context, the Supreme Court noticed that the court was called upon to determine whether an action against an industrial concern under section 29 and / or section 31 of the State Financial Corporation Act, 1951 (in short SFC Act) would fall within the ambit of the term 'proceedings' set out in the first part of sub section (1) of section 22. The court noticed that in Maharashtra Tubes Limited, it had been observed that the term 'proceedings' should not be limited to legal proceedings as understood in the narrow sense but should include actions taken out under sections 29 and 31 of the SFC Act. The court's analysis as to why in Maharashtra Tubes Limited case such a course was adopted is set out in paragraph 18 of its judgment. The reasons being apposite and informative are set out hereinafter for the sake of convenience.

> "18. It appears that there were three reasons why this Court construed the word "proceeding" as including action which may be taken under Section 29 of the State Financial Corporations Act:
>
> 1. The recovery proceedings were against an industrial company, the revival of which was one of the objects of the Act.
>
> 2. The use of the omnibus expression "or the like" after the word "proceeding".
>
> 3. The fact that the entire scheme as contained in Sections 16 to 19 of SICA would be rendered nugatory and the process short-circuited if State Financial Corporations were allowed to recover their dues from the assets of the Company." (emphasis is ours)

19.1 After analyzing the pre 1994 situation, the court undertook the exercise of analyzing the insertion made to sub section (1) of section 22 (with which, we are also called upon to grapple;), in paragraph 19 to 25 of the Judgment. For the sake of convenience, the same are extracted

hereinbelow:-

> "19. After this decision was rendered, Section 22(1) was amended by the Sick Industrial Companies (Special Provisions) Amendment Act (12 of 1994). The following words were inserted in Section 22(1):
>
> **"and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company"**
>
> 20. There is an apparent distinction between the expressions "proceeding" and "suit" used in Section 22(1). While it is true that two different words may be used in the same statute to convey the same meaning, that is the exception rather than the rule. The general rule is that when two different words are used by the same statute, prima facie one has to construe these different words as carrying different meanings. In Kanhaiyalal Vishindas Gidwani this Court found that the words "subscribed" and "signed" had been used in the Representation of the People Act, 1951 interchangeably and, therefore, in that context the Court came to the conclusion that when the legislature used the word "subscribed" it did not intend anything more than "signing". The words "suit" and "proceeding" have not been used interchangeably in SICA.
>
> Therefore, the reasons which persuaded this Court to give the same meaning to two different words in a statute cannot be applied here.
>
> 21. In none of the decisions cited before us, has the word "suit" been defined in a context similar to that of SICA. The decisions cited by the appellants do not relate to the same or similar statutes nor do they seek to define the word "suit" in contradistinction to the word "proceeding". The decision in Ghantesher Ghosh v. Madan Mohan Ghosh was given in the context of the Partition Act where a distinction between "filing a suit for partition" and "suing for partition" has been drawn. It was held that "suing for partition" was a wider phrase than the phrase "suit for partition" without defining what a suit meant.

22. The decision in **CCE v. Ramdev Tobacco Co.** related to the construction of the bar of suit section in the Central Excises and Salt Act, 1944. The section as it stood at the relevant time provided that "no suit, prosecution or other legal proceedings shall be instituted for anything done or ordered to be done under the Act ...". The Court held: (SCC p. 124, para 6) "There can be no doubt that 'suit' or 'prosecution' are those judicial or legal proceedings which are lodged in a court of law and not before any executive authority, even if a statutory one."

23. A definition of the word "suit" has been given in **Pandurang R. Mandlik v. Shantibai R. Ghatge**[6] but in the context of Section 11 of the Code of Civil Procedure. This is what the Court said: (SCC p. 639, para 18)

"In its comprehensive sense the word 'suit' is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. The modes of proceedings may be various but that if a right is litigated between parties in a court of justice the proceeding by which the decision of the court is sought may be a suit."

24. According to these decisions, a suit is an action taken in a court of law.

25. Having regard to the judicial interpretation of the word "suit", it is difficult to accede to the submission of the appellants that the word "suit" in Section 22(1) of the Act means anything other than some form of curial process."

19.2 The conclusion in a sense is set out in paragraphs 29 and 30. Once again, for easy reference, we extract the same hereinafter :-

29. One of the reasons for the word "proceeding" in Section 22(1) being construed widely by this Court in Maharashtra Tubes was that the proceedings were against the Company itself. Having regard to the object of the Act viz. if possible to revive the Company, as also the operation of the various sections towards this end, the Court held that it would be unreasonable to give such meaning to the word "proceeding" as would result in dealing a death-blow to the Company so that the entire procedure

envisaged under SICA would be set at naught.

30. We have been unable to find a corresponding reason for widening the scope of the word "suit" so as to cover proceedings against the guarantor of an industrial company. The object for enacting SICA and for introducing the 1994 Amendment was to facilitate the rehabilitation or the winding up of sick industrial companies. It is not the stated object of the Act to protect any other person or body. If the creditor enforces the guarantee in respect of the loan granted to the industrial company, we do not see how the provisions of the Act would be rendered nugatory or in any way affected. All that could happen would be that the guarantor would step into the shoes of the creditor vis-a-vis the company to the extent of the liability met.
(emphasis is ours)

19.3 Importantly, the judgment in **Kailash Nath Aggarwal's** case was delivered by a bench comprising Hon'ble Ms. Justice Ruma Pal and Hon'ble Mr. Justice B.N. Shrikrishna (as they then were). Hon'ble Ms. Justice Ruma Pal was also a part of the bench which delivered the judgment in the case of **Patheja Brothers Forgings and Stamping**. This judgment was specifically distinguished by Hon'ble Ms. Justice Ruma Pal in **Kailash Nath Aggarwal's** case. The discussion in that regard are contained in paragraphs 31 to 34 of the judgment. What is noticeable is that, the court quite categorically observes that, it is not that the observations made in the Patheja Brothers Forgings and Stamping, seem to suggest that the protection of guarantors of loans to a sick industrial company is the object of the amendment brought about in sub section (1) of section 22 in 1994. The relevant observations in this behalf are as follows :-

31. It is true that this Court in **Patheja Bros. Forgings & Stamping v. ICICI Ltd.** construed the 1994 Amendment to Section 22(1) to hold: (SCC p. 548, para 7)

"For our purposes, therefore, the relevant words are: 'no suit ... for the enforcement ... of any guarantee in respect of any loans or advance granted to the industrial company, shall lie without the consent of the Board or the Appellate Authority. The words are crystal clear. There is no ambiguity therein. It must, therefore, be held that no suit for the enforcement of a guarantee

in respect of a loan or advance granted to the industrial company concerned will lie or can be proceeded with, without the sanction of the Board or the Appellate Authority under the said Act."

32. This is in keeping with the well-established principle of statutory interpretation that where the language of the provision is explicit the language of the statute must prevail.

33. The appellants have, however, sought to draw sustenance from the following passage in the judgment: (SCC p. 548, para 9)

"The argument on behalf of the first respondent is that while this provision provides for the continuation of proceedings against the industrial company, there is no provision in the said Act which provides for the continuation of any held-up proceeding against the guarantor of a loan or advance to such company and that, therefore, Section 22 should be read as applying only to a suit against the industrial company and not a guarantor. Apart from the fact that, as indicated above, the language of Section 22 is explicit, the scheme would provide for the repayment of the loan or advance and, therefore, would take within its ambit the claim on the guarantee; the question of proceeding with the suit against the guarantor would not arise. On the other hand, if the industrial company cannot be revived by a scheme, the embargo under Section 22 would cease to operate."

(emphasis is ours)

34. These observations do not mean that when the words used are unambiguous, other extrinsic interpretative aids such as the objects of the statute, or the difficulties that would be faced by creditors will be relevant in interpreting the expression. The Court in Patheja case merely observed that the creditor could recover its sum from the principal debtor under the scheme and, therefore, the claim on the guarantee would not arise if the amount is so recovered under the scheme. We do not read the observations quoted as holding that protection of guarantors of loans to a sick company is an object of the 1994 Amendment which object must colour our interpretation of the amendment. Till 1994 no protection was afforded to the guarantors under the Act at all.

A limited protection has been given in 1994. The expression used being clear and unambiguous, it is not for us to question the wisdom of the legislature in giving the limited protection it did or why such protection was necessary at all." (emphasis is ours)

20. It is in this background that the Supreme Court referred the issue raised in Zenith Steel Tubes & Industries Ltd. for consideration by a Larger Bench. Briefly, the facts in this case were that the appellants before the Supreme Court were both the principal debtor company as well as the guarantor. The loan from the financial institution i.e., SICOM Limited had been taken by the principal debtor company which was, inter alia, secured by a personal guarantee of the second appellant. Since, there were defaults, notices were issued demanding payment of the amounts owed to SICOM Ltd. Upon failure, SICOM Ltd. filed a petition against the second appellant under section 31(1)(aa) of the SFC Act. In the meanwhile, the first appellant was declared a sick industrial company by the BIFR. Against the action of SICOM Ltd., a writ petition was filed before the Bombay High Court. The learned Single Judge of the Bombay High Court rejected the contentions of the second appellant /guarantor that by virtue of provision of section 22 of SICA, its liability under the personal guarantee could not be enforced. The Division Bench came to a somewhat similar conclusion and also went on to hold that, the liability of the guarantor being co-extensive with that of the principal debtor, the creditor was not required to exercise his right first against the principal debtor and only thereafter, against the guarantor. This is how the matter travelled to the Supreme Court.

20.1 The Supreme Court in paragraph 20 noticed the observations in **Paramjit Singh Patheja's** case that the term "suit" would have to be understood in the larger context to include other proceedings as well, which were filed before a **"legal forum"** The court noticed that the decision in **Kailash Nath Aggarwal's** case was not brought to the notice of the Division Bench in Paramjit Singh Patheja's case. After noticing the observations of the court in Kailash Nath Aggarwal's case, the bench decided to refer the matter to a Larger Bench.

21. We may also at this stage take note of the observations of the Supreme Court in **Nahar Industrial Enterprise Limited Vs. Hong Kong and Shanghai Banking Corporation,** JT 2009 (10) SC 199.

21.1 The Supreme Court in this case was dealing with a situation

where the appellant before it – Nahar Industrial Enterprises Ltd. had filed a suit against HSBC, in a civil court at Ludhiana seeking a declaration that the foreign interest derivative contracts executed with HSBC, be declared void as they were illegal and violative of the Foreign Exchange Management Act (in short FEMA). On the other hand, HSBC had filed an action under the RDDB Act. The OA was filed before the DRT, Mumbai. HSBC thereafter moved the High Court of Punjab and Haryana by way of an application seeking transfer of the proceedings filed before the civil court at Ludhiana to the DRT at Mumbai. The learned Single Judge of the High Court allowed the application in the form of a counter claim to the OA pending in the DRT, Mumbai.

21.2 A special leave petition was filed against the said order of the High Court. Other banks and financial institutions filed applications by way of transfer under section 25 of the Code of Civil Procedure, 1908 (in short the Code). By virtue of this judgment, the special leave petition against the judgment of the High Court of Punjab as well as the transfer petitions were disposed of. It is in this context, the Supreme Court considered as to whether the DRT was a court and hence, a court subordinate to the High Court for exercising a power of transfer. In dealing with this issue, the Supreme Court in paragraph 113 touched upon what are the attributes of a civil court as against the Tribunal. The Supreme Court concluded by holding that a tribunal under the RDDB Act is not a civil court. The observations being apposite, are extracted hereinafter :-

> "113. The Tribunal was constituted with a specific purpose as is evident from tis statement of objects. The preamable of the Act also is a pointer to that too. We have also noticed the scheme of the Act. It has a limited jurisdiction. Under the Act, as it originally stood, did not even have any power to entertain a claim of set off or counter claim. No independent proceedings can be initiated before it by a debtor. A debtor under the common law of contract as also in terms of the loan agreement may have an independent right. No forum has been created for endorsement of that right. Jurisdiction of a civil court as noticed hereinbefore is barred only in respect of the matters which strictly come within the purview of section 17 thereof and not beyond the same. The Civil Court, therefore, will continue to have jurisdiction. Even in respect of set off or counter claim, having regard to the

provisions of sub sections (6) to (11) of section 19 of the Act, it is evident :-

a) That the proceedings must be initiated by the bank.

b) Some species of the remedy as provided therein would be available therefor.

c) In terms of sub section (11) of Section 19, the bank or the financial institution is at liberty to send a borrower out of the forum.

d) In terms of the provisions of the Act, thus, the claim of the borrower is excluded and not included.

e) In the event the bank withdraws his claim the counter claim would not survive which may be contrasted with Rule 6 of Order VIII of the Code.

f) Sub section (9) of section 19 of the Act in relation thereto has a limited application.

g) The claim petition by the bank or the financial institution must relate to a lending/borrowing transaction between a bank or the financial institution and the borrower.

h) The banks or the financial institutions, thus, have a primacy in respect of the proceedings before the Tribunal.

i) An order of injunction, attachment or appointment of a receiver can be initiated only at the instance of the bank or the financial institution. We, however, do not mean to suggest that a Tribunal having a plenary power, even otherwise would not be entitled to pass an order of injunction or an interim order, although ordinarily expressly it had no statutory power in relation thereto.

j) It can issue a certificate only for recovery of its dues. It cannot pass a decree.

k) Although an appeal can be filed against the judgment of the Tribunal, pre-deposit to the extent of 75% of the demand is imperative in character.

l) Even cross-examination of the witnesses need not be found to be necessary.

m) Subject to compliance of the principle of natural justice it

may evolve its own procedure

n) It is not bound by the procedure laid down under the Code. It may however be noticed in this regard that just because the Tribunal is not bound by the Code, it does not mean that it would not have jurisdiction to exercise powers of a court as contained in the Code. Rather, the Tribunal can travel beyond the Code of Civil Procedure and the only fetter that is put on its powers is to observe the principles of natural justice. [see **Industrial Credit and Investment Corpn. Of India Ltd. Vs. Grapco Industries Ltd.** [1999 (4) SCC 710]

The tribunal, therefore, would not be a Civil Court."

(emphasis supplied)

22. What emerges on a reading of the objects and reasons alongwith the interpretation accorded by the Supreme Court, to the provisions of sub section (1) of section 22, is that :

(i) the 1994 amendment which brought in the relevant insertion with which we are confronted, was not necessarily intended to accord protection to the guarantors of loans given to an industrial company; (see observations in Kailash Nath Aggarwal's case)

(ii) till 1994, no protection was accorded to the guarantors under SICA;

(iii) post 1994, a limited protection has been granted by the legislature to the guarantors;

(iv) the legislature has consciously used the two different terms, i.e., 'proceedings' and 'suit'; and

(v) the term. 'proceedings' has been given a wider interpretation by the Supreme Court in the case of Maharashtra Tubes.

(vi) the amendment in sub section (1) of section 22 was brought about w.e.f. 01.02.1994, when the RDDB Act was already in force that is, w.e.f. 24.06.1993. Therefore, the Legislature while bringing about the amendment in sub section (1) of section 22 of SICA on 01.02.1994 was

aware of the enactment of the RDDB Act. The term. 'suit' would have to be read and understood in the context of this legislative history and in the background of the scheme of SICA as also the setting of the term in issue, in the very provision under consideration i.e., sub section (1) of section 22.

23. Thus, in our view, having regard to the facts set out hereinabove, the word 'suit' cannot be understood in its broad and generic sense to include any action before a legal forum involving an adjudicatory process. If that were so, the legislature which is deemed to have knowledge of existing statute would have made the necessary provision, like it did, in inserting in the first limb of section 22 of SICA, where the expression proceedings for winding up of an industrial company or execution, distress, etc. is followed by the expression or "the like" against the properties of the industrial company. There is no such broad suffix placed alongside the term 'suit'. The term suit would thus have to be confined, in the context of sub section (1) of section 22 of SICA, to those actions which are dealt with under the Code and not in the comprehensive or overarching sense so as to apply to any original proceedings before any legal forum as was sought to be contended before us. The term, 'suit' in our opinion would apply only to proceedings in a civil court and not actions for recovery proceedings filed by banks and financial institutions before a Tribunal, such as, the 'DRT'.

24. We may briefly also touch upon certain other judgments which the counsels for the petitioners place on record after the arguments had been concluded.

24.1 The first judgment is of the Division Bench of this court in **Asset Reconstruction Co. India Pvt. Ltd. Vs. Shamken Spinners Ltd. & Ors.,** (2011) 164 COMPCAS 344 (Delhi). This judgment dealt with the interpretation to be accorded to the second proviso of section 15(1) of SICA. The said proviso provides that no reference shall be made to the BIFR after the commencement of SARFAESI where financial assets have been acquired by a securitization company or reconstruction company under sub section (1) of section 5 of SARFAESI. The court came to a conclusion that the said proviso would have to be read harmoniously with the third proviso whereby it is provided that a reference before the BIFR shall abate if the secured creditors representing not less

than 3/4th in value of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors have taken measures under section 13(4) of SARFAESI. The Division Bench in that case came to the conclusion that the base limit of 75% of the value of the amount outstanding against financial assistance disbursed to the borrower would also have to be applied to the second proviso where no such limit was provided. We are of the opinion that one cannot but agree with the principle enunciated therein requiring the need to harmoniously construe provisions of a section. The judgment, therefore, in our view does not carry the arguments advanced by the petitioners any further as on facts it renders no assistance in dealing with the issue before us.

24.2 The judgment in **Bhoruka Textiles Vs. Kashmiri rice Industries,** (2009) 7 SCC 521 was cited to stress the point that if the civil courts. jurisdiction was ousted in terms of provision of section 22 of SICA, any judgment rendered by such a forum would be coram non judice. This again a case where the principle evolved cannot but be accepted but the fact remains in the circumstances obtaining in the present case, the said judgment once again has no applicability. This is specially so as the moot question is whether the term "suit" appearing in sub-section (1) of section 22 of SICA would apply to a forum which is decidedly not a civil court.

24.3 The next judgment relied upon by learned counsels for the petitioners is **Intercraft Ltd. Vs. Cosmique Global,** 173 (2010) DLT 116. In this case, the issue was whether the provisions of section 22 would come into play immediately on registration of the reference under section 15 of the SICA. The DRAT had apparently applied an earlier judgment of this court rendered in the case of **Industrial Development Bank of India Vs. Surekha Coated tubes and Sheets Ltd.,** 1994 II AD (Delhi) 119 ignoring the judgment of the Supreme court in **Real Value Applicances Ltd.** (supra). Quite correctly the Division Bench of this court reversed the order. The court incidentally also cited the judgment in **Bhoruka Textiles Ltd.** (supra) to emphasis that an order passed in violation of section 22 would be one, which is, without jurisdiction. The Division Bench in that case was not deciding as to whether forum constituted under the RDDB Act are civil courts. The judgment therefore has no applicability to the issues which arise in the present case.

24.4 The other judgments relied upon by learned counsels for the

petitioners are **ALSPPI Subramania Chettiar Vs. Moniam P. Narayanswami,** AIR 1951 Mad 48 and **Aypunni Mani Vs. Devassy Kochouseph & Ors.,** AIR 1966 Kerala 203. These judgments have been cited to emphasize the point that liability of the surety is co-extensive with that of the principal debtor if the latter liability is scaled down the liability of the surety will accordingly stand reduced or even extinguished. The principle in so far as this aspect is concerned is pivoted on the fact that the liability of a guarantor i.e., the surety being co-extensive is both joint and several. Therefore, a creditor need not sue a principal debtor in order to bring an action against a guarantor. This aspect has been squarely considered by the Supreme Court in Kailash Nath Aggarwal's case, therefore, it need not detain us any further.

25. For the aforesaid reasons, we are of the view that the second issue will also have to be decided against the petitioners.

26. Having held so, we are of the view that the impugned judgments both, of the DRT and the DRAT do not call for our interference. The petition is accordingly dismissed.

ILR (2012) V DELHI 256
FAO

RAJINDER SINGH ….APPELLANT

VERSUS

RAM SONI & ORS. ….RESPONDENTS

(G.P. MITTAL, J.)

FAO NO. : 572/2002 DATE OF DECISION: 02.05.2012

Motor Vehicle Act, 1988—Appeal filed before High Court for enhancement of compensation awarded in fovour of petitioner who suffered injuries in a motor accident—Plea taken, compensation towards loss of

leave was awarded to appellant on basis of minimum wages for a period of nine months although it was established that he was a meter reader in DESU and was earning a salary of Rs. 2,226.15 per month—Compensation was awarded towards permanent disability and loss of amenities in life—Held:- It is established that appellant had remained on medical leave for 383 days and was getting a salary of Rs. 2,226,15 per month-compensation for loss of leave to be enhanced from Rs. 4,500/- to Rs. 28,000/- Appellant's testimony that there was shortening of his right leg and that it is not in proper shape was not challenged in cross examination—His testimony that even after 12 years of accident he was unable to walk properly was not disputed in cross examination—Disability certificate issued by a Doctor shows that appellant suffered shortening of his right leg and foot—His permanent disability was assessed as 40%—Although, disability certificate has not been issued by a Board of Doctors, yet in absence of any challenge to same by respondents disability certificate can be relied on-considering that this accident took place in 1985, a compensation of Rs. 25,000/- towards loss of amenities and permanent disability awarded—Compensation enhanced—Appeal allowed.

Important Issue Involved: (A) Where salary of injured is proved on record compensation for loss of leave cannot be assessed on the basis of minimum wages and compensation is to assessed on the basis of salary.

(B) Where a disability certificate which is not issued by a Board of Doctors is not challenged by respondents same can be relied on for calculating the compensation.

[Ar Bh]

APPEARANCES:

FOR THE APPELLANT : Mr. O.P. Mannie, Advocate.

FOR THE RESPONDENTS : Mr. P.K. Seth, Advocate for R-3.

CASE REFERRED TO:

1. *New India Assurance Company Ltd.* vs. *Anuj Sharma*,(2006) 128 DLT 528.

RESULT: Allowed.

G.P. MITTAL, J. (ORAL)

1. The Appeal is for enhancement of compensation of Rs. 28,151/- awarded in favour of Rajinder Singh who suffered injuries in a motor accident which occurred on 23.08.1985.

2. At the time of the accident, the Appellant was working as a Meter Reader in Delhi Electricity Supply Undertaking (DESU) and was earning a salary of Rs.2226.15P per month (as deposed by PW-1).

3. The Appellant suffered injuries on various parts of his body including crush injuries on the right leg. He suffered fracture of both bones in the right leg. He was operated upon in Hindu Rao Hospital. He then received treatment in Safdarjung Hospital and Sir Ganga Ram Hospital. On account of the treatment he took leave for the period of about 13 months. As per the Disability Certificate issued by Dr. S.P. Mandal, there was permanent disability to the extent of 40% in respect of his right lower limb.

4. Since there is no challenge to the impugned judgment by the driver, the owner or the Insurance Company, the finding on negligence between the parties has become final.

5. The compensation awarded by the Motor Accident Claims Tribunal (the Claims Tribunal) is tabulated hereunder:-

Sl. No.	Compensation under various heads	Awarded by the Claims Tribunal
1.	Loss of Leave for nine months	Rs. 4,500/-

2.	Pain and Suffering	Rs. 15,000/-
3.	Special Diet & Conveyance	Rs. 5,000/-
4.	Medical Bill	Rs. 3,651/-
	Total	**Rs. 28,151/-**

6. The following contentions are raised on behalf of the Appellant:-

(i) The compensation towards Loss of Leave was awarded to the Appellant on the basis of minimum wages for a period of nine months although it was established that he was getting a salary of Rs. 2226.15P per month and he had to obtain leave for a period of 383 days. Thus, it is urged that the Appellant was entitled to the compensation for loss of leave for the above said period.

(ii) Although, the Appellant did not suffer any damage on account of loss of earning capacity because of permanent disability, as he continued to work with DESU on the same post, yet, he was not awarded any compensation towards permanent disability and loss of amenities in life.

(iii) The compensation of Rs. 15,000/- awarded towards pain and suffering is low.

7. It is established from PW-1's testimony that the Appellant remained on medical leave from 26.08.1985 to 07.08.1986 and then from 24.11.1988 to 31.12.1988. He also deposed in August, 1985 that the Appellant was getting salary of Rs. 2226.15P per month.

8. This accident took place on 23.08.1985. The Appellant was entitled to the compensation for Loss of Leave for 383 days @ 2226.15P per month which comes to about Rs. 28,000/-. The compensation for Loss of Leave is thus enhanced from Rs. 4,500/- to Rs. 28,000/-.

9. The Appellant's testimony that there was shortening of his right leg and that it is not in proper shape, was not challenged in cross-examination. His testimony that even in the year 1997 (i.e. after 12 years of the accident) he was unable to walk properly was not disputed in the cross-examination. The Disability Certificate Ex.PW-5/14 issued by Dr. S.P. Mandal shows that the Appellant suffered shortening of his right leg and foot. His permanent disability was assessed as 40%. Although, the

Disability Certificate has not been issued by a Board of Doctors, yet in the absence of any challenge to the same by the Respondents, I would rely on the same on the basis of the judgment of this Court in **New India Assurance Company Ltd. v. Anuj Sharma,**(2006) 128 DLT 528.

10. Considering that this accident took place in the year 1985, I would award him a compensation of Rs. 25,000/- towards Loss of Amenities and Permanent Disability.

11. The Claims Tribunal awarded a compensation of Rs. 15,000/- towards pain and suffering. It is not disputed that the Appellant suffered serious injuries resulting into permanent disability. He had to undertake a prolonged treatment for over a year. Considering the value of rupee in the year 1985, the compensation of Rs. 15,000/- appears to be just and reasonable and does not call for any interference.

12. The compensation is thus reassessed as under:-

Sl. No.	Compensation under various heads	Awarded by the Claims Tribunal	Awarded by this Court
1.	Loss of Leave for nine months	Rs.4,500/-	Rs.28,000/-
2.	Pain and Suffering	Rs. 15,000/-	Rs. 15,000/-
3.	Special Diet & Conveyance	Rs. 5,000/-	Rs. 5,000/-
4.	Medical Bill	Rs. 3,651/-	Rs. 3,651/-
5.	Loss of Amenities & Permanent Disability	....	Rs. 25,000/-
	Total	**Rs. 28,151/-**	**Rs. 76,651/-**

13. The overall compensation is thus enhanced from Rs. 28,151/- to Rs. 76,651/-.

14. It is urged by the learned counsel for the Appellant that the rate of interest should have been awarded from the date of filing of the Petition. The Claims Tribunal held that the Appellant repeatedly amended

the Claim Petition and adjournments had to be granted to the Respondents for filing written statement to the amended petitions. On many of the dates, the Appellant did not take steps for the service of notice on the Respondents. Thus, the Claims Tribunal was justified in granting interest only w.e.f. 01.02.1994.

15. The enhanced compensation of Rs. 48,500/- shall carry interest @ 9% per annum from 01.02.1994 (as granted by the Claims Tribunal) till the date of the deposit with UCO Bank, Delhi High Court Branch, New Delhi. The Respondent No.3 Insurance Company is directed to deposit the enhanced amount of compensation within six weeks.

16. The amount so deposited shall be released to the Appellant immediately.

17. The Appeal is allowed in above terms.

ILR (2010) V DELHI 261
W.P. (C)

ANOOP KUMAR ….PETITIONER

VERSUS

CENTRAL INDUSTRIAL SECURITY FORCE AND ANR. ….RESPONDENTS

(ANIL KUMAR & SUDERSHAN KUMAR MISRA, JJ.)

W.P. (C). : 4906/2001 DATE OF DECISION: 04.05.2012

Constitution of India, 1950—Article 226, Disciplinary proceedings—Misconduct imputed against petitioner constable was that he was found under influence of liquor while on duty on a particular date and did not turn up for duty on certain particular dates and on certain dates found sleeping under influence of liquor and thereafter deserted the unit without permission—

Inquiry officer held charges proved—Disciplinary authority awarded punishment of removal from service—Appeal dismissed—Writ petition challenging the punishment and dismissal of appeal—Perusal of original record of the inquiry found to reveal that petitioner participated in the inquiry and his plea that the inquiry was not conducted in accordance writ rules and he was given adequate opportunity was not made out—Held, the respondents produced sufficient proof to establish that petitioner was found under influence of alcohol and absent from duty—Further held, the court under writ jurisdiction dose not have to go into correctness or the truth of the charges and cannot sit in appeal on the findings of disciplinary authority and cannot assume the role appellate authority and cannot interfere with findings of fact arrived at in disciplinary proceedings unless there was perversity or mala fide or no reasonable opportunity were given to the delinquent or there was non-application of mind or punishment is shocking to the conscience of the court.

This Court does not have to go into the correctness of the truth of the charges. It cannot take over the functions of the disciplinary authority. It cannot sit in appeal on the findings of the disciplinary authority and assume the role of the appellate authority. In cannot interfere with the findings of the fact arrived at in the disciplinary proceedings except in the case of mala-fides or perversity i.e where there is no evidence to support a finding or where the finding is such that no one acting reasonably or with objectivity could have arrived at or where a reasonable opportunity has not been given to the delinquent to defend himself or it is a case where there has been non application of mind on the part of the enquiry authority or if the charges are vague or if the punishment imposed is shocking to the conscience of the Court. Reliance for this can be placed on **State of U.P & ors. Vs Raj Kishore Yadav & anr.,** (2006) 5 SCC 673;

V.Ramana Vs A.P. SRTC & ors., (2005) 7 SCC 338; **R.S.Saini Vs State of Punjab & ors.,** JT 1999 (6) SC 507; **Kuldeep Singh Vs The Commissioner of Police,** JT 1998 (8) SC 603; **B.C.Chaturvedi Vs Union of India & ors,** AIR 1996 SC 484; **Transport Commissioner, Madras-5 Vs A.Radha Krishna Moorthy,** (1995) 1 SCC 332; **Government of Tamil Nadu & anr.Vs A. Rajapandia, AIR 1995 SC 561; Union of India & ors. Vs Upendra Singh,** (1994) 3 SCC 357 and **State of Orissa & anr. vs Murlidhar Jena,** AIR 1963 sc 404. **(Parta 27)**

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Inderjit Singh.

FOR THE RESPONDENT : Ms. Archana Gaur.

CASES REFERRED TO:

1. *M.V.Bijlani vs. Union of India & ors.* (2006) 5 SCC 88.
2. *State of U.P & ors. vs. Raj Kishore Yadav & anr.*, (2006) 5 SCC 673.
3. *V.Ramana vs. A.P. SRTC & ors.*, (2005) 7 SCC 338.
4. *R.S.Saini vs. State of Punjab & ors.*, JT 1999 (6) SC 507.
5. *Kuldeep Singh vs. The Commissioner of Police*, JT 1998 (8) SC 603.
6. *B.C.Chaturvedi vs. Union of India & ors*, AIR 1996 SC 484.
7. *Transport Commissioner, Madras-5 vs. A.Radha Krishna Moorthy*, (1995) 1 SCC 332.
8. *B.C.Chaturvedi vs. Union of India & ors.* (1995) 6 SCC 749.
9. *Government of Tamil Nadu & anr. vs A. Rajapandia*, AIR 1995 SC 561.
10. *Union of India & ors.* vs. *Upendra Singh*, (1994) 3 SCC 357.

11. *State of Orissa & anr.* vs. *Murlidhar Jena*, AIR 1963 sc 404.

RESULT: Petition dismissed.

ANIL KUMAR, J.

1. The petitioner has sought the quashing of the order of his termination dated 13th May, 1999 and has also sought his reinstatement in the service with all the consequential benefits.

2. The brief facts to comprehend the dispute are that the petitioner was employed as a Constable bearing No.912330390 and was posted in the Company of CISF Unit, BSL Bokaro, Bihar. On 13th January, 1999 the petitioner was issued a charge sheet imputing certain allegations against him. The misconduct imputed against the petitioner was that he was found under the influence of the liquor by Inspector/Exe. Rakesh Kapoor (RI) on 4th November, 1998 at 2345 hours while on 'C' shift duty from 2100 hours on 4th November, 1998 to 0500 hours on 5th November, 1998. It was also alleged that he did not turn up for 'C' shift duty on 17/18.11.1998, 28/29.11.1998, 29/30.11.1998 and 16/17.12.1998 without any information/permission of the competent authority. The petitioner had been indisciplined and had also committed the gross misconduct of dereliction of duty, as he was found sleeping under the influence of liquor on 19/20.11.1998 and 21/22.11.1998. It was further imputed that the petitioner did not turn up for 'C' shift duty again on 16/17.12.1998 and thereafter, deserted from the Unit Line without any leave and permission of the competent authority and reported back to the Unit only on 29.12.1998.

3. The charges framed against the petitioner by memorandum dated 13.01.1999 are as under:-

Article of charge-I

Gross misconduct indiscipline and dereliction of duty in that No. 912330390 Constable Anoop Kumar of HQ@ Coy CISF Unit BSL Bokaro was found under the influence of liquor by Insp./Exe Rakesh Kapoor (RI) at about 2345 hrs on 4.11.98 while on 'C' shift duty from 2100 hrs on 4.11.98 to 0500 hrs on 5.11.98 at unit line gate.

Article of charge-II

Gross misconduct ,indiscipline and dereliction of duty in that No. 912330390 Constable Anoop Kumar of 'HQ' Coy CIS F unit BSL Bokaro did not turn-up for 'C' shift duty on 17/18-11-98, 28/29-11-98, 29/30-11-98 and 16/17-12-98 without any information/permission of the competent authority.

Article of charge-III

Gross misconduct, indiscipline and dereliction of duty in that No 912330390 Constable Anoop Kumar of 'HQ¦ Coy CISF Unit BSL Bokaro while detailed for 'C' shift duty on 19/20-11-98 and 21/22-11-98 was found in sound sleep under influence of liquor when checking Officer at about 2130 hrs on 19-11-98 and 2330 hrs on 21-11-98.

Article of charge-IV

Gross misconduct, and indiscipline in that No.912330390 Constable Anoop Kumar of 'HQ' Coy CISF Unit BSL Bokaro did not turn up for 'C¦ shift duty on 16/17-12-98 and thereafter deserted from Unit lines without any leave/permission of the competent authority and reported back to Unit on 29.12.98 at 1530 hrs.

Article of charge –V

Gross misconduct, indiscipline and disobedience of lawfully orders in that No.912330390 Constable Anoop Kumar of 'HQ' Coy CISF –Unit BSL Bokaro is a habitual offender of coming various offences and incorrigible inspite of deterrent punishments awarded to him during his past service.

4. The petitioner had received the charge memo on 19th January, 1999, however, he did not file any reply to the charges made against him. An Inquiry Officer was, thereafter, appointed by order dated 11th February, 1999 at Bokaro. The Inquiry Officer conducted the inquiry as per the rules and laid down procedure by giving the petitioner reasonable opportunity to defend himself. During the inquiry, eight witnesses were examined and the petitioner was given due opportunity to cross-examine the said witnesses. Thereafter, on the basis of the statement of the

witnesses and the documents produced and proved during the inquiry, the Inquiry Officer had held that the charges against the petitioner were established and he submitted the enquiry report on 24th April, 1999.

5. A copy of the inquiry report was also served on the petitioner and he was asked to file reply/representation within 15 days. The petitioner filed his representation dated 10th May, 1999. The Disciplinary Authority considered the inquiry report and the representation made by the petitioner and relying on the statement of PW-5, who had deposed that the petitioner was found under the influence of liquor and that the smell of alcohol was coming from his mouth, and also by referring to the statement of PW-2, Sub Inspector/Exe. K.C.Baliar Singh; PW 7 Constable S.A.Hafees and Exhibit P/20, the medical examination report indicating the level of Alcohol in his blood which was found to be 15 mg% it was held that the petitioner was in drunken condition while on duty and thus the misconduct in terms of Charge-I was proved. Relying on the Duty Deployment Chart dated 17th November, 1998, 28th November, 1998, 29th November, 1998 and 16th December, 1998, it was also inferred by the Disciplinary Authority that Charge-II was also proved against him. The Disciplinary Authority further held that the petitioner was liable for the misconduct alleged under Charge-III and Charge-IV as well.

6. The Disciplinary Authority also considered the past record of the petitioner and inferred that he had indulged in gross misconduct, indiscipline and dereliction of duty leading to awarding of one major and four minor punishments for various misconducts. Reliance was also placed on the statement of PW4, ASI/CLK B.Ghosh Ray who had deposed that the petitioner was awarded as many as 5 punishments during his past service in the CISF, which was also established from his service record and thus, the Disciplinary Authority did not accept the plea of the petitioner that he was not given any documents during the course of the departmental inquiry, and that the petitioner did not know anything due to the mental disorder suffered by him during the stipulated period of the alleged misconducts. The Disciplinary Authority also observed that the charged official did not ask the Inquiry Officer for any documents during the course of the departmental inquiry. According to the Disciplinary Authority, the petitioner only indulged in resorting to dilatory tactics by taking the plea of his illness. Relying on the certificate dated 10th April, 1999, the Disciplinary Authority held that the petitioner had no Psychiatric disorder and in the circumstances, the Disciplinary Authority held that the absence

of the petitioner from duty on 17th November, 1998, 28th November, 1998 and 29th November, 1998 for three days and period of AWL w.e.f. 16th December, 1998 to 29th December, 1998 for 14 days be treated as EOL without medical certificate and also awarded the punishment of removal of the petitioner from service with immediate effect by his order dated 13th May, 1999.

7. In respect of the other charge sheet dated 7th May, 1999 where the petitioner was charged with desertion from Unit on 15th January, 1999 and reporting only on 7th March, 1999 after remaining absent without any leave for 51 days, the Disciplinary Authority passed the order dated 15th May, 1999 holding that since by order dated 13th May, 1999 in the present case the petitioner had already been removed from the service, therefore, the departmental inquiry was ordered to be kept in abeyance in case his order of removal dated 13th May, 1999 is set aside. In case the order of removal got set aside, the departmental proceeding pursuant to memorandum of charge sheet dated 7th May, 1999 was to be re-opened.

8. The order of termination dated 13th May, 1999 was challenged by the petitioner in an appeal. The appeal of the petitioner dated 28th September, 1999 to the DIG, CISF Unit, BSL, Bokaro was, however, dismissed by order dated 22nd/23rd January, 2000. The petitioner has challenged his order of removal and dismissal of his appeal by filing the present petition contending, inter-alia, that the respondents failed to give a proper look into the representation given by the father of the petitioner while imposing the penalty of removal; the respondents failed to consider that there was no specific nuisance created by the petitioner while on duty; the Commandant of the petitioner did not afford adequate opportunity to the petitioner to defend his case properly; the Commandant completed the enquiry without examination of any witnesses and did not allow the petitioner to cross examine the witnesses; the blood test of the petitioner was not done, which could been the evidence about the petitioner consuming liquor; that the petitioner had not taken liquor on earlier occasions; that no personal hearing was given to the petitioner; that the penalty of removal is disproportionate to the alleged guilt of the accused and that the order of punishment is not a speaking order.

9. The petitioner also produced the copies of some of the telegrams given on behalf of the petitioner after he was removed from service by

order dated 13th May, 1999. In the telegram dated 24th May, 1999 given by the wife of the petitioner to the Commandant, CISF Unit it was alleged that his acts are highly irregular and unlawful and that she believes that her husband has been killed in conspiracy by the Commandant. In another telegram given to the Commandant by the father of the petitioner it was alleged that the petitioner was not mentally healthy and it was the responsibility of the Commandant to hand over the petitioner after his dismissal.

10. On behalf of the petitioner the discharge certificate dated 2nd June, 1997 has also been produced, showing that the petitioner was admitted to Dr.Damani's Nursing Home, Dibrugarh from 11th May, 1997 till 2nd June, 1997 on account of Paranoid Disorder. Along with the said certificate, a copy of the medical prescription has also been produced advising him home rest for two months. Yet another certificate has been produced on behalf of the petitioner dated 18th November, 1997 from Dr.Hiranya Kumar Goswami, Dibrugarh stating that the petitioner suffered from adjustment disorder and he was under his treatment from 12th November, 1997 till 18th November, 1997 on which date he was discharged with the advice to continue his medication. The certificate also stipulated that the petitioner should be provided escort for to and fro journey and that he should be posted in and around his hometown.

11. Another certificate from Dr.Damani's Nursing Home details that the petitioner was admitted from 11th February, 1998 till 19th February, 1998 and he was diagnosed with "Alcohol Dependence" and he was advised a conservative treatment. The medical prescription stipulates that the petitioner should be accompanied with an escort. On behalf of the petitioner other medical prescriptions have also been produced which details the medicines prescribed to the petitioner from time to time.

12. The petitioner has also produced a medical certificate dated 5th December, 1998 about his admission from 29th November, 1998 to 5th December, 1998 on account of the petitioner suffering from Typhoid fever. 13. The petitioner has further produced the photocopy of an undated letter showing endorsement of receipt by someone dated 9th December 1998 seeking leave on medical ground. The petitioner has also produced a letter written by his wife dated 9th June, 1999 to the Director General (Admn.) complaining about the misbehavior with the petitioner

who was allegedly innocent and his unfair removal from the service. Along with the writ petition, the copy of the appeal filed by the wife of the petitioner to the Deputy Inspector General, Central Industrial Security Force along with the treatment card of the petitioner of J.N.Medical College Hospital, Aligarh from 16th September, 1999 is also appended.

14. The writ petition is contested by the respondents who have filed a counter affidavit dated 21st August, 2002 of Sh.Vinod Kumar Gupta, Commandant, Central Industrial Security Force, Bokaro Steel Limited, Bokaro. The respondents have revealed in the counter affidavit that the petitioner has not exhausted the departmental remedy available to him, as a revision petition is still maintainable to the next higher authority in terms of Section 9 of the Central Industrial Security Force, 1968. The respondents have further alleged that the petitioner is indulging in frivolous allegations and is abusing the judicial process.

15. The respondents have also contended that the petitioner has not approached the Court with clean hands and has not disclosed all the facts. According to the respondents, the petitioner is a habitual offender and during his short span of service he has been awarded 7 punishments in addition to the punishment of removal from service challenged by him in the present petition. Referring to the charges framed against the petitioner, it is contended that on 4th November, 1998 while on duty he was found under the influence of liquor at Unit Line Gate; he did not turn up for "C" Shift duty on 17th/18th November, 1998; 28th/29th November, 1998; 29th/30th November, 1998 and 16th/17th November, 1998 without any information and permission of the competent authority; on 19th/20th November, 1998 and 21st/22nd November, 1998 he was found sleeping under the influence of liquor when checked by checking officer at about 2130 hours on 19th November, 1998 and 2330 hours on 21st November, 1998 and the petitioner did not turn up for "C" shift duty on 16th/17th December, 1998 and thereafter, he deserted the unit lines without any leave/permission and reported back to unit on 29th December, 1998 at 1530 hours entailing issuance of chargesheet dated 13th January, 1999. The respondents have disclosed that the charge sheet was received by the petitioner on 19th January, 1999, however, he did not reply to the charges made against him leading to the conduct of departmental enquiry against him by order dated 11th February, 1999. An enquiry report dated 24th April, 1999 was given by the Enquiry Officer, a copy of which was also given to the petitioner and he was given adequate time to make a

representation against the same. The petitioner had submitted his representation on 10th May, 1999 and pleaded innocence. However, the Disciplinary Authority after considering his representation and the enquiry report, had imposed the penalty of removal from service by order dated 13th May, 1999. The respondents have detailed earlier seven punishments awarded to the petitioner, which are as under:-

Sl.No.	Charge	Punishments Awarded
1.	Overstayed from leave for 17 days without prior permission of competent authority w.e.f 24-5-94 to 9-6-94	Awarded penalty of fine equal to his 03 days pay vide order dated 9-9-94.
2(i).	He manhandled a truck driver while on duty on 20.4.95 in presence of public without any provocation	Awarded penalty of reduction of pay by 02 stages for a period of one year with cumulative effect vide order dated 17.10.95
(ii)	He was found under influence of liquor while on duty on 20-4-95.	
3(i)	Overstayed from leave for 46 days wef. 24-5-96 to 8-7-96 without permission of competent authority	Awarded penalty of fine equal to 03 days pay vide order dated 18-9-96.
4(i)	He was found absent from duty at 1735 hrs on 6-5-97 and found at Sukhanpokhari at 2000 hrs in intoxicated condition	Awarded penalty of with holding of one increment for two years without cumulative effect vide order dated 30-4/2-5-98.
(ii)	Found absent from assigned duty on 09-05-97.	
(iii)	He was admitted in Sibsagar Hospital on 9-5-97 at 2230 hrs, but he left hospital and went to CWS gate at 1030 hrs on 10-5-97 in intoxicated condition.	

5.	He did not deposit trefoil copy of railway warrant No.036986	Awarded penalty of fine equal to his 03 days pay vide order dated 1/2-6-98.
6.	Deserted unit lines from 5-11-98 to 13-11-98 without any information and permission of competent authority	Awarded penalty of fine equal to his 07 days pay vide order dated 22-1-99.
7.	Overstayed from leave wef. 17-1-98 to 9-2-98 for 24 days and again deserted unit lines from 19.2.98 to 15-4-98 for 56 days without any permission or information of competent authority	Awarded penalty of withholding of one increment for one year without cumulative effect vide order dated 25.1.99.

16. The respondents have also disclosed that the petitioner has been issued charge sheets dated 7th May, 1999 and 8th May, 1999 under Rule 34 of CISF Rules, 1969. By chargesheet dated 7th May, 1999 the petitioner has been charged with deserting the unit line from 2350 hours on 15th January, 1999 and remaining absent upto 6th March, 1999. By charge memo dated 8th May, 1999 the petitioner is charged of creating nuisance under the influence of liquor on 10th April, 1999 at about 2030 hours and misbehaving with Miss M.Minz, a staff nurse of Bokaro General Hospital and also remaining absent from unit lines with effect from 10th April, 1999 at 2230 hours to 11th April, 1999 at 0805 hours. The petitioner was also charged by the said chargesheet dated 8th May, 1999 for lifting three suitcases of the other CISF Personnel from the 'J' Company Barrack on 4th May, 1999 and taking them away in a three wheeler. The allegation is that he was caught red handed while opening the said suitcases by making duplicate keys at Dundibagh market.

17. The departmental proceedings initiated pursuant to the charge memo dated 7th May, 1999 and 8th May, 1999 have not been finalized as the order of removal dated 13th May, 1999 has been passed and consequently, the disciplinary proceedings have been kept in abeyance by order dated 15th May, 1999 and 19th May, 1999.

18. The respondents have also disclosed that the petitioner had joined the CISF Unit, BSL, Bokaro on 28th July, 1998 on regular transfer from CISF Unit, ONGC Nazira and have denied that the petition dated

2nd March, 1998 was submitted to the respondents. The respondents have submitted that the petition dated 2nd March, 1998 had been addressed to the Deputy Commandant, ONGC Sibsagar, Assam, who has, in any case, not been cited as a respondent in the present matter.

19. Regarding the request of the petitioner for allotment of a formal quarter, the respondents have contended that the same was placed in the seniority list and the formal quarter could not be allotted to the petitioner immediately.

20. Regarding the treatment received by the petitioner after his removal from service, the respondents have averred that this is not relevant for determination of the penalty imposed on the petitioner pursuant to the proper enquiry conducted against him in accordance with the rules and the action taken by the Disciplinary Authority. The respondents have also placed reliance on the medical certificate dated 10th April, 1999 detailing that there was no psychiatric disorder in the petitioner and that the petitioner is "alcohol dependant" which was also established from the pathological tests of his blood on 4th November, 1998, 20th November, 1998 & 22nd November, 1998. Regarding the absence of the petitioner from the duty, the respondents have relied on GD entries No.352 & 353 dated 17th November, 1998, No.603 dated 28th November, 1998, No.620 dated 29th November, 1998 and No.444 dated 16th December, 1998.

21. The respondents have further averred that no representation was received from the father of the petitioner; enquiry was conducted according to the rules and laid down procedure giving reasonable opportunity to the petitioner; and the petitioner was present throughout the departmental enquiry. The respondents have denied that no witnesses were examined by the Enquiry Officer. It has been categorically asserted that 8 witnesses were examined on behalf of the respondents and that the petitioner was given opportunity to cross examine the witnesses, however, he did not cross examine all the witnesses but did cross examine PW-2, PW-4 & PW-7. The allegation that the petitioner has not signed the relevant proceedings was also denied. The respondents disclosed that the copies of the transactions of the enquiry had been supplied to the petitioner by the Enquiry Officer. The respondents also disclosed that the record of the medical examination of the petitioner was produced before the Enquiry Officer and has been duly established.

22. The respondents categorically denied that the father of the petitioner had submitted any medical records pertaining to the petitioner

to the respondents.

23. The petitioner filed a rejoinder dated 16th January, 2004 denying the specific pleas raised by the respondents, however, he did not produce anything new or disclosed any new fact except for reiterating whatsoever had been stated by the petitioner in his petition.

24. This Court has heard the counsel for the parties and perused the writ petition, the counter affidavit and the rejoinder and the documents produced by the parties. The respondents also have produced the original record pertaining to the disciplinary proceedings initiated against the petitioner pursuant to the charge memo dated 13th January, 1999. Perusal of the original record of the enquiry proceedings reveals that the petitioner had participated in the enquiry proceedings and had received the relevant documents. The petitioner had also signed the proceedings. On 3rd March, 1999 he had pleaded "not guilty" by contending that he accepts whatsoever is alleged against him, but it was on account of minor causes. He admitted that he had not replied to the charge memo, and he also admitted that the Enquiry Officer could act as an Enquiry Officer. Perusal of the record reveals that the statements of various witnesses were recorded in his presence, as the statements were counter signed by the petitioner. The petitioner has cross examined some of the witnesses. Perusal of the record also reveals that the respondents have produced the record pertaining to the various DG entries to establish that the petitioner had been absent on the date and time as had been alleged by the respondents. The respondents have also established the reports given by the concerned personnel regarding the absence of the petitioner on different dates. The respondents have also produced, during the enquiry, the report of the petitioner from Bokaro General Hospital regarding alcohol dependancy. PW-5 also reveals that substantial alcohol was found in the blood of the petitioner, which is further substantiated by PW5/Ex.P21 which stipulates that 42 mg percent alcohol was found in the blood of the petitioner and PW5/Ex.P22 which reveals that 48 mg percent alcohol was found in his blood.

25. In the circumstances, the plea on behalf of the petitioner that the enquiry was not conducted in accordance with the rules and that the petitioner was not given adequate opportunity is not made out. The respondents have produced sufficient proof to establish the fact that the petitioner was found under the influence of alcohol and in an inebriated

state on various dates and that he was absent from duty.

26. The medical record which has been produced on behalf of the petitioner along with the writ petition had not been produced during the enquiry proceedings. No sufficient reason has been disclosed by the petitioner for not producing the medical record prior to the period during which the enquiry was conducted. The perusal of the said record rather reveals that it is not material and does not absolve the petitioner of the charges made against him. Rather the medical certificate dated 19th February, 1998 diagnosing the petitioner as "alcohol dependence" substantiates the plea of the respondents. The medical record which has been produced by the petitioner along with the writ petition after the enquiry was concluded also does not absolve the petitioner of the charges made against him in any manner. The representations and the appeals filed on behalf of the petitioner by his wife and father rather highlights the reckless and baseless allegations made against the respondents. The respondents have categorically denied the representations received from the father of the petitioner which fact cannot be disbelieved in the facts and circumstances as the representations and appeal received from the wife of the petitioner were duly dealt with and were rejected by passing reasoned orders. There was no reason for the respondents to have not considered and disposed off the representation received from the father of the petitioner had it been received by the respondents.

27. This Court does not have to go into the correctness of the truth of the charges. It cannot take over the functions of the disciplinary authority. It cannot sit in appeal on the findings of the disciplinary authority and assume the role of the appellate authority. In cannot interfere with the findings of the fact arrived at in the disciplinary proceedings except in the case of mala-fides or perversity i.e where there is no evidence to support a finding or where the finding is such that no one acting reasonably or with objectivity could have arrived at or where a reasonable opportunity has not been given to the delinquent to defend himself or it is a case where there has been non application of mind on the part of the enquiry authority or if the charges are vague or if the punishment imposed is shocking to the conscience of the Court. Reliance for this can be placed on **State of U.P & ors. Vs Raj Kishore Yadav & anr.,** (2006) 5 SCC 673; **V.Ramana Vs A.P. SRTC & ors.,** (2005) 7 SCC 338; **R.S.Saini Vs State of Punjab & ors.,** JT 1999 (6) SC 507; **Kuldeep Singh Vs The Commissioner of Police,** JT 1998 (8) SC 603; **B.C.Chaturvedi**

Vs Union of India & ors, AIR 1996 SC 484; **Transport Commissioner, Madras-5 Vs A.Radha Krishna Moorthy,** (1995) 1 SCC 332; **Government of Tamil Nadu & anr.Vs A. Rajapandia, AIR 1995 SC 561; Union of India & ors. Vs Upendra Singh,** (1994) 3 SCC 357 and **State of Orissa & anr. vs Murlidhar Jena,** AIR 1963 sc 404.

28. It also cannot be disputed that the grounds on which administrative action is subject to control by judicial review are, "illegality"; "irrationality" and "procedural impropriety". The Court will not interfere in such matters unless the decision is tainted by any vulnerability like illegality, irrationality and procedural impropriety. Whether action falls within any of the categories is to be established and mere assertion in that regard may not be sufficient. To be "irrational" it has to be held that on material, it is a decision "so outrageous" as to be in total defiance of logic or moral standards. If the power is exercised on the basis of facts which do not exist or reaching conclusions which are patently erroneous, such exercise of power shall be vitiated. Exercise of power will be set aside if there is manifest error in the exercise of such power or the exercise of power is manifestly arbitrary. To arrive at a decision on "reasonableness" the court has to find out if the respondents have left out a relevant factors or taken into account irrelevant factors. In (1995) 6 SCC 749, **B.C.Chaturvedi v. Union of India & ors** Supreme Court at page 759 has held as under:-

> 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.

29. The Supreme Court in (2006) 5 SCC 88, **M.V.Bijlani Vs Union of India & ors.** had also held that the Judicial review is of decision making process and not with re-appreciation of evidence. The Supreme Court in para 25 at page 96 had held as under:

> 25. It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analyzing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with.

30. In the circumstances, the petitioner has not been able to make out any illegality, irregularity or any perversity in the enquiry conducted by the respondents pursuant to which the punishment of removal from the service has been passed against the petitioner. The previous

punishments imposed upon the petitioner and other chargesheets issued to him for various other lapses and misconduct on the part of the petitioner rather points out that the punishment of removal from the service passed by the respondents against the petitioner by order dated 13th May, 1999 is justified. The learned counsel for the petitioner, in the facts and circumstances, has not been successful in making out any ground or show any such facts which will show that the punishment imposed on the petitioner is disproportionate to the misconduct which has been established against him.

31. For the foregoing reasons and in the totality of the facts and circumstances, therefore, there are no grounds to interfere with the orders of the respondents and the action taken by the respondents against the petitioner. There are no ground to interfere by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. The writ petition is without any merit, and it is, therefore, dismissed. Parties are however, left to bear their own costs.

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RFA

CHAMPA JOSHI **….APPELLANT**

VERSUS

MAAN SINGH & ORS. **….RESPONDENTS**

(VALMIKI J. MEHTA, J.)

RFA. NO. : 207/2007 **DATE OF DECISION: 15.05.2012**

Code of Civil Procedure, 1908—Order 7 Rule 11- Appellant/plaintiff filed suit for declaration, possession mesne profits, mandatory injunction and permanent injunction—Three defendants, filed separate written statements—However, Ld. Trial Judge dismissed the suit on ground that it lacked cause of action—Plaintiff

preferred appeal—Held—For the purpose of deciding plea under Order 7 Rule 11 of the Code, the contents of the plaint have to be taken as correct and final-It is not permissible to hold that plaint contains false facts and therefore, the suit is liable to be dismissed as lacking in cause of action.

In my opinion, the trial Court has fallen into a clear cut error in deciding the disputed questions of fact at the stage of pleadings. A reading of the impugned judgment shows that the trial Court has disbelieved the case as set out by the appellant/plaintiff in the plaint and held that since the appellant/plaintiff is not stating the correct facts the suit should be dismissed. Surely, whether or not it is the plaintiff who has stated incorrect/correct facts or the defendants are stating incorrect/correct facts, will and can only be known after evidences are led by both the parties, witnesses of both the parties are cross-examined by the other side and the case is decided at the stage of final arguments. Of course, if one party to a legal proceeding has made an inconsistent statement in the suit, as compared with an earlier statement in a judicial proceeding, then the necessary consequences in law will follow, however, of course subject to complying with the requirements of Section 145 of the Evidence Act, 1872, because as per this section it will be necessary to put the statement to the witness so as to contradict him on the ground that a false statement has been made. However, merely because there is an issue of inconsistent stand of the appellant/plaintiff, cannot mean that the suit itself has to be dismissed at the threshold. The doctrine of *falsus in uno falsus in omnibus* has no application in India inasmuch as each party to a litigation always states some sort of convenient facts, even amounting to a false statement to suit his own case, however, merely because there is found a certain falsehood in a case of a person, that in itself cannot be a ground to dismiss the suit at the initial stage though there are issues pertaining to valuable rights in an immovable property to be decided. **(Para 7)**

Important Issue Involved: For the Purpose of deciding plea U/o 7 Rule 11 of the Code, the contents of the plaint have to be taken as correct and final. It is not permissible to hold that plaint contains false fact and therefore the suit is liable to be dismissed as lacking in cause of action.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Rajat Aneja, Advocate with Mr. S. Sethu Mahendran, Advocate.

FOR THE RESPONDENTS : Mr. R.L. Kohli, Advocate.

CASES REFERRED TO:

1. *Madan Lal Vaid* vs. *Nand Kumar Walia & Another* 2002 1 AD (Delhi) 682.
2. *T. Arvindandam* vs. *T.V. Satyapal and Another* reported in AIR 1977 SC Page 2421.

RESULT: Appeal allowed.

VALMIKI J. MEHTA, J. (ORAL)

1. The challenge by means of this Regular First Appeal filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 18.11.2005 by which the trial Court allowed the application of the defendant No.3/respondent No.3 filed under Order 7 Rule 11 CPC and dismissed the suit as being without cause of action.

2. Before coming to the facts of the present case, I must observe that it is elementary that matters pertaining to merits of the disputes i.e. whether a fact as alleged by the appellant/plaintiff is or is not correct or whether a fact as alleged by the respondents/defendants is or is not correct cannot be decided at the stage of pleadings, and surely such disputed questions of fact can only be decided at the stage of final arguments after both the parties have led their evidence. This is because what the plaintiff states in his plaint, as per the plaintiff is right, and what the defendant states in his written statement is, as per the defendant correct, however, who is right can only be decided after the evidence is

led by the respective parties on the facts as stated in their pleadings.

3. The subject suit filed by the appellant/plaintiff was a suit for declaration, possession, mesne profits, mandatory injunction and permanent injunction. In the suit, the appellant/plaintiff claimed rights in the suit property bearing No.37B, forming part of khasra No.437, Jeevan Nagar/ Bhagwan Nagar, New Delhi-14. Rights are claimed by the appellant/ plaintiff inasmuch as he claims to have entered into an agreement to sell etc with the owner/defendant No.1-Sh. Maan Singh on 4.1.1991 and paid valuable consideration of Rs. 2,40,000/- out of the total price of Rs. 2,50,000/-. In the plaint, it is alleged that the appellant/plaintiff was put into possession by the defendant No.1 pursuant to the documentation dated 4.1.1991. The appellant/plaintiff thereafter alleges dispossession by the defendant No.1 in terms of the averments made in para 7 of the plaint. The plaint which was originally filed was thereafter amended to include the facts with regard to the selling of the rights in the suit property (by means of the similar documentation executed in favour of the appellant by the defendant No.1) by the defendant No.1 to the defendant No.2 vide documentation dated 30.12.1996. This date of 30.12.1996 is mentioned because the defendant No.1 in the suit had filed an affidavit that he had sold rights in the suit property to the defendant No.2 by means of the documentation dated 30.12.1996. There are other averments in the plaint of the defendant No.2 by means of similar documentation dated 2.4.1997 transferring rights in the suit property to the defendant No.3. The plaint seeks restoration of possession, the related claim of mesne profits, the relief of mandatory injunction against the defendants to execute sale documents in favour of the plaintiff and also for restraining the defendants from further dealing with the suit property.

4. Defendants filed their written statements independently i.e. each of the three defendants filed a separate written statement. Defendant No.1 admitted entering into agreement to sell with the appellant/plaintiff on 4.1.1991, however, pleaded that the documentation created no rights in favour of the appellant/plaintiff as the appellant/plaintiff paid only a sum of ‘ 35,000/- out of the total consideration of Rs. 2,50,000/-. With regard to possession being delivered to the appellant/plaintiff by the defendant No.1, the defendant No.1 in his written statement is mysteriously vague. The defendant Nos.2 and 3 have taken up a common stand whereby it is pleaded that the defendant No.2 sold rights in the suit property to the defendant No.3 under the documentation dated 2.4.1997,

and which documentation was executed inasmuch as defendant No.2 purchased rights in the suit property vide the documentation executed by the defendant No.1 in favour of the defendant No.2 on 30.12.1996.

5. The impugned judgment dismisses the suit as lacking in cause of action by making the following observations:-

> "Perusal of the plaint, however, shows that plaintiff was alleged dispossessed from the suit premises by defendant in Feb 97 as per cause of action clause. As per certified copy of the plaint filed by husband of the plaintiff G.D. Joshi, the petitioner i.e. husband of G.D. Joshi was dispossessed by force by the accused person Sukhdev Singh and Dalip Singh in the Month of January 25.02.92. In this connection reference is made to para-9 of the plaint wherein the plaintiff averred that defendant no.1 sold the suit property to defendant no.2 on 30.12.96 by sale transaction which sale transaction and delivery of possession is absolutely illegal and not binding on the plaintiff as according to him the same is void in law.
>
> There is substance in the submissions by Ld counsel for defendant no.3 that nowhere the plaintiff referred to the criminal complaint under Section 341/391/448/34 IPC of which certified copy is placed by him on record alongwith statement of defendant no.2 and also there is no averment in the plaint that plaintiff ever came into possession of the suit premises after being dispossessed from the same in the year 1992 and till it was sold by defendant no.1 to defendant no.2. There is substance in the submissions by Ld. Counsel for the defendant that cause of action of the plaintiff as per plaint on record is based on the plea that same arose in February, 1997 when the defendant no.1 forcibly dispossessed the plaintiff from the property in question which still continuous whereas in the same plaint in para-9b the plaintiff pleaded that defendant no.2 sold the property to defendant no.3 on 02.04.97 and defendant no.2 has no right, title or interest in the suit property and as such the transaction and delivery of possession, if any is absolutely illegal and without justification and not binding on the plaintiff.
>
> Here the plaintiff is not able to show any cause of action to file the present suit as there are no pleadings that after delivery of

> possession of the suit property by defendant no.1 to defendant no.2 on 30.12.96, the plaintiff ever came into possession or continued to be in possession of the suit property as on 02.04.97 as admittedly on 02.04.97 possession of the suit property was handed over to the defendant no.3 by defendant no.2. As such there was no cause of action in favour of the plaintiff and against the defendant so as to file the case with the plea that defendant no.1 forcibly dispossess the plaintiff from the suit property in the month of February, 1997. Accordingly I hold that plaintiff filed the suit without any cause of action in his favour and against the defendants and based the suit on cause of action by suppressing material facts. Therefore, the suit plaint of the plaintiff is need to be rejected as filed without any cause of action under Order 7 Rule 11 CPC considering the observations of the Apex Court in case of **T. Arvindandam Vs. T.V. Satyapal and Another** reported in AIR 1977 SC Page 2421 as referred to by Their Lordships in case of **Madan Lal Vaid Vs. Nand Kumar Walia & Another**-2002 1 AD (Delhi) 682.
>
> > "The answer to this question is provided by a decision of the Supreme Court in the case of **T. Arviandandam Vs. T.V. Satyapal and another** reported in AIR 1977 SC Page 2421, Hon'ble Supreme Court observed that if clever drafting has created illusion of a cause of action the evil should be nipped in the bud by examining the party searchingly under order 10 CPC. It was held that such bogus litigation should be struck down at the earliest. As already noticed, the plaintiff concealed all the material facts in the original plaint and also in the amended plaint. He filed suit as the original owner of the property which has been found to be untrue from his own admission contained in the reply referred to above. If true facts were pleaded he would not have been entitled to maintain the suit for possession nor he could maintain the suit for declaration that the sale deed dated 0th June 1995 executed by defendant no.1 and 2 in favour of the defendant no.3 in respect of one half portion of the property no.IX/6075, Kashyap Marg, New Police Station, Gandhi Nagar, Delhi is illegal because at the time of execution of the said sale

deed, the power of attorney executed by the plaintiff in favour of defendant no.1 and 2 was admitted in force. The said power of attorney was cancelled subsequently vide cancellation deed dated 26th June, 1995. The true facts which are admitted in his own reply indicate that he had no cause of action to file the suit. Material facts were suppressed from the Court only make out a sham, flimsy cause of action. Therefore, on the authority of the judgment of the Supreme Court in case of **T. Arvandandam** (Supra), I think the suit is liable to be dismissed not under Order 7 Rule 11 CPC, but for want of cause of action."

The suit of the plaintiff is accordingly dismissed as without any cause of action. No orders as to the costs. File be consigned to the Record Room."

6. A reading of the aforesaid paras shows that the trial Court has held that since the husband of the plaintiff in a criminal case mentioned that possession of the suit property was lost in the year 1992 and therefore there does not arise the issue of losing possession once again in the year 1997. Trial Court also holds that there is no plea with regard to continuation of possession from the years 1992 to 1997 and therefore there does not arise an issue of appellant/plaintiff being dispossessed in the year 1997. It is in view of these facts that the trial Court has held that the appellant/plaintiff has not been able to show arising of cause of action to file the suit. Trial Court has effectively held that a plaint which contains false facts must not be entertained and must be dismissed under Order 7 Rule 11 CPC in terms of the judgment of the Supreme Court in the case of **T. Arvindandam Vs. T.V. Satyapal and Anr.** AIR 1977 SC 2421.

7. In my opinion, the trial Court has fallen into a clear cut error in deciding the disputed questions of fact at the stage of pleadings. A reading of the impugned judgment shows that the trial Court has disbelieved the case as set out by the appellant/plaintiff in the plaint and held that since the appellant/plaintiff is not stating the correct facts the suit should be dismissed. Surely, whether or not it is the plaintiff who has stated incorrect/correct facts or the defendants are stating incorrect/correct facts, will and can only be known after evidences are led by both the parties, witnesses of both the parties are cross-examined by the other

side and the case is decided at the stage of final arguments. Of course, if one party to a legal proceeding has made an inconsistent statement in the suit, as compared with an earlier statement in a judicial proceeding, then the necessary consequences in law will follow, however, of course subject to complying with the requirements of Section 145 of the Evidence Act, 1872, because as per this section it will be necessary to put the statement to the witness so as to contradict him on the ground that a false statement has been made. However, merely because there is an issue of inconsistent stand of the appellant/plaintiff, cannot mean that the suit itself has to be dismissed at the threshold. The doctrine of *falsus in uno falsus in omnibus* has no application in India inasmuch as each party to a litigation always states some sort of convenient facts, even amounting to a false statement to suit his own case, however, merely because there is found a certain falsehood in a case of a person, that in itself cannot be a ground to dismiss the suit at the initial stage though there are issues pertaining to valuable rights in an immovable property to be decided.

8. A reading of the plaint of the plaintiff in the trial Court shows that whereas the appellant/plaintiff claims rights in the suit property by means of documentation dated 4.1.1991 and illegality/invalidity of the subsequent documents executed by the defendant No.1 in favour of the defendant No.2 dated 30.12.1996 and also the consequent documentation dated 2.4.1997, the defendant Nos.2 and 3 on the other hand have pleaded validity of the documentation dated 30.12.1996 executed by the defendant No.1 in favour of the defendant No.2 and the subsequent documentation dated 2.4.1997 executed by the defendant No.2 in favour of defendant No.3. Whether the documentation dated 4.1.1991 is valid or whether the subsequent documentations, dated 30.12.1996/2.4.1997 are valid will be a factual issue in the suit and which will be decided at the stage of final arguments after trial in the case. At the stage of pleadings, however, it is not permissible in law to hold that one set of documents is correct and the other set of documents is wrong without allowing the plaintiff to prove his case during trial. In cases such as the present whether or not there is cause of action in favour of the plaintiff would mean that whether or not plaintiff will be entitled after trial to the reliefs as claimed in the plaint on the basis of averments made in the plaint. For the purpose of deciding an application under Order 7 Rule 11 CPC, the law is that for the plaint to be lacking in cause of action, only the averments in the plaint have to be seen without any reference to the

written statement or other documents. The contents of the plaint, when an application under Order 7 Rule 11 CPC is decided, have to be taken as correct and final. It is not permissible while deciding an application under Order 7 Rule 11 CPC to hold that the plaint contains false facts and therefore the suit is liable to be dismissed as lacking in cause of action.

9. In view of the above, the appeal is allowed. Impugned judgment dated 18.11.2005 dismissing the suit under Order 7 Rule 11 CPC is set aside. Trial Court will now decide the suit in accordance with law. It is clarified that nothing contained in today's judgment is a reflection on merits of the case for or against any of the parties to the suit or the present proceedings and the observations which are made in the present judgment have only been made for the purpose of deciding the present appeal against the impugned order dismissing the suit under Order 7 Rule 11 CPC as lacking in cause of action.

10. Parties to appear before the District & Sessions Judge, Delhi on 31st July, 2012, and on which date the District & Sessions Judge will mark the suit for disposal to a competent Court in accordance with law. Trial Court record be sent back so as to be available to the District & Sessions Judge, Delhi on the date fixed.

ILR (2012) V DELHI 286
CRL. M.A.

MOHD. WASIM ….APPELLANT

VERSUS

STATE ….RESPONDENT

(S. RAVINDRA BHAT & S.P. GARG, JJ.)

CRL. M.A. NO. : 9630/2011 DATE OF DECISION: 16.05.2012
IN CRL. A. NO. : 1008/2011

Juvenile Justice (Care and Protection of Children) Act, 2000—Section 7A—Appellant was convicted by Trial Court for committing offences punishable U/s 364A/506/120 IPC and was sentenced—Aggrieved, appellant filed appeal and also raised plea about his being juvenile for first time in appeal—Trial Court was directed to hold inquiry for determination of age of appellant—After appreciating evidence, Trial Court concluded that an approximate age of appellant on day of incident was between 19-24 years—Appellant also challenged said finding of Trial Court and urged he was less than 18 years of age on day of incident—Also, his ossification report by Dr. Mehra was ignored by Trial Court whereas his ossification report prepared in AIIMS should not have been considered—According to the prosecution, appellant failed to produce any material documents like ration card, voter's I card, electoral rolls to prove his age—Trial Court relied upon the ossification report prepared in AIIMS and also margin of error of six months was given to conclude that appellant was not juvenile on day of incident—Held:- Once the legislature has enacted a law to extend special treatment in respect of trial and conviction to juveniles, the courts should be jealous while administering such law so that the delinquent juveniles driver full benefit of the provisions of such Act but, at the same time, it is the duty of the courts that the benefit of the provisions meant for Juveniles

are not derived by unscrupulous persons, who have been convicted and sentenced to imprisonment for having committed heinous and serious offences, by getting themselves declared as children or juveniles on the basis of procured certificates.

Considering the above factual and legal position, we are of the view that two years margin on either side cannot be given. The Medical Board determined his age between 25 to 27 years on the basis of physical, dental and radiological examination. The only question to be considered is whether we should exercise discretion in giving the benefit of one year on the lower side to the Appellant. **(Para 16)**

It is apparent from the Rule 12(3)(b) that the relaxation of one year is not automatic but it should be granted after considering all the evidence available on record.

The observation of Hon'ble Supreme Court in **'Jitender Ram @ Jitu vs. State of Jharkhand.** (2006) 9 SCC 428 are instructive :

> "Once the legislature has enacted a law to extend special treatment in respect of trial and conviction to juveniles, the courts should be jealous while administering such law so that the delinquent juveniles derive full benefit of the provisions of such Act but, at the same time, it is the duty of the courts that the benefit of the provisions meant for juveniles are not derived by unscrupulous persons, who have been convicted and sentenced to imprisonment for having committed heinous and serious offences, by getting themselves declared as children or juveniles on the basis of procured certificates." **(Para 17)**

Important Issue Involved: Once the legislature has enacted a law to extent special treatment in respect of trial and conviction to juveniles, the courts should be jealous while administering such so law that the delinquent juveniles driver full benefit of the provisions of such Act but, at the same time, it is the duty of the courts that the benefit of the provisions meant for juveniles are not derived by unscrupulous persons, who have been convicted and sentenced to imprisonment for having committed heinous and serious offences, by getting themselves declared as children or juveniles on the basis of procured certificates.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. R.M. Tufail with Mr. Farooq Chaudhary and Mr. Vishal Sahijpal, Advocates.

FOR THE RESPONDENT : Mr. Sanjay Lao, APP.

CASES REFERRED TO:

1. *Jitender @ Jitu* vs. *State* (Crl.M.A.15749/2010 and Crl.A.438/2010).
2. *State of NCT of Delhi* vs. *Shiva & ors.* (Crl.L.P.172/2008).
3. *State of U.P.* vs. *Chhoteylal* (Crl.A.769/2006 decided on 14.01.2011).
4. *Jitender Ram @ Jitu* vs. *State of Jharkhand* (2006) 9 SCC 428.
5. *Lal Bahadur* vs. *the State* (Crl.R.145/2003 decided on 25.07.2003).

RESULT: Application dismissed.

S.P. GARG, J.

1. By an order dated 09.12.2011 on the Appellant's application under Section 7-A of the Juvenile Justice (Care and Protection of Children) Act, 2000 claiming juvenility on the day of occurrence (28.03.2006), this Court directed the Trial Court to hold an enquiry for determination of his age. The Trial Court examined CW-1 (Appellant's father), CW-2 (Appellant himself), CW-3 (Ram Niwas), Inspector, Food and Supply Office, CW-

4 (R.K.Anand), CW-5 (Dr.Shivani Mehra) and CW-6 (Dr.Sanjeev Lalwani). After appreciating the evidence and considering the rival contentions of the parties, the Trial Court concluded that the approximate age of the Appellant on the date of incident i.e. 28.03.2006 was between 19 to 24 years.

2. Learned counsel for the Appellant challenged the findings of the Trial Court and vehemently argued that he was less than 18 years of age, on the date of incident. He further contended that the Trial Court fell into grave error in ignoring the ossification report (Ex.CW-5/A of Dr.Shivani Mehra) by which the Applicant's age was determined between 21 to 22 years as on 09.01.2012. The counsel urged to ignore the report (Ex.CW-6/A) prepared at AIIMS as it did not consider that medial end of clavicle bone fuses at the age of 22. The report of the Radiologist of AIIMS to set the age as 25 years is an undue exaggeration without any basis. He relied upon page No.199 of Dr.R.M.Jhalla and V.B.Raju's *Medical Jurisprudence* where it is stated that at the age of 21, medial end of clavicle appears and it fuses at the age of 22 in case of human males. He further argued that if two views are possible, then, the view favouring the accused has to be adopted. Since the age has been opined in between 25 to 27, (in Ex.CW-6/A), benefit of 2 years is to be given for calculating the age of the Appellant. He further contended that the Applicant had disclosed his age 25 years at the time of recording his statement under Section 313 Cr.P.C. at the first opportunity. He is entitled to the protection and in any event could not have been sentenced to imprisonment for life.

3. Learned APP supported the findings of the Trial Court and urged that the Appellant was than 19 years on the date of incident and was not juvenile. He and his family members suppressed material documents i.e. Ration Card, Voter I-Card, Electoral Rolls etc. deliberately to conceal the exact age. During enquiry, the police was able to lay hands on these documents and examine official witnesses to prove those documents. He further contended that the medical report proved by Dr.Sanjeev Lalwani from AIIMS is authentic as it considered physical, dental and ossification test, to estimate the age of the Applicant. He relied upon **'Lal Bahadur vs. The State'** (Crl.R.145/2003 decided on 25.07.2003) where in such cases, this Court reduced margin of error in ascertaining the age to six months on either side.

4. We have considered the submissions of both the parties and have

scrutinized the records. The Appellant was convicted by the Trial Court by the impugned judgment dated 21.07.2011 for committing the offences punishable under Sections 364-A/506/120-B IPC and sentenced to undergo imprisonment for life with fine of Rs. 75,000/-. The appeal against the impugned judgment is pending before this Court. Before the Trial Court, the Appellant did not raise any plea that he was a juvenile. In the absence of any such plea, the Trial Court at no stage had gone into the question as regards the age of the Appellant in terms of provisions of the Act. Appellant's father moved an application (CM.A.9630/2011) and by order dated 31.10.2011 this Court required him to furnish the following particulars :

> (1) "the numbers of children, the sequence of their births and their approximate dates and/or years of birth;
>
> (2) copies of Ration Card or any other documents, revealing the number of family members and their relative ages, their places of birth, date of marriage of the appellant's parents;
>
> (3) any other proof of date of birth, such as School Certificate, Voter ID Card (including the appellant's parents as well as other sibling details). The affidavit shall be filed within a week and copy thereto shall be furnished to learned APP. The affidavit shall also enclose the relevant documents which are adverted to by it."

5. On 29.11.2011, instead of furnishing the required particulars, the learned counsel under instructions from the Applicant withdrew the application to file a proper application supported by his affidavit. Subsequently, the accused/Appellant filed his affidavit dated 01.12.2011 claiming that his parents did not have any documentary proof in their possession to show his age. Needless to say, no document was filed along with the application to show his date of birth or specific age on the date of incident.

6. In the enquiry too, both the Applicant (CW-2) and his father (CW-1) in their depositions denied to having any document i.e. Ration Card, Driving Licence, Passport and Birth Certificate etc. to prove the exact age. They further did not give any specific date of birth or approximate age of the accused on the date of incident. In nutshell, there is bald statement of both CW-1 and CW-2 that the Appellant was juvenile.

7. The Court examined CW-3 (Ram Niwas) who brought original record from the Food and Supply Office, Circle-22, 2 Battery Lane, Rajpur road, Delhi from where CW-2 (Appellant's father) had got issued Ration Card for himself and his family members. He testified that pursuant to the application dated 25.04.2005 (Ex.CW-3/A) for renewal of previous Ration Card No.B726964, a new Ration Card No.APL59303213 (Ex.CW-3/B) was issued to Ajij Ahmed (Appellant's father). He had attached a photo copy of the voter identity card issued by the Election Commission and had mentioned the year i.e. 1980 when his son (Appellant Mohd.Wasim) was born. The testimony of the official witnesses remained unchallenged. The accused did not challenge the existence of these documents.

8. The Court also examined CW-4 (R.K.Anand) who brought the Electoral Roll of Assembly constituency No.22 Ballimaran for the period 2002 to 2012. As per record, the Appellant (Mohd.Wasim son of Ajij Ahmed), aged 21 years was a voter in 2002 in the said constituency and his name appeared at sl.No.835. Sl.No.833 to 838 showed names of his family member as registered voters. The computerized generated Electoral Roll was exhibited (CW-4/A). Similarly, the Electoral Rolls of 2005, 2007, 2008, 2012 in which the accused's age was shown 24 years, 26 years, 27 years and 31 years, respectively were exhibited (CW-4/B to CW-4/E). CW-4 elaborated in his deposition that Election Officer (ER Branch), Kashmiri Gate, Delhi issued a soft copy of the Electoral Roll from the period 2002 to 2007 in the Pen drive on their request letter (Ex.CW-4/F) and thereafter, a printout was taken from the office computer. Again, the accused did not elicit anything in the cross-examination to doubt his assertions.

9. From the un-rebutted testimony of official witnesses (CW-3 and CW-4), it is apparent that the accused was a regular registered voter since 2002 and also his name appeared in the Ration Card without break. To hide the truth, a false claim was made in the affidavit denying any such document in the Appellant's possession. There is no reason to doubt the genuineness and authenticity of these public documents, issued at the behest of the accused or his father to avail certain benefits. Adverse inference is to be drawn against the accused for withholding and suppressing these vital documents.

10. The Ration Card (Ex.CW-3/A) fixes the age of the accused

more than 25 years on the date of incident. The Electoral Rolls are consistent showing his age 21, 24, 25 and 31 in the year 2002, 2005, 2006 and 2012 respectively. There documents categorically establish that the accused was more than 18 years on the date of occurrence.

11. After considering the physical, dental and radiological examination, the age of the accused was opined between 25-30 years on the date of examination i.e. 23.01.2012 by the Medical Board at AIIMS (Ex.CW-6/A). It is not disputed that the determination of age on the basis of ossification test is only an estimation and not conclusive. In practice, such determination is extremely difficult and cannot fix age with certainty because it is considered an inexact science where the margin of error can be 2 or 3 years on either side. Relying on the judgment of this Court **'State of NCT of Delhi vs. Shiva & ors.'** (Crl.L.P.172/2008), the counsel contended that the margin of error in age ascertained by radiological examination is two years on either side and the benefit of such margin of error should have been given to the Appellant. We are un-persuaded with this argument. According to the authorities referred on medical jurisprudence, benefit of margin of error of two years on either side at the maximum can be given in case of determination of age based on ossification test. It is however not so, in case of radiological examination for multiple joints. In a case **'State of U.P. vs. Chhoteylal'** (Crl.A.769/2006 decided on 14.01.2011), the Supreme Court observed that :

> "There was no such rule much less an absolute one, that 2 years have to be added to be age determined by a doctor." It further observed that, "merely because the doctor's evidence showed that the victims belong to the age group of 14 to 16, to conclude that the 2 years. age has to be added to the upper age limit is without any foundation."

12. In the case of **'Lal Bahadur vs. The State'** (Crl.R.145/2003 decided on 25.07.2003) this Court extracted the passage from Jhala and Raju's Medical Jurisprudence :

> "If ossification test is done for a single bone, the error may be two years either way. But if the test is done for multiple joints with overlapping age of fusion, the margin of error may be reduced. Sometimes this margin is reduced to six months on

either side."

And held :

"In the present case, the radiological examination of the petitioner was done for multiple joints, which is evident from the report of the Medical Board. According to the petitioner's own plea, he was just short of eight days in completing 18 years on the date of alleged commission of offence by him. Learned counsel for the petitioner contended that even if the age of the petitioner is to be ascertained in the light of medical report, by giving the benefit of margin of two years, on the date of alleged commission of offence, he would be found to be less than 18 years of age, and thus, a juvenile. While advancing such an argument, learned counsel for the petitioner appears to have taken the age as reflected in the medical report exactly at 21 years losing sight of the fact that it is actually above 21 years, which implies that it cold be anything above 21 years. Taking into account radiological examination in respect of multiple joints, in view of above extracted passage from Medical Jurisprudence by Jhala & Raju, the margin of error in ascertaining the age of the petitioner could be reduced to six months on either side....."

13. Section 7-A of the Juvenile Justice (Care and Protection of Children) Act, 2000 does not indicate to allow any such benefit. Rule 12(3)(b), however, empowers the Court or the Board or as the case may be the committee, for the reasons to be recorded, if considered necessary to give benefit to the child or juvenile by considering his/her age on the lower side within the margin of one year.

14. In **'Jitender @ Jitu vs. State'** (Crl.M.A.15749/2010 and Crl.A.438/2010) this Court considered the age (between 25 and 28 years) determined by the duly constituted Medical Board and for the reasons recorded gave benefit of one year under Rule 12(3)(b).

15. In the presence of authentic and comprehensive report (Ex.CW-6/A), the Trial Court rightly preferred it (to the medical report (Ex.CW-5/A) prepared by Dr.Shivani Mehra at RML Hospital).

16. Considering the above factual and legal position, we are of the view that two years margin on either side cannot be given. The Medical Board determined his age between 25 to 27 years on the basis of physical,

dental and radiological examination. The only question to be considered is whether we should exercise discretion in giving the benefit of one year on the lower side to the Appellant.

17. It is apparent from the Rule 12(3)(b) that the relaxation of one year is not automatic but it should be granted after considering all the evidence available on record.

The observation of Hon'ble Supreme Court in **'Jitender Ram @ Jitu vs. State of Jharkhand'** (2006) 9 SCC 428 are instructive :

"Once the legislature has enacted a law to extend special treatment in respect of trial and conviction to juveniles, the courts should be jealous while administering such law so that the delinquent juveniles derive full benefit of the provisions of such Act but, at the same time, it is the duty of the courts that the benefit of the provisions meant for juveniles are not derived by unscrupulous persons, who have been convicted and sentenced to imprisonment for having committed heinous and serious offences, by getting themselves declared as children or juveniles on the basis of procured certificates."

18. In the instant case, the accused and his family members did not produce the documents in their power and possession and concealed the age of the Appellant. It is not believable that during all the years the accused or his family members did not cast their vote or did not draw any ration. The State produced and proved these documents during enquiry; the existence of these documents remain unchallenged. Considering the conduct of the Appellant and his family members in withholding the official documents, and the position of law on the subject, we are not inclined to give relaxation of one year under Rule 12(3)(b), which does not in any manner inhibit the Court from taking into account all available materials. The substantive power or jurisdiction under Section 7-A to hold inquiry and make determinations can be seen along with Rule 12. However, the latter, being only a rule, cannot preclude the Court from considering the effect of all materials brought on record during the inquiry.

19. In the light of above discussion, we find no merit in the application, and the same is dismissed.

ILR (2012) V DELHI 295
CRL. REV. P.

ANAND MOHAN .....PETITIONER

VERSUS

STATE NCT OF DELHI ....RESPONDENT

(PRATIBHA RANI, J.)

CRL. REV. P. NO. : 584/2011 DATE OF DECISION: 16.05.2012

Indian Penal Code, 1860—Section 304B, 306, 498A—On statement of brother of deceased, Smt. Usha Punjab Singh FIR was registered against husband of deceased for harassing her and raising dowry demands from her—On completion of investigation, chargesheet for offences punishable U/s 498A/304B/306 IPC was filed—After considering material on record, charge for offences punishable U/s 498A/304B IPC and in alternative charge for offence punishable U/s 306 IPC were framed against the husband of the deceased—By way of criminal revision petition, he challenged the order wherein he disputed his marriage with deceased and also put forth other lacunae in investigation—Whereas on behalf of state, it was urged, prosecution had produced sufficient material against petitioner and moreover at stage of charge, court has only to consider prima-facie evidence and not whether case would ultimately result in conviction or not—Held:— At the initial stage of trial, the Court is not required to meticulously judge the truth, veracity and effect of evidence to be adduced by prosecution during trial—The probable defence of the accused need not be weighed at this stage—The Court at this stage is not required to see whether the trial would end in conviction—Only prima facie the Court has to consider

whether there is strong suspicion which leads the court to think that thee are grounds for presuming that the accused has committed the offence.

After considering the numerous judgments, in the case **Sajjan Kumar vs Central Bureau of Investigation,** JT 2010 (10) SC 413, the Apex court laid down the following guidelines to be considered by the Courts while framing charge:

(i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(ii)Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.

(iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution stages as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal."

(Para 19)

Important Issue Involved: At the initial stage of trial, the Court is not required to meticulously judge the truth, veracity and effect of evidence to be adduced by prosecution during trial—The probable defence of the accused need not be weighed at this stage. The court at this stage is not required to see whether the trial would end in conviction. Only prima facie the Court has to consider whether there is strong suspicion which leads the court to think that there are grounds for presuming that the accused has committed the offence.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. B.S. Chowdhary, Advocate.

FOR THE RESPONDENT : Mr. Navin Sharma, APP.

CASES REFERRED TO:

1. *Sajjan Kumar* vs. *Central Bureau of Investigation*, JT 2010 (10) SC 413.
2. *Reema Aggarwal* vs. *Anupam & Ors.* AIR 2004 SC 1418.

RESULT: Revision petition dismissed.

PRATIBHA RANI, J.

1. This Criminal Revision Petition has been filed by the petitioner Anand Mohan, accused in case FIR No.183/2011 registered at P.S.Malviya Nagar, New Delhi against him for committing the offence punishable under Section 498-A/304-B/306 IPC. Petitioner is impugning 25th the order dated November, 2011, vide which the learned ASJ ordered to charge the petitioner for the aforesaid offences.

2. In brief the case of the prosecution is that vide DD.No.9-A, an intimation was received regarding commission of suicide by a lady aged about 28 years. The said DD was assigned to SI Prem Singh, who along with staff reached the spot and met Sh.Dhanesh and two other ladies, namely, Jyoti Singh and Smt.Sunita. One lady was found hanging with iron grill mounted at the door of the bedroom, whose name and address he came to know as Usha Punjab Singh wife of Anand Mohan.

3. Sh.Dhanesh informed the police that the lady along with her husband had been residing there for the last six months as a tenant on the second floor of the house.

4. On 12th May, 2011, two relatives of the deceased came and inquired about Usha Punjab Singh and he accompanied them to the second floor. The door was bolted from inside, when none opened the door, he peeped inside through ventilator and found Usha Punjab Singh in standing position near the door of bedroom but with no movement in her body despite several calls. He opened the door through ventilator and Usha Punjab Singh was found hanging from the grill mounted on the door. He informed the PCR.

5. On enquiry from the relatives present at the spot, it was revealed that Usha Punjab Singh was married to Anand Mohan. SDM was informed and inquest proceedings were conducted. Dead body was sent for post mortem. The brother of the deceased Sh.Rajinder Singh along with his wife Sangeeta Singh came to the police station and this information was given to the SDM. The statement of brother of the deceased was recorded in which he disclosed the marriage of the deceased with Anand Mohan at Arya Samaj Mandir, Kolkata and also her harassment and being treated with cruelty on non-fulfillment of his demand for dowry. The deceased was also harassed by the petitioner saying that he was being offered Rs.25 lacs in second marriage and either she should arrange the money or he would not live with her. The complainant informed that his sister was harassed by Anand Mohan for dowry. She was also threatened with dire consequences on nonfulfillment of demand which led his sister to commit suicide.

6. On the basis of the statement made by the brother of the deceased, FIR No.183/2011 was registered and after completion of investigation charge sheet was filed.

7. One diary and one letter, stated to have been written by the deceased were also recovered and sent to CFSL for comparison of the handwriting on the diary and the letter with the admitted handwriting of the deceased. During the course of hearing, it has been informed that as per CFSL report, letter and diary have been written by the deceased.

8. After considering the material on record, learned ASJ, vide order dated 25th November, 2011, charged the petitioner for committing the offence under Sections 498-A/304B IPC. Alternatively, he was also charged for committing the offence punishable under Section 306 IPC.

9. The impugned order has been challenged by the petitioner on the ground that:

(i) there is no proof of marriage between the deceased and Anand Mohan;

(ii) The investigation report reveals that brother of the deceased despite being given opportunity to produce any proof of marriage, failed to do so;

(iii) The contents of the diary, which as per CFSL report written by her, reveal that she was insisting to marry her, thus making it clear that there was no marriage between the parties;

(iv) Provisions of Sections 498-A/304B IPC pre-suppose existence of relationship of husband and wife, there is absolutely no proof of marriage;

(v) From the testimony of the witnesses recorded under Section 161 Cr.P.C., at the most it can be termed to be live-in-relationship and in that situation, he cannot be charged for offences under Sections 498A/304B IPC.

(vi) At the time of commission of suicide, the petitioner was away to Bihar to get married to some other girl and there is no question of he being abettor so as to attract the provisions of Section 306 IPC.

(vii) The statement of Sh.Dhanesh recorded under Section 161 Cr.P.C is not signed and there is no rent agreement to prove that the petitioner has ever resided in that house with the deceased as his tenant, claiming the relationship to be that of husband and wife.

10. Learned counsel for the petitioner has relied upon **Yogesh @ Sachin Jagdish Joshi Vs. State of Maharashtra** – (2008) 10 Supreme Court Cases 394 and submitted that if two views are equally possible and the Judge is satisfied that evidence produced gives rise to suspicion only, as distinguished from grave suspicion, he would be fully within his right to discharge the accused.

11. Learned counsel for the petitioner has also placed on record copy of an undated complaint, allegedly written by the deceased to the SHO, P.S. Malviya Nagar, New Delhi and submitted that the prosecution has failed to explain how it came into the possession of this letter, written by the deceased, when it was never sent to the SHO concerned.

12. On behalf of the State, it has been submitted that the statements of the complainant Sh.Rajinder Punjab Singh and his wife Sangeeta Singh is to the effect that the deceased Usha Punjab Singh married Anand Mohan in Arya Samaj Mandir, Kolkata and they were so informed by the deceased. The statement of Sh.Dhanesh Kumar, the landlord is also there to establish that the petitioner contacted him to take the premises on rent and also filled the form, required for verification of tenancy by the police.

Anand Mohan also informed him that initially he would be alone and later on his wife would join and that in the month of November, 2011 his wife Usha Punjab Singh also started living with him in the same premises and both of them were living as husband and wife.

13. On behalf of the State, it has been further submitted that as the brother and sister-in-law did not arrange the marriage of the deceased with the petitioner, they have made the statement to this effect on the basis of communication received from the deceased. The statement of Sh.Dhanesh, the landlord as well as the verification by the police in respect of the tenancy to whom the premises were let out, would reveal that the petitioner has stayed in that house as tenant. It has also been submitted that at the stage of charge the Court has not considered whether the case would ultimately result in conviction or not. Prima facie, there is sufficient material on record to charge the petitioner for committing the offence punishable under Sections 498-A/304-B/306 IPC and the impugned order need not be interfered with.

14. I have considered the relevant contentions and also gone through the record.

15. During the course of arguments, learned counsel for the petitioner was asked about the dates when the diary was written by the deceased to the effect that she was insisting the petitioner to marry her. He fairly conceded that it is undated. The copy of letter written to SHO, P.S., Malviya Nagar and placed on record by the learned counsel for the petitioner which is part of the charge sheet, was seized by the police during investigation as on last page of the charge sheet, date and manner of seizure is given. The relevant portion from the chargesheet is extracted as under:

> "On 14/5/2011 itself I along with the complainant searched the house of the deceased. On searching brother of the deceased produced some medical papers and one complaint which she wrote to the police but there was no receipt."

16. This answers the query of counsel for the petitioner as to how police came into possession of this letter, copy of which he filed today in Court.

17. This complaint addressed to the SHO, P.S. Malviya Nagar is to

the effect that the author of the letter i.e., Usha Punjab Singh (deceased) wife of Anand Mohan was residing at 15, Begum Pur Park, Near Shivalik, C Block along with her husband. She got married to Anand Mohan three years ago on 22nd June, 2007 and thereafter started living with him as his wife at different places. She has further written how she has been treated by her husband as he did not disclose about his marriage to his parents and now in order to have more dowry he was getting married to another girl of his parent's choice and treated her with cruelty to get rid of her and very soon he would be getting married to another girl. Not only that, she had apprehension in her mind that her husband could take her life if she make a complaint to the police. He had tried to strangulate her and beat her which even resulted in hair line fracture of the bones of her chest and back. She wanted legal action to be taken against her husband, who had been cheating and exploiting her.

18. The judgment **Yogesh alias Sachin Jagdish Joshi vs. State of Maharashtra** (Supra) relied upon by learned counsel for the petitioner does not advance his case any further for the reason that it is not a case where two views are possible so as to extend any benefit to the petitioner to discharge him. There is material collected by the prosecution and statement of landlord about the petitioner living with the deceased as her husband in the rented premises. No doubt the usual proof of marriage, like, wedding card, photographs are not available with the prosecution but that is for obvious reason that it was not an arranged marriage and as per complaint addressed to SHO, PS Malviya Nagar by the deceased, it was performed at Arya Samaj Mandir, Kolkata.

19. After considering the numerous judgments, in the case **Sajjan Kumar vs Central Bureau of Investigation,** JT 2010 (10) SC 413, the Apex court laid down the following guidelines to be considered by the Courts while framing charge:

> (i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.
>
> (ii) Where the materials placed before the Court disclose grave

suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.

(iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution stages as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal."

20. The main contention on the basis of which impugned order has

been assailed is absence of proof of marriage between the decease and the petitioner. The statement of brother and sister-in-law of the deceased as well landlord is on record that the deceased was living with the petitioner as his wife in the tenanted premises. In the complaint addressed to the SHO which was recovered from the house of the deceased during search, she has even mentioned the date of her marriage with the petitioner. In **Reema Aggarwal vs. Anupam & Ors.** AIR 2004 SC 1418, the issue whether in a case under Section 498-A IPC it is necessary that the marriage is valid in law, was dealt with. In para 18 of the report, the Apex Court dealt with this subject in detail and it is extracted as under:

'18. The concept of "dowry is intermittently linked with a marriage and the provisions of marriage and the provisions of the Dowry Act apply in relation to marriages. If the legality of the marriage itself is an issue further legislation problems do arise. If the validity of the marriage itself is under legal scrutiny, the demand of dowry in respect of an invalid marriage would be legally not recognizable. Even then the purpose for which Sections 498-A and 304-B IPC and Section 113-B of the Indian Evidence Act, 1872 (for short the 'Evidence Act') were introduced cannot be lost sight of. Legislations enacted with some policy to curb and alleviate some public evil rampant in society and effectuate a definite public purpose or benefit positively requires to be interpreted with certain element of realism too and not merely pedantically or hyper technically. The obvious objective was to prevent harassment to a woman who enter into a marital relationship with a person and later on, becomes a victim of the greed for money. Can a person who enters into a marital arrangement be allowed to take a shelter behind a smokescreen to contend that since there was no valid marriage the question of dowry does not arise? Such legalistic niceties would destroy the purpose of the provisions. Such hairsplitting legalistic approach would encourage harassment to a woman over demand of money. The nomenclature 'dowry' does not have any magic charm written over it. It is just a label given to demand of money in relation to marital relationship. The legislative intent is clear from the fact that it is not only the husband but also his relations who are covered by Section 498-A. Legislature has taken care of children born from invalid marriages. Section 16 of the Marriage Act

deals with legitimacy of children of void and voidable marriages. Can it be said that legislature which was conscious of the social stigma attached to children of void and voidable marriages closed eyes to plight of a woman who unknowingly or unconscious of the legal consequences entered into the marital relationship. If such restricted meaning is given, it would not further the legislative intent. On the contrary, it would be against the concern shown by the legislature for avoiding harassment to a woman over demand of money in relation to marriages. The first exception to Section 494 has also some relevance. According to it, the offence bigamy will not apply to "any person whose marriage with such husband or wife had been declared void by a Court of competent jurisdiction". It would be appropriate to construe the expression 'husband' to cover a person who enters into marital relationship and under the colour of such proclaimed or feigned status of husband subjects the woman concerned to cruelty or coerce her in any manner or for any of the purposes enumerated in the relevant provisions – Sections 304-B/498-A, whatever be the legitimacy of the marriage itself for the limited purpose of Sections 498-A and 304-B IPC. Such an interpretation, known and recognized as purposive construction has to come into play in a case of this nature. The absence of a definition of 'husband' to specifically include such persons who contract marriage ostensibly and cohabitate with such woman, in the purported exercise of his role and status as 'husband' is no ground to exclude them from the purview of Section 304-B or 498-A IPC, viewed in the context of the very object and aim of the legislations introducing those provisions.

21. At the stage of framing of charge, Sections 227 and 228 CrPC are applicable. On reading the same prima facie it is clear that at the initial stage of trial, the Court is not required to meticulously judge the truth, veracity and effect of evidence to be adduced by prosecution during trial. The probable defence of the accused need not be weighed at this stage. The Court at this stage is not required to see whether the trial would end in conviction. Only prima facie the Court has to consider whether there is strong suspicion which leads the Court to think that there are grounds for presuming that the accused has committed the offence.

22. In the instant case, in view of legal position as discussed in para

18 of the report **Reema Aggarwal vs. Anupam & Ors.** (Supra), extracted above, I am of the considered view that absence of proof of marriage at this stage is no ground to discharge the petitioner. The present revision petition has no merits and the same is hereby dismissed.

ILR (2012) V DELHI 306
INCOME TAX APPEAL

ESSEL SHYAM COMMUNICATION LTD. ....APPELLANT

VERSUS

COMMISSIONER OF INCOME TAX ....RESPONDENT

(SANJIV KHANNA & R.V. EASWAR, JJ.)

INCOME TAX APPEAL NO. : 130/2011, 279/2011 & 284/2011 **DATE OF DECISION: 17.05.2012**

Income Tax Act, 1961—Section 80—Appellant preferred appeal against order of Income Tax Tribunal and Revenue Department also preferred two appeals against same order passed by Tribunal—Appellant, a public limited company, was providing satellite based telecommunication including VSAT services, up-linking services, play out services and broadband service through satellite—It earned income through said services besides rental income and income from other sources—Appellant filed income tax return for assessment year 2005-06 claiming deduction under Section 80-1A of Act after seeking adjustments—One of the issues raised by appellant was, it had earned interest of Rs.8,38,626/- on FDRs pledged with banks for availing non-found based credit limits but they had paid interest of Rs.1,70,09/277/- and effectively net

interest paid was expenses, interest earned was business income directly connected with qualifying service and therefore, should be set off from interest paid—Assessing Officer, however, did not agree with said contention—CIT agreed (Appeals) with assessee and held that interest on deposit was taxable as business income and not under head "income from other sources" and therefore, assessee was entitled to deduction under Section 80-1A (4)(ii)—Tribunal reversed findings of CIT (Appeals) and agreed with Assessing Officer, so appellant agitated said issue by way of appeal—Held:- For determining income derived by an undertaking or enterprise, we have to compute total income of assessee from business referred in sub-section (4) to Section 801A—Words used in Section 80-1A (1) and (2A) are "profit and gains of eligible business"—On basis of same logic and reasoning, we have to first find out profit and gains of business from specified activities—Case remanded back to Tribunal to examine balance sheets and account of assessee to decide question.

We have quoted Section 80IA (1) and (2A) above. For determining the income derived by an undertaking or enterprise, we have to compute the total income of the assessee from the business referred in sub-section (4) to Section 80IA. The words used in Section 80IA(1) and (2A) are "profit and gains of eligible business". On the basis of same logic and reasoning, we have to first find out the profit and gains of business from the specified activities. Section 80IA was interpreted and elucidated in **Liberty India v. Commissioner of Income Tax,** (2009) 9 SCC 328. It was highlighted Section 80IA is a profit linked incentive and only profits "derived from" eligible business are entitled to deduction. The expression "derived from" covers sources not beyond the first degree. Devices to inflate or reduce profits from eligible business should be rejected. On DEPB utilization and duty drawback it was held:-

"39. Analysing the concept of remission of duty

drawback and DEPB, we are satisfied that the remission of duty is on account of the statutory/policy provisions in the Customs Act/Scheme(s) framed by the Government of India. In the circumstances, we hold that profits derived by way of such incentives do not fall within the expression "profits derived from industrial undertaking" in Section 80-IB." **(Para 21)**

Reliance was placed by the assessee on AS 2 and explaining the same in **Liberty India** (supra), it was held;-

"40. Since reliance was placed on behalf of the assessee(s) on AS-2 we need to analyse the said standard. AS-2 deals with valuation of inventories. Inventories are assets held for sale in the course of business; in the production for such sale or in the form of materials or supplies to be consumed in the production. "Inventory" should be valued at the lower of cost and net realisable value (NRV). The cost of "inventory" should comprise all costs of purchase, costs of conversion and other costs including costs incurred in bringing the "inventory" to their present location and condition.

41. The cost of purchase includes duties and taxes (*other than those subsequently recoverable by the enterprise from taxing authorities*), freight inwards and other expenditure directly attributable to the acquisition. Hence trade discounts, rebate, duty drawback, and such similar items are deducted in determining the costs of purchase. Therefore, duty drawback, rebate, etc. should not be treated as adjustment (credited) to cost of purchase or manufacture of goods. They should be treated as separate items of revenue or income and accounted for accordingly (see p. 44 of *Indian Accounting Standards & GAAP* by Dolphy D.Souza).

42. Therefore, for the purposes of AS-2, CENVAT credits should not be included in the cost of purchase

of inventories. Even the Institute of Chartered Accountants of India (ICAI) has issued Guidance Note on Accounting Treatment for CENVAT/MODVAT under which the inputs consumed and the inventory of inputs should be valued on the basis of purchase cost net of specified duty on inputs (i.e. duty recoverable from the Department at a later stage) arising on account of rebates, duty drawback, DEPB benefit, etc. Profit generation could be on account of cost cutting, cost rationalisation, business restructuring, tax planning on sundry balances being written back, liquidation of current assets, etc.

43. Therefore, we are of the view that duty drawback, DEPB benefits, rebates, etc. cannot be credited against the cost of manufacture of goods debited in the profit and loss account for purposes of Sections 80-IA/80-IB as such remissions (credits) would constitute independent source of income beyond the first degree nexus between profits and the industrial undertaking.

44. We are of the view that the Department has correctly applied AS-2 as could be seen from the following illustration:

Expenditure	Amount(Rs)	Income	Amount(Rs)
Opening stock	100	Sales	1000
Purchases (including customs duty paid)	500	Duty drawback received	100
Manufacturing overheads	300	Closing stock	200
Administrative, selling and distribution expenses	200		
Net profit	200		
	1300		1300

Note: In the above example, the Department is allowing deduction on profit of Rs 100 under Section 80-IB of the 1961 Act."

(emphasis supplied)

(Para 22)

Important Issue Involved: For determining income derived by an undertaking or enterprises, total income of assessee from business referred in sub-section (4) to Section 801A is to be computed—Words used in Section 80-1A (1) and (2A) are "profit and gains of eligible business"—On basis of same logic and reasoning, first profit and gains of business from specified activities are to be found out.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Ajay Vohra, Ms. Kavita Jha, Mr. Somnath Shukla, Advocates, Mr. N.P. Sahni, Sr. Standing.

FOR THE RESPONDENT : Mr. Ajay Vohra, Ms. Kavita Jha, Mr. Somnath Shukla, Advocates, Mr. N.P. Sahni, Sr. Standing.

CASES REFERRED TO:

1. *ACG Associated Capsules Private Limited* vs. *Commissioner of Income Tax* (2012) 3 SCC 321.
2. *CIT* vs. *Asian Star Company Ltd.*(2010) 326 ITR 56 (Bom.).
3. *CIT* vs. *Shri Ram Honda Power Equip* (2007) 289 ITR 475.
4. *Distributors (Baroda) (P) Ltd.* vs. *Union of India* (1986) 1 SCC 43.

RESULT: Appeals disposed of.

SANJIV KHANNA, J.:

ITA 130/2011 preferred by Essel Shyam Communication Ltd. and ITA Nos.284/2011 and 279/2011 preferred by the Revenue arise out of the common order dated 31stMarch, 2010, passed by the Income Tax Appellate Tribunal (for short, the tribunal). The appeals pertain to the assessment year 2005-06. We may note that the Revenue has preferred two appeals as there were cross appeals by the Revenue and one by the assessee before the tribunal against the order of the first appellate authority.

2. By order dated 12th July, 2011, the following substantial questions of law were framed in the respective ITAs:-

ITA 130/2011

"1. Whether on the facts and in the circumstances of the case, the Tribunal erred in law in holding that income earned by the appellant from development of software upgrades for Network Management Systems for smooth and trouble free working of VSAT service provided by the appellant, as part of business of telecommunication services, was not eligible for deduction under Section 80-IA(4(ii) of the Income Tax Act?

2. Whether on the facts and in the circumstances of the case, the Tribunal erred in law in not directing exclusion of only net interest income, i.e., gross interest income less expenditure incurred for earning such interest income, while computing deduction under Section 80-IA of the Income Tax Act?"

ITA No.279/2011

"Whether learned ITAT erred in law in holding that INSAT 2E is a domestic satellite within the meaning of sub-clause (ii) of Clause (4) of Section 80-IA of the Income Tax Act, 1961, despite the fact that British Telecom has leased it to the assessee?"

ITA No.284/2011

"Whether learned ITAT erred in law in holding that income of Rs.50,42,764/- from trading activities is derived from Industrial undertaking within the meaning of Section 80-IA of the Income Tax Act, 1961?"

3. The assessee is a public limited company and was providing satellite based telecommunication solutions including VSAT services, up-linking services, play out services and broadband service through satellite. It had earned income from the said services, besides rental income and income from other sources. In the return of income filed on 28th October, 2005, it had claimed deduction under Section 80IA of the Income Tax Act, 1961 (Act, for short) of Rs.4,88,29,013/- and after the adjustment, had declared total taxable income of Rs. 5,45,89,013/-. The total taxable income under Section 115JB was Rs.6,90,32,533/-.

4. As section 80IA is required to be interpreted and examined, we deem it appropriate to reproduce the relevant portion of the said provision, as it existed during the assessment year period in question:-

"80-IA **Deductions in respect of profit and gains from industrial undertakings etc., in certain cases.**-(1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of profits and gains derived from such business for ten consecutive assessment years.

(2) xxxxxxx

(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the deduction in computing the total income of any undertaking providing telecommunication services, specified in clause (ii) of sub-section (4Z), shall be hundred per cent of the profits and gains of the eligible business for the first five assessment years commencing at any time during the periods as specified in sub-section (2) and thereafter, thirty per cent of such profits and gains for further five assessment years.

(3) xxxxxxxx

(4) (ii) any undertaking which has started or starts providing telecommunication services whether basis or cellular, including radio paging, domestic satellite service, network of trunking, broadband network and internet services on or after the 1st day of April, 1995, but on or before the 31st day of March, 2005.

Explanation.- For the purpose of this clause, "domestic satellite" means a satellite owned and operated by an Indian company for providing telecommunication service."

(emphasis supplied)

5. Clause (ii) to Section 80IA (4) quoted above can be bifurcated and divided into several parts. It applies to an undertaking which had

started or was providing; (i) telecommunication services whether basic or cellular, (ii) radio paging (iii) domestic satellite service (iv) network of trunking, (v) broadband network and (vi) Internet service. The dates during which the said services should be started/provided is stipulated. Any company/assessee providing the said services was entitled to claim benefit in respect of income earned i.e., profits and gains derived from the said services. Therefore, the first and the foremost requirement, when a deduction is claimed with reference to clause (ii) of Section 80IA (4), is to determine and decided whether activity undertaken by the assessee is covered by any of categories mentioned in clause (ii) to Section 80IA(4). This aspect has somehow escaped notice of the authorities as well as the tribunal. This has resulted in confusion as the Assessing Officer has made several additions including addition for software sales, domestic satellite services etc. There is no clear and direct finding on the precise nature of the activity undertaken resulting in income earned and whether or not they fall within one of the aforesaid specified categories. To some extent, the assessee is also responsible for the said confusion because of their reply in the course of the assessment proceedings. The Assessing Officer had not appreciated and understood the issue and the proper legal affect of clause (ii) of Section 80IA (4). As we answer the questions, this aspect becomes apparent.

6. Question No. 1 in ITA No. 130/2011 and the Questions raised in ITA Nos. 279/2011 and 284/2011 are inter-related and are being taken up first. Question No. 2 raised by the assessee in ITANo. 130/2011 will be taken up in the end.

7. Question raised in ITA 279/2011 arises as the Assessing Officer had treated Rs.1,42,34,278/- as income earned by the assessee from domestic satellite service. The reasoning given by the Assessing Officer is difficult to understand and somewhat ingenious. The Assessing Officer referred to notes on accounts in which the assessee had disclosed that payment of Rs.13,42,288/- was made for space segment charges in foreign currency. This payment was made to British Telecom (Worldwide) for use of satellite service in the Indian Satellite INSAT 2E. The Assessing Officer held that the said satellite was not a 'domestic satellite' as it was owned by Department of Space, Government of India, which was not an Indian company and was being operated by British Telecom (Worldwide), a foreign company. The said view, however, was not accepted by the CIT (Appeals), who held that British Telecom (Worldwide)

or INTELSAT did not have ownership right over the satellite. Relying upon the letter dated 21stNovember, 2007, written by the Director, ISRO, it was held that the satellite was owned by the Department of Space, Government of India and, therefore, the Assessing Officer was not justified in excluding the income earned from the domestic satellite services. The view of the CIT (Appeals) has been affirmed by the tribunal.

8. The Assessing Officer to compute and make the aforesaid addition of Rs.1,42,34,278/- observed that the assessee had made payment of Rs.13,42,288/- to British Telecom (Worldwide) and had not shown any income or receipts earned from any third party. The addition was made holding that the income included income from satellite services not in the nature of domestic satellite service as defined for purpose of the Section 80IA. The profit/income disclosed by the assessee was notionally on proportionate basis treated as profit/income earned from satellite services, not being domestic satellite services.

9. The assessee holds a VSAT license to establish, maintain and operate closed users group, an Internet license to establish, maintain and operate internet services and a license/permission from the Ministry of Information and Broadcasting for providing uplinking services. The case of the assesse is that they have incurred an expenditure for utilization of space segment on a satellite to provide the said services. It is not their case that they are in the business of providing lease/ sale of space segment or satellite services or that they were providing domestic satellite services. Contention of the assessee was/is that as a broadband/internet service provider etc. it had procured space segment in the satellite and paid charges in foreign currency for utilizing space segment. It was an expense, which was incurred and not that any income was earned. The question is not whether any expense was incurred in respect of the services stipulated in clause (ii) of Section 80IA (4), but whether the assessee has earned income derived from the specified services. It is not the case of the assessee that it was providing domestic satellite services and earning income from the said activity. The term "domestic satellite" as defined in the explanation means the satellite owned and operated by an Indian company for providing telecommunication services. The assessee is not an owner of the domestic satellite and nor is it operating the satellite. On the other hand, it is apparent that the assessee is claiming benefit/coverage under the said section on the basis that it is providing broadband/internet services etc. As long as it was providing the stipulated

services and had received payments for the specified services, the income earned would qualify for deduction under Section 80IA(4)(ii). In case the assessee incurs expenditure to buy and utilize space segment on a satellite for providing the qualifying services, the expenditure incurred cannot be disallowed and no notional income can be computed or reduced from the income earned/derived from the qualifying service. In view of the said position and in the absence of details, we have no option, but to remit the matter to the tribunal to examine the said aspect afresh. The tribunal has to examine and clearly decide nature and character of service rendered by the assessee to third parties and whether the same qualifies and is a prescribed/stipulated service under section 80IA. The order of remit is also necessary in view of the ambiguous stand of the assessee before the Assessing Officer and the appellate authorities which has contributed to the confusion. The letter written by the assessee to the Assessing Officer reads:-

> "From the above, it is clear that though the payment to BT is made in USD, yet the same was paid for use of domestic Satellite which is owned and operated by Department of Space, Government of India but leased out by Department of Space (DOS) to INTELSAT, who in-turn have subleased part of it to BT and some of which is used by the assessee Company. Hence, this is no question of disallowance under Section 80IA in this regard."

10. The question raised in ITA 284/2011 again requires an order or remit. The Assessing Officer noticed that the assessee had shown sales of Rs.2,12,28,512/-. On scrutiny of details, it was noticed that major sales were in respect of Antenna, RFT and other miscellaneous items, which included computer printer, UPS, CTV, air conditioner, hand camera, generator sets, telephone instruments, video conferencing systems, monitor etc. He held that the said equipments could be bought and procured from the Original Equipment Manufacturers (OEMS, for short) including the foreign vendors. Accordingly, Rs.50,42,717/- was excluded from the deduction claimed under Section 80IA of the Act as income not derived from specified services, after noticing that the cost of material was Rs.1,61,85,795/-. The CIT (Appeals) upheld the said addition holding that this was income derived from trading in goods. The tribunal has deleted the said addition, inter alia, holding :-

> "11. Let us have a look on the nature of equipments. We have perused pages number 29-40 of the paper book. On page 29-31 the copy of the import license for import of C band redundant 1:1 Up Converter and Down Converter have been placed on record. These are the technical device. Similarly on page 32-33 are the import license on page 34 is the description of the items which are to be imported. At page 34 the description of the items is Codan 40 Wku Band BUC. According to the assessee these equipments are essential equipments for enabling, assessee to the telecommunication services. The Govt. has put up various restrictions on import of such items because of security reasons. If the assessee is unable to provide these items to its customer then it might not be possible for it to provide telecommunication services. It was pointed out at the time of hearing that these equipments cannot be used for availing the services from any other service provider. The customer has to avail the telecommunication services through these items necessarily from the assessee only. Considering the nature of equipments and their relation to the nature of services provided by the assessee, in our opinion the receipt received by the assessee for supply of these items is inextricably links to the business of its telecommunication services. The AO is not justified in excluding these receipts. Therefore we direct the AO to include the receipt of Rs.5042717/- representing income from sale of equipment in the eligible receipt for grant of deduction u/s 80IA."

11. Learned counsel for the Revenue, during the course of hearing before us, has drawn our attention to the assessment order and the stand taken by the assessee. It was submitted that the assessee had stated and accepted that the customers could buy the equipment from them or from third parties and had pleaded that entire income, which was inextricably related to business of telecommunication and was exempt. Sale of equipment etc., had close and direct nexus with profit and gains of the stipulated industrial undertaking.

12. The legal contention of assessee is substantially correct. However, what was relevant and required examination was the contracts under which the sales were made. Sale of TV Camera, Air Conditioner, generator sets per se or on standalone basis would not qualify for deduction 80IA read with sub-section (4) clause (ii). On the other hand, in case the

assessee has been awarded a contract for providing telecommunication service, network of trunking and broadband/internet services and while and for executing the said contract, generator sets, air conditioner etc. were sold as a part of a complete package, then the income earned may qualify for deduction under Section 80IA. Therefore, each contract and nature thereof has to be examined. It has to be ascertained whether it was a case of supply of goods or it was a case where the assessee was providing qualifying services which mandated and required inextricably or as an necessary requirement, (under the same contract or under a different contract), sale/supply goods to operationalize and use/provide the telecommunication services. In case, the sale of goods was inextricably linked, had nexus and was connected with the primary purpose of providing or starting telecommunication services, the assessee will be entitled to benefit under Section 80IA. Otherwise, the assessee will not be entitled to exemption under Section 80IA on the transaction. Whether the commodities/goods could have been also purchased from a third party may not relevant and the determinative factor in many a case. It is the predominant or primary reason or purpose why the contract was entered into, and whether it has direct nexus and is inextricably linked with providing the qualifying activities, is and would be the determinative factor. The substantial question of law is accordingly answered. An order of remit is passed, with a direction to the tribunal to decide the issue/question afresh in the light of the above observation/ratio.

13. The question No.1 raised in the appeal of assessee i.e. ITA 130/2011 relates to income earned from development and sale of software and whether the said amount qualifies for deduction under Section 80IA. The tribunal has not treated the proceeds from sale of software declared by the assessee as eligible for deduction under Section 80IA on the ground that the income derived from the sale of software was not derived from qualifying business i.e. telecommunication services. It has been observed that development of software was a separate source of business income. Accordingly, the total receipt of Rs.61,58,000/- from the sale of software should be excluded from the deduction claimed under Section 80IA of the Act.

14. The contention of the assessee, which is recorded in the order passed by the tribunal, is that the software developed was for upgrading the Network Management System (NMS, for short), to enable smooth working of VSAT service under the technology from Via Sat and HSN

at the request and on confirmed purchase orders from TVC India Pvt. Ltd. The justification given by the assessee to treat and regard the said income as eligible for deduction under Section 80IA, reads as under:-

> ".....The Hub controls the entire operations of the communication network through a NMS, which continuously accumulates data on the system so as to provide regular 'health checks' for the remotes and determine the level of activity for billing purpose. The NMS, which is principally a software, is an integral part of Hub station for running VSAT services at various remotes. The NMS needs to be regularly updated and maintained for a smooth and trouble free service. Since TVC could not have the upgrades of these NMS's through the OEMs, the appellant provided the upgrades so that a smooth and uninterrupted service on the VSATs located at various remotes could be provided, it was argued that the software developed by the appellant is a part of the satellite based telecommunication services rendered by it. The appellant had the requisite expertise for the software development. The appellant under the impugned software developed four modules for TVC. Each module was developed to provide wide time window for packet transfers between TVC and Bank of Tokyo & Mitsubishi, Ludhiana Stock Exchange, EIH and BNP respectively. Without this software, the client of the appellant (TVC) could not have satellite connection with the abovementioned companies and the signal could not be transmitted thereto. The sole motive of developing the software was to further its telecommunication operations and was thus, inextricably linked to the business of the appellant of providing telecommunication services."

15. We find that the tribunal has not examined the said aspect and question with reference to the contention raised by the assessee, on the nature and character of the software, which was developed and sold. The exact reasoning given by the tribunal reads as under:-

> "4.8 In regard to income from software, the development of software is certainly a separate source of business income of the appellant different from providing Telecommunication services. Thus, this income cannot be said to the income derived from the eligible business of providing Telecommunication service. The

appellant has shown total receipts of Rs.61,58,000/- from development and selling of software. The A.O. has allowed expenses on account of salary paid to employees and other administrative expenses of Rs.4,00,000/- and calculated the net profit from software development at Rs.57,58,000/-. The A.R. of the appellant submitted that the appellant had incurred higher amount of expenses than Rs.4,00,000/- on the development of software because apart from personnel/staff, the appellant had incurred various other overhead charges also. But the appellant had not furnished any details of expenses in excess of 4,00,000 incurred for the development of software. In these circumstances, the calculation made by the A.O. does not warrant any interference. Since the income earned from development of software was not profit and gains derived from the eligible business of providing Telecommunication service, the A.O. was justified in excluding the income from software development for computing deduction u/s 80IA."

16. We find that the Assessing Officer as well as the appellate authorities have not examined the issue/question keeping in mind the mandate of the section and contention of the assessee. Nature, character and type of the software and whether or not it could be treated and regarded as income earned from the business referred to in sub-section (4) clause (ii) to Section 80IA has not been examined and considered. Without examining the said aspect and the factual position regarding nature and type of software, the Assessing Officer and the appellate authorities were not justified in excluding the sale proceeds from computation of deduction under Section 80IA. The Assessing Officer has merely recorded that the assessee had furnished copy of the work orders as well as the bill raised and in view of the judicial pronouncements, income from selling of software cannot be considered as income earned or derived from the activities specified in Section 80IA(4)(ii) of the Act. This issue is accordingly remitted to the tribunal for a fresh decision. The tribunal will examine the nature, type and character of the software or whether it was inextricably and directly connected with the activities/ services stipulated in clause (ii) to sub-section (4) of Section 80IA. This is a technical aspect and if required, the tribunal can take help and/or opinion of experts. The assessee will be also at liberty to justify and establish their claim by filing opinion from the experts. Question No.1 is

accordingly answered with an order of remit.

17. The last question is question No.2 in ITA No.130/2011. The findings recorded by the tribunal in this regard are that the assessee had earned interest income on FDRs of Rs.7,61,584/- and other interest of Rs.77,042/-. It has been observed by the tribunal that the aforesaid receipts cannot be included in the income derived from the specified activities in view of the decision of this Court in **CIT Vs. Shri Ram Honda Power Equip** (2007) 289 ITR 475.

18. The assessee has submitted that they had earned this interest of Rs.8,38,626/- on FDRs pledged with the banks for availing non- fund based credit limits but they had paid interest of Rs.1,70,99,277/- and, effectively the net interest paid was the expense. Interest earned was business income directly connected with the qualifying service and therefore should be set off from the interest paid. It was stated that the interest earned had direct nexus with the business of the assessee since the FDRs were pledged as margin money for availing credit limits. The Assessing Officer, however, did not agree with the said contention. The CIT (Appeals) agreed with assessee and held that the interest on deposit was taxable as "business income" and not under the head "income from other sources" and therefore the assessee was entitled to deduction under Section 80IA(4)(ii). As noticed above, the tribunal has reversed the findings of the CIT(Appeals) and agreed with the Assessing Officer.

19. Decision of this Court in **Shri Ram Honda** (supra) consists of two parts. In the first part it has been held that interest income is not income derived from exports as it is not a part of export proceeds and is not a direct and proximate result of exports earning but earning made from deposit of money and payment by the bank. The second part of the said judgment deals with computation under Explanation (bba) to Section 80HHC. For the purpose of the said explanation, it has been held that interest refers to and means net interest and not gross interest, provided the interest earned is taxable under the head "income from business" and not under the head "income from other sources." This view has been upheld by the Supreme Court in its recent decision in **ACG Associated Capsules Private Limited. Vs. Commissioner of Income Tax** (2012) 3 SCC 321. The Supreme Court approving the said judgment has referred to their earlier Constitution Bench's decision in **Distributors (Baroda) (P) Ltd. Vs. Union of India** (1986) 1 SCC 43 and observed as under:-

"11. Before we deal with the contentions of Learned Counsel for the parties, we may extract Explanation (baa) to Section 80HHC of the Act.

Explanation: For the purposes of this section,-

* * *

(baa) "profits of the business" means the profits of the business as computed under the head "Profits and gains of business or profession" as reduced by-

1300 ninety per cent of any sum referred to in clauses (iiia), (iiib), (iiic), (iiid) and (iiie) of Section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits; and

(2) the profits of any branch, office, warehouse or any other establishment of the Assessee situate outside India.

12. Explanation (baa) extracted above states that "profits of the business" means the profits of the business as computed under the head "Profits and Gains of Business or Profession" as reduced by the receipts of the nature mentioned in Clauses (1) and (2) of the Explanation (baa). Thus, profits of the business of an Assessee will have to be first computed under the head "Profits and Gains of Business or Profession" in accordance with provisions of Sections 28 to 44D of the Act. In the computation of such profits of business, all receipts of income which are chargeable as profits and gains of business under Section 28 of the Act will have to be included. Similarly, in computation of such profits of business, different expenses which are allowable under Sections 30 to 44D have to be allowed as expenses. After including such receipts of income and after deducting such expenses, the total of the net receipts are profits of the business of the Assessee computed under the head "Profits and Gains of Business or Profession" from which deductions are to made under Clauses (1) and (2) of Explanation (baa).

13. x x x x x x x

14. x x x x x x x

15. Section 80M of the Act provided for deduction in respect of certain intercorporate dividends and it provided in Sub-section (1) of Section 80M that "where the gross total income of an Assessee being a company includes any income by way of dividends received by it from a domestic company, there shall, in accordance with and subject to the provisions of this Section, be allowed, in computing the total income of the Assessee, a deduction from such income by way of dividends an amount equal to" a certain percentage of the income mentioned in this Section. The Constitution Bench held that the Court must construe Section 80M on its own language and arrive at its true interpretation according to the plain natural meaning of the words used by the legislature and so construed the words "such income by way of dividends" in Sub-section (1) of Section 80M must be referable not only to the category of income included in the gross total income but also to the quantum of the income so included.

16. Similarly, Explanation (baa) has to be construed on its own language and as per the plain natural meaning of the words used in Explanation (baa), the words "receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits" will not only refer to the nature of receipts but also to the quantum of receipts included in the profits of the business as computed under the head "Profits and Gains of Business or Profession" referred to in the first part of the Explanation (baa). Accordingly, if any quantum of any receipt of the nature mentioned in Clause (1) of Explanation (baa) has not been included in the profits of business of an Assessee as computed under the head "Profits and Gains of Business or Profession", ninety per cent of such quantum of the receipt cannot be deducted under Explanation (baa) to Section 80HHC."

20. The Supreme Court in **ACG Associated Capsules** (supra), did not approve the view of the Bombay High Court in **CIT Vs. Asian Star Company Ltd.** (2010) 326 ITR 56 (Bom.).

21. We have quoted Section 80IA (1) and (2A) above. For determining the income derived by an undertaking or enterprise, we have to compute

the total income of the assessee from the business referred in sub-section (4) to Section 80IA. The words used in Section 80IA(1) and (2A) are "profit and gains of eligible business". On the basis of same logic and reasoning, we have to first find out the profit and gains of business from the specified activities. Section 80IA was interpreted and elucidated in **Liberty India v. Commissioner of Income Tax,** (2009) 9 SCC 328.It was highlighted Section 80IA is a profit linked incentive and only profits "derived from" eligible business are entitled to deduction. The expression "derived from" covers sources not beyond the first degree. Devices to inflate or reduce profits from eligible business should be rejected. On DEPB utilization and duty drawback it was held:-

> "39. Analysing the concept of remission of duty drawback and DEPB, we are satisfied that the remission of duty is on account of the statutory/policy provisions in the Customs Act/ Scheme(s) framed by the Government of India. In the circumstances, we hold that profits derived by way of such incentives do not fall within the expression "profits derived from industrial undertaking" in Section 80-IB."

22. Reliance was placed by the assessee on AS 2 and explaining the same in **Liberty India** (supra), it was held;-

> "40. Since reliance was placed on behalf of the assessee(s) on AS-2 we need to analyse the said standard. AS-2 deals with valuation of inventories. Inventories are assets held for sale in the course of business; in the production for such sale or in the form of materials or supplies to be consumed in the production. "Inventory" should be valued at the lower of cost and net realisable value (NRV). The cost of "inventory" should comprise all costs of purchase, costs of conversion and other costs including costs incurred in bringing the "inventory" to their present location and condition.
>
> 41. The cost of purchase includes duties and taxes (*other than those subsequently recoverable by the enterprise from taxing authorities*), freight inwards and other expenditure directly attributable to the acquisition. Hence trade discounts, rebate, duty drawback, and such similar items are deducted in determining the costs of purchase. Therefore, duty drawback, rebate, etc. should not be treated as adjustment (credited) to cost of purchase

> or manufacture of goods. They should be treated as separate items of revenue or income and accounted for accordingly (see p. 44 of *Indian Accounting Standards & GAAP* by Dolphy D.Souza).
>
> 42. Therefore, for the purposes of AS-2, CENVAT credits should not be included in the cost of purchase of inventories. Even the Institute of Chartered Accountants of India (ICAI) has issued Guidance Note on Accounting Treatment for CENVAT/MODVAT under which the inputs consumed and the inventory of inputs should be valued on the basis of purchase cost net of specified duty on inputs (i.e. duty recoverable from the Department at a later stage) arising on account of rebates, duty drawback, DEPB benefit, etc. Profit generation could be on account of cost cutting, cost rationalisation, business restructuring, tax planning on sundry balances being written back, liquidation of current assets, etc.
>
> 43. Therefore, we are of the view that duty drawback, DEPB benefits, rebates, etc. cannot be credited against the cost of manufacture of goods debited in the profit and loss account for purposes of Sections 80-IA/80-IB as such remissions (credits) would constitute independent source of income beyond the first degree nexus between profits and the industrial undertaking.
>
> 44. We are of the view that the Department has correctly applied AS-2 as could be seen from the following illustration:

Expenditure	Amount(Rs)	Income	Amount(Rs)
Opening stock	100	Sales	1000
Purchases (including customs duty paid)	500	Duty drawback received	100
Manufacturing overheads	300	Closing stock	200
Administrative, selling and distribution expenses	200		
Net profit	200		
	1300		1300

> Note: In the above example, the Department is allowing deduction on profit of Rs 100 under Section 80-IB of the 1961 Act."

(emphasis supplied)

23. In view of the aforesaid observations in the case of Liberty India (supra), the aforesaid second question of law in ITA No. 130/2011 is answered in negative with an order of remand to the tribunal. In the absence of details, it is directed that the tribunal will examine the factual matrix of the present case including the balance-sheet and accounts of the assessee, to decide the question. It will be open to the tribunal to examine and consider the contention of the assessee, if raised and supported by facts, the quantum of expenditure incurred/attributed to earning of exempt income under Section 80IA of the Act.

24. The appeal is accordingly disposed of. There will be no order as to costs.

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UNITED BIOTECH PVT. LTD. ….APPELLANT

VERSUS

ORCHID CHEMICALS & PHARMACEUTICALS LTD. & ORS. ….RESPONDENTS

(A.K. SIKRI, ACJ. & RAJIV SAHAI ENDLAW, J.)

LPA NO. : 679/2011 DATE OF DECISION: 18.05.2012

Trademarks Act, 1999—Section 9, 11, 18, 57, 125—Appellant got registered trademark FORZID—Respondent filed application for removal of aforesaid trademark or rectification of register, urging trademark FORZID was deceptively similar to earlier registered trademark ORZID (label mark) registered in name of respondent no.1—Plea of respondent was accepted by Intellectual Property Appellate Board (IPAB) and Registrar of trademark was directed to remove trademark FORZID—Appellant filed writ petition

challenging the said order of IPAB which was dismissed by L.d. Single Judge thereby affirming order of IPAB—Appellant challenged said order and urged that two marks were not structurally and phonetically similar and would were not structurally and phonetically similar and would not cause deception in minds of consumer—Held:— When a label mark is registered, it cannot be said that the word mark contained therein is not registered. Although the word ORZID is a label mark, the word ORZID contain therein is also worthy of protection.

The entire arguments are on the wrong premise and it proceeds on the basis of common feature of the two marks suffix "ZID" and since the respondent has registration and trade mark "ORZID", it cannot bare a part of it, i.e., "ZID". What has been seen in a case like this is as to whether the mark "FORZID" is deceptively similar to "ORZID". That is the test which is to be applied and in a process, it is to be seen as to whether the two marks are structurally and phonetically similar and would cause deception in the minds of consumers. When we judge the matter from this angle, we find ourselves in agreement with the view taken by IPAB as well as the learned Single Judge. Although the mark "ORZID" is a label mark, the word mark "ORZID" is an essential feature which has been covered by the registration. **(Para 25)**

Important Issue Involved: When a label mark is registered, it cannot be said that the word mark contained therein is not registered.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Gaurav Pachnanda with Ms. Sangeet Goel, Mr. Mohit Goel, Mr. Sidhant Goel and Mr. Yawar, Advocates.

FOR THE RESPONDENT : Mr. S. Santhanam Swaminathan with Ms. Clady Daniels, Advocates for respondent no.1 Mr. D. Tomar, Advocate for respondent no. 3.

CASES REFERED TO:

1. *Kamadhenu Realtors Pvt. Ltd.* vs. *Kamadhenu Ispat Limited & Anr.*, 2011 (46) PTC 93 (IPAB).
2. *Unichem Laboratories Ltd. Ipca Laboratories Ltd.*, 2011 (45) PTC 488 (Bom.).
3. *Bhole Baba Milk Food Industries Ltd.* vs. *Parul Food Specialities Pvt. Ltd.*, 2011 (48) PTC 235 (DB) (Del.).
4. *Ranbaxy Laboratories Ltd.* vs. *Intas Pharmaceuticals Ltd.*, 2011 (47) PTC 433 (Del.).
5. *Aravind Laboratories* vs. *Modicare* (decided on 05.07.2011).
6. *Schering Corporation* vs. *United Biotech Pvt. Ltd.* (DB) decided on October 08, 2010.
7. *Three-N Products Pvt. Ltd.* vs. *Emami Ltd.*, 2009 (41) PTC 689 (Cal.).
8. *P.P. Jewellers Pvt. Ltd.* vs. *P.P. Buildwell Pvt. Ltd.*, 2009 (41) PTC 217 (Del.).
9. *B. Mohamed Yousuff* vs. *Prabha Singh Jaswant Singh, rep. by its Power of Attorney Mr. C. Raghu and Ors.*, MIPR 2007 (1) 107.
10. *Astrazeneca UK Limited and Anr.* vs. *Orchid Chemicals and Pharmaceuticals Ltd.* 2007 (34) PTC 469.
11. *Ramdev Food Products Ltd.* vs. *Arvindbhai Rambhai Patel* AIR 2006 SC 3304.
12. *Kalindi Medicure Pvt. Ltd.* vs. *Intas Pharmaceuticals Ltd.*, 2006 (33) PTC 477 (Del.).
13. *Astrazeneca UK Ltd.* vs. *Orchid Chemicals & Pharmaceuticals Ltd.*, 2006 (32) PTC 733 (Del.).
14. *USV Limited* vs. *Systopic Laboratories*, 2004 (1) CLT 418.

15. *Laxmikant V. Patel* vs. *Chetanbhai Shah and Another*, (2002) 3 SCC 65.
16. *Cadila Health Care Limited* vs. *Cadila Pharmaceuticals Limited*, 2001 (1) CTMR 288 (SC).
17. *Aviat Chemicals Pvt. Ltd.* vs. *Intas Pharmaceuticals Ltd.*, 2001 PTC 601 (Del.).
18. *Patel Field Marshal Agencies* vs. *P.M. Diesels Ltd.*, 1999 PTC (19) 718.
19. *Baker Hughes Limited* vs. *Hiroo Khushalani*, [1998 PTC (18) 580].
20. *Indo-Pharma Pharmaceuticals Works Ltd.* vs. *Citadel Fine Pharmaceuticals Ltd.*, 1998 (18) PTC 775 (DB).
21. *Jagsonpal Pharmaceuticals* vs. *Jagson Parenterals (P) Ltd.*, 1997 PTC (17).
22. *Cadila Laboratories Ltd.* vs. *Dabur India Ltd.*, 1997 PTC (17) 417.
23. *Reckitt d Colman of India Ltd.* vs. *Medicross Pharmaceuticals Pvt. Ltd.*, 1992 (3) BomCr 408.
24. *Kedar Nath* vs. *Monga Perfumery and Flour Mills*, AIR1974Delhi12.
25. *Corporation* vs. *Steinway & Sons, a corporation*, 365 F.Supp. 707 (1973).
26. *Amritdhara Pharmacy* vs. *Satya Deo Gupta*, AIR 1963 SC 449.
27. *Registrar of Trade Marks* vs. *Ashok Chandra Rakhit* AIR 1955 SC 558.
28. *Gujarat Bottling Co. Ltd. and Others* vs. *Coca Cola Co. and Others*, (1955) 5 SCC 545.
29. *American Drill Busing Co.* vs. *Rockwell Mfg. Co.*, 342 F.2d 1922, 52 CCPA 1173 (1965)].
30. *Communications Satellite Corp.* vs. *Comcet, Inc.*, 429 F.2d at 1252].
31. *B & L Sales Associates* vs. *H. Daroff & Sons, Inc.*, supra, 421 F.2d at 354).

32. *Pinto* vs. *Badman* [8 RPC 181].

RESULT: Appeal dismissed.

A.K. SIKRI (ACJ)

1. The appellant herein got registration of trademark FORZID under No.1144258 dated 18.10.2002 in Class – 5 questioning this registration in favour of the appellant, the respondent herein filed application for removal of the aforesaid trademark FORZID or rectification of register under Sections 9, 11, 18, 57 and 125 of the Trademarks Act, 1999 (hereinafter referred to as 'the Act'). To put it in brief, the removal was sought on the ground that the said trademark FORZID was deceptively similar to an earlier registered trademark, viz., ORZID (label mark), standing registered in the name of the respondent No.1 in Class – 5. The plea of the respondent herein was accepted by the Intellectual Property Appellate Board ('IPAB' for brevity) vide decision dated 14.10.2008. The IPAB allowed the rectification application with direction to the Registrar of the Trademarks to remove the trademark FORZID belonging to the appellant from the register. The appellant field Writ Petition challenging the said order of the IPAB which has been dismissed by the learned Single Judge vide orders dated 04.7.2011 thereby affirming the order of the IPAB. The appellant filed the instant intra-Court appeal questioning the validity of the said order of the learned Single Judge.

2. When this appeal came up for hearing on 30.8.2011, counsel for the appellant had inter alia urged that the respondent has filed the rectification application without leave being obtained under Section 124(1)(B)(ii) of the Trademarks Act, 1999 from the Madras High Court and therefore, rectification application before the IPAB was not maintainable. It was noted by the Division Bench that this plea urged by the appellant had not been dealt with by the learned Single Judge. It was not known as to whether the same was even pressed or not, liberty was granted to the appellant to move an application before the learned Single Judge in this behalf. The application was accordingly moved before the learned Single Judge. This application has also been dismissed vide orders dated 09.9.2011. Thereafter, leave was given to include challenge to this order as well. It is in this backdrop we are called upon the deal with the orders dated 04.7.2011 passed in the writ petition and orders dated 09.9.2011 passed in the Miscellaneous Application. Arguments were heard on these aspect, which are submitted vide written submissions of the parties as

well.

3. In the application for rectification filed by the respondent before the IPAB, it was claimed that the respondent was the manufacturer and marketer of various pharmaceutical products under a large number of trademarks. The company which had a modest Rs. 12 Crores of infrastructure in 1994-95 has grown at a remarkable pace to achieve a capital base of Rs. 800 Crores; has achieved a turnover of US$163 million and a world leadership in the pharmaceutical bulk actives in a short period of time. The respondent also claims to have two modern state of art manufacturing plants and a one of its kind R & D centre. It was awarded the prestigious ISO 9001:2000, ISO 14001 and OHSAS 18001 certificates for its world class quality management, environmental management and occupational health and safety management system. It was also claimed by the respondent that it is the pioneer in establishing 'zero discharge' facilities in the Indian pharmaceutical industry. In the year 1999, it adopted the trademark ORZID which is used with respect to the appellant's pharmaceutical preparations having active ingredient CEFTAZIDINE and the said mark became popular among the medical fraternity. On 06.9.1999, the appellant filed application No.874808 for registration of trade mark ORZID with respect to medical and pharmaceutical preparations. This application was advertised in the Trade Marks Journal No.1291 (S) dated 13.3.2003 and got registration of the mark unopposed. The appellant commenced use of the trademark upon goods with effect from May, 1999. It was, thus, claimed that being prior user and prior registered proprietor, the use by any person, an identical or any other mark deceptively similar thereto would amount to infringement of the appellant's registered trademark. As per the respondent, it came to know about the trademark FORZID of the appellant in respect of medicinal and pharmaceutical preparations in September, 2007 which according to the respondent was slavish imitation of the respondent registered trademark. The respondent No.1, thus, filed a civil suit in C.S. No.1027 2007 in the High Court of Madras seeking permanent injunction restraining the appellant to use that trademark which amounted to infringement of registered trade mark and from passing off its goods as that of respondent. Ex parte injunction was granted on 22.11.2007. However thereafter, this the respondent filed OA No.187 of 2008 seeking interim injunction against passing off. While this application was pending adjudication, the respondent also filed the aforesaid application for

rectification before the IPAB. In the reply filed by the appellant to the said application, the appellant also claimed to be part of the famous United Group of Companies and is one of the fastest growing companies in the Indian Pharmaceutical Industry, incorporated under the Companies Act, 1956 in the year, 1997 and had established a great reputation by adopting latest manufacturing techniques introducing world class quality products, ground braking R & D efforts in association with its foreign counterparts and for setting new standards of customer service.

4. The plea of the appellant regarding trademark FORZID was that this trademark was adopted in the year, 2001 and the registration of trademark for its pharmaceutical preparations and obtained registration of the trademark unopposed under No.1144258 dated 18.10.2002. It was stated that the appellant is continuously and extensively using the same and in the year 2006-07, the sale of goods under this trademark was Rs. 229.51 lacs. According to the appellant, the trademark FORZID is an invented word coined by the appellant. The mark is adopted from the words FORceftaZIDime, where the suffix 'ZID' was adopted from the word Ceftazidime, which is the medicinal ingredients of the drug and thus and such an adoption ought to have been also protected under Section 35 of the Act. Furthermore, several manufacturers of Ceftazidime injections were using trademarks with the suffix 'ZID', such as OZID, IZID, INDOZID, KEMZID, MANZID, MEGZID, MYZID, NICZID, etc. Moreover, the appellant's product FORZID injection is a Schedule 'H' drug, which can be sold only on the written prescription of a registered medical practitioner. The appellant's product FORZID is always prescribed by a doctor based on the ailments suffered by a patient and is dispensed with by a qualified druggist and chemist. This fact was also wrongly not considered in favour of the appellant.

5. The appellant had also narrated about the orders passed by the Madras High Court whereby ex parte stay was granted in favour of the respondent was vacated by way of speaking order and the appeal against that order was also dismissed by the Division Bench of the Madras High Court and the plea of delay was taken up.

6. The IPAB was, however, not convinced with the defence put by the appellant herein. It held that the trademark FORZID was deceptible similar to the earlier trademark ORZID in respect of some pharmaceutical products. Position in law was stated, viz., a trademark cannot be regist

red if it is of such nature as to deceive the public or cause confusion or it is similar with an earlier trade mark and goods covered by the trademark are similar, the IPAB quoted from the judgment of the Supreme Court in **Amritdhara Pharmacy Vs. Satya Deo Gupta,** AIR 1963 SC 449 and **Cadila Health Care Limited Vs. Cadila Pharmaceuticals Limited,** 2001 (1) CTMR 288 (SC) and on the application of principles in those judgments, position in the instant case was analysed in the following manner:

> "16. In the present case, the applicant contended that the two marks ORZID and FORZID are structurally, visually and phonetically similar to each other. There is no doubt that in both the marks the syllables 'ZID' have been taken from the pharmaceutical composition Ceftazidime and in the prefix 'OR' and 'FOR' the only uncommon syllable is 'F'. It is difficult to hold that FORZID is phonetically altogether dissimilar to ORZID. While pronouncing, both the marks give only slightly different sound but structurally and visually the marks ORZID and FORZID have close resemblance to each other. Judicial pronouncements have been made by various Courts holding that the prefix of the word should be given due weightage and importance in case where the suffix is common [see **Jagsonpal Pharmaceuticals v. Jagson Parenterals (P) Ltd.,** 1997 PTC (17)] and in view of this the close structural and visual similarity should be given due weightage in the present case. It is also well settled that the competing marks should be compared as a whole without dissecting the same. In the **Cadila Health Care Limited** (supra), the Supreme Court with approval referred the observation of Farwell, J. in **William Baily (Birmingham) Ltd.'s Application,** (1935) 52 RPC 136:
>
> "It is well recognized that in deciding a question of similarity between two marks, the marks have to be considered as a whole. So considered, we are inclined to agree with Desai, J., that the marks with which this case is concerned are similar. Apart from the syllable 'co' in the appellant's mark, the two marks are identical. That syllable is not in our opinion such as would enable the buyers in our country to distinguish the one mark from the other" in the present case also apart from the letter 'F' in the

mark of respondent No.1, the two marks are identical and the letter 'F' is not in our opinion is such as would enable the buyers in our country to distinguish the one mark from the other. In the case of Amritdhara Pharmacy, the Court held Amritdhara and Lakshmandhara were likely to deceive or to cause confusion based on the facts of the case. The Court observed that the use of the word 'dhara' which is literally meant 'current or stream' is not by itself decisive of the matter. A critical comparison of the two names may disclose some points of difference but an unwary purchaser of average intelligence and imperfect recollection would be deceived by the overall similarity f the two names having regard to the nature of the medicine he is looking for with somewhat vague recollection that he had purchased a similar medicine on a pervious occasion with a similar name. The Court further observed that each case must be decided on its own facts. In the case on hand due to overall close structural and visual similarity the unwary purchaser will be deceived or confused. It is a settled principle that while ascertaining two rival marks, as to whether they are deceptively similar or not, it is not permissible to dissect the words to the two marks. It is also held that the meticulous comparison of words, letter by letter and syllable by syllable, is not necessary and phonetic or visual similarity of the marks must be considered. On seeing the two marks, the first impression one gets is that both marks are same unless the person meticulously compares or he has been gifted with Sherlockholm's eyes. In view of paras 15 and 16 of the Apex Court's judgment in the **Cadila Health Care Limited** (supra), both products are Schedule 'H' drug is no guarantee that there will be no confusion or deception. We agree with the contention of the applicant that there will be adverse effect if a patient mistakenly gets injected 1000mg instead 250mg of injection. The trade channel of both goods/products are same and the consumers are patients of the same/common ailment. In the same judgment the Court further observed that the marks in every case in determining what is likely to deceive or cause confusion must depend on its. own particular facts, and the value of authorities lies not so much in the actual decision. The reliance placed upon several judgments by the learned counsel for respondent No.1 to bring home his contention that both the

competing marks are dissimilar will be of no help in furthering such contention as in most of the cases the findings of the Courts are prima facie. For instance, in the **Astrazeneca UK ltd. And Anr** (supra) the Court has expressedly stated that needless to mention, the view expressed are tentative and prima facie conclusion which shall not be treated as expression of any final opinion of the final merits of the case."

7. It was also held that the appellant adopted the trademark FORZID with dishonest and mala fide intention and had even set up a false claim of user date. The IPAB also rejected the plea on delay, laches and acquiescence. Discussion on these aspects is as under:

"18. Now we would take up the issue that the respondent No.1 is not the proprietor of the trade mark and its adoption is dishonest with mala fide intention. The respondent No.1 has stated that it has coined the trade mark FOR plus ZID. Being taken from the bulk drug CEFTAZIDIME but the respondent No.1 has not explained as to why it has adopted FOR, as it is neither the name of the company nor indicating or relating anything to the respondent No.1. The impugned trade mark of the respondent No.1 has submerged the trade mark of the applicant in its entirely in the impugned trade mark. The trade mark of the applicant has been in use since 1999. Therefore, the adoption of trade mark FORZID by the respondent No.1 subsequent to the use of the trade mark by the applicant gives serious doubts about the bona fide adoption of the impugned mark by the respondent No.1. The documents filed by the applicant proves beyond doubt that it is the prior adopter and user of the trade mark ORZID. When that be so, the respondent No.1 ought to have explained the reasons for adoption of such deceptively similar mark. It is not the case of the respondent No.1 that it was not aware of the existence of the registered trade mark of the applicant. Besides this, the respondent No.1 has also not averred or pleaded that it has made any application to the Registrar of Trade Mark in search of a conflicting mark registered or pending registration. In the case of dishonest adoption no amount of user makes the adoption honest. As per section 18 of the Act, being the subsequent adopter of the mark, the respondent NO.1 cannot claim to be the proprietor of the impugned trade mark. When the respondent

No.1 is hit by section 9(1)(a) and (2)(a) and section 11(1) and (2)(a) of the Act. The submission of the respondent No.1 that the ZID is common to trade is not sustainable in the absence of any proof that the names/marks occurring in the Drugs Today 2005 are at all in use or if in use, the extent of their use.

19. We consider that there is considerable force in the contention of the appellant that the respondent No.1 has obtained registration on false claim of user date. In the application for registration dated 18.10.2002 and in the advertisement issued in the Trade Marks Journal the date of user is shown as 01.01.2001. The claim of respondent No.1 that it had adopted the trade mark and had been using the same since 01.01.2001 for which there is no material placed on record by the respondent No.1 to substantiate its claim. The respondent No.1 entered into an agreement for manufacturing of its product with its licensee on 30.01.2001 and thereafter the licensee obtained licence on 13.05.2002 and launched FORZID on April 25, 2002. In view of these facts, it is certain that the respondent No.1 has claimed the use date falsely and hence not entitled for obtaining the impugned registration. Therefore, the allegation that the registration is wrongly remaining without sufficient cause on the register is proved beyond doubt."

8. Consequently, the rectification application was allowed.

9. Before the learned Single Judge, arguments were substantially the same. The learned Single Judge first took up the issue of deceptive similarity between the two competing marks FORZID and ORZID. According to the learned Single Judge, no doubt, the word 'ZID' which was common to both FORZID and ORZID was derived from active pharmaceutical ingredient CEFTAZIDIME. However, while comparing the two trademarks as a whole, it was clear that FORZID is nothing but ORZID prefixed by a soft consonant 'F'. This meant prefixing of the letter 'F' failed to distinguish FORZID sufficiently from ORZID so as not to cause deception or confusion in the mind of an average customer holding that the two competing marks were to be compared as a whole which was the rule of dissection of mark is an exception which is not generally permitted, in the present case, IPAB applied a correct test. The learned Single Judge also discussed in detail the principle of law laid down in **Cadila Health Care Limited** (supra) case, viz., "more regress test" in deciding the matters relating to pharmaceuticals with preparations

and observed as under:

"26. Viewed in light of the decision in Cadila Health Care Ltd. admittedly both FORZID and ORZID are prescription drugs. The dosages of FORZID and ORZID are not the same. It would pose a grave risk to health if a person who has been prescribed a dosage of 250mg CEFTAZIDIME injection (ORZID) is administered a 1000mg dosage (FORZID). These are injections administered intravenously and can have a direct and immediate impact. In the circumstances, the mere fact that they are priced differently is not sufficient to hold that the unwary average purchaser of the drugs will not be confused into thinking one is as good as the other or in fact both are the same drug. Then there is the other real danger that a prescription written for ORZID may be mistaken by the dispenser at the pharmacy shop to be FORZID or vice versa. It if is asked for verbally the phonetic similarity is likely to cause confusion. The health of a person for whom the medicine is prescribed cannot possibly be put to such great risk. In the considered view of this Court on the question of deceptive similarity, the reasoning and conclusion of the IPAB does not call for interference."

10. Following dicta from the judgment of the Apex Court in **Gujarat Bottling Co. Ltd. and Others Vs. Coca Cola Co. and Others,** (1955) 5 SCC 545 also brings home the point candidly:

".....(i) the licensing does not result in causing confusion or deception among the public; (ii) it does not destroy the distinctiveness of the trade mark, that is to say, the trade mark, before the public eye, continues to distinguish the goods connected with the proprietor of the mark from those connected with others; and (iii) a connection in the course of trade consistent with the definition of trade mark continues to exist between the goods and the proprietor of the mark....."

11. Section 11 of the Act becomes significant in the process. It uses the expression earlier "trademark" and not "earlier registered trademark". As per Section 2 (z) (b) of the Act, therefore, phonetic similarity could be compared while examining the case of the confusion. It is for this reason, we have earlier observed that the arguments proceed on wrong premise.

12. Brushing aside the arguments of the learned counsel for the appellant that the respondent could not have successfully asked for rectification, as respondent's registration was only for a label mark, the learned Single Judge observed that the judgment by the Supreme Court in the case of **Ramdev Food Products Ltd. Vs. Arvindbhai Rambhai Patel,** AIR 2006 SC 3304 was a complete answer to this argument. The learned Single Judge also rejected the contention of the appellant that in view of orders of the Madras High Court vacating the interim injunction, IPAB has passed the impugned order on the principles of comity of jurisdiction, observed that in forming an opinion at the time of deciding interim injunction only prima facie conclusion is arrived at.

13. Dismissing the application for modification preferred by the appellant, vide orders dated 09.9.2011, the learned Single Judge, in the first instance, clarified that the plea of prior permission of the High Court of Madras High Court was not pressed when the writ petition was finally heard. However, counsel for the appellant had necessitated that this plea be taken on merits as it goes to the root of the matter. It was noted by the learned Single Judge that when the application for interim injunction was dismissed and ex parte stay vacated by the Madras High Court as far as infringement of trademark ORZID, the appellant thereafter filed application to restrain the appellant from passing off its pharmaceutical preparation using the trade mark FORZID. This application as dismissed by the learned Single Judge on 30.4.2008. Prior thereto on 11.3.2008, the respondent filed a rectification application before the IPAB. Consequently, when the respondent filed appeal before the Division Bench, the rectification application was already pending before the IPAB. The appellant, at this stage, could not point out to the Division Bench that the rectification application could not have been filed by the respondent before the IPAB to dispose of the rectification application on or before 16.10.2008. From this, the learned Single Judge has drawn the inference with the appellant accepted the maintainability of respondent's rectification application before the IPAB and in any case, the aforesaid order of the Division Bench amounted to imply permission for the purposes of Section 124 (1)(b)(ii) of the Act. That was a reason, this point was not urged by the IPAB or even before the learned Single Judge in the first instance. Another reason given by the learned Single judge is as under:

> "7..... Viewed from another angle, the purpose of Section 124 is to ensure that there are no parallel proceedings concerning validity of a trademark registration before two different fora. In the present case, the IPAB decide the issue with no conflicting opinion on the point simultaneously arrived at by the High Court in the suit. Therefore, the purpose of Section 124 TM Act was not defeated. On the other hand, accepting the plea of UBPL at this stage would mean reverting to a stage anterior to the rectification proceedings and that would neither be expedient not in the interests of justice."

Re: Maintainability of Rectification Petition without obtaining specific permission of the Madras High Court under Section 124(1)(b) of the Trademark Act:

14. Section 124 of the Act reads as under:

> "124. Stay of proceedings where the validity of registration of the trade mark is questioned, etc.- (1) Where in any suit for infringement of a trade mark-
>
> (a) the defendant pleads that registration of the plaintiffs trade mark is invalid; or
>
> (b) the defendant raises a defense under Clause (e) of Sub-section (2) of Section 30 and the plaintiff pleads the invalidity of registration of the defendant's trade mark, the court trying the suit (hereinafter referred to as the court), shall,—
>
> (i) if any proceedings for rectification of the register in relation to the plaintiffs or defendant's trade mark are pending before the Registrar or the Appellate Board, stay the suit pending the final disposal of such proceedings;
>
> (ii) if no such proceedings are pending and the court is satisfied that the plea regarding the invalidity of the registration of the plaintiffs or defendant's trade mark is prima facie tenable, raise an issue regarding the same and adjourn the case for a period of three months from the date of the framing of the issue in order to enable the party concerned to apply to the Appellate Board for rectification of the register.
>
> (2) If the party concerned proves to the court that he has made any such application as is referred to in Clause (b) (ii) of Sub-

section (I) within the time specified therein or within such extended time as the court may for sufficient cause allow, the trial of the suit shall stand stayed until the final disposal of the rectification proceedings.

(3) If no such application as aforesaid has been made within the time so specified or within such extended time as the court may allow, the issue as to the validity of the registration of the trade mark concerned shall be deemed to have been abandoned and the court shall proceed with the suit in regard to the other issues in the case.

(4) The final order made in any rectification proceedings referred to in Sub- section (1) or Sub-section (2) shall be binding upon the parties and the court shall dispose of the suit conformably to such order in so far as it relates to the issue as to the validity of the registration of the trade mark.

(5) The stay of a suit for the infringement of a trade mark under this section shall not preclude the court from making any interlocutory order (including any order granting an injunction directing account to be kept, appointing a receiver or attaching any property), during the period of the stay of the suit."

15. This provision deals with stay of proceedings in civil suit where validity of registration of trademark is questioned. However, proceedings for rectification in this behalf are pending before the Registrar or the IPAB, the Court trying the suit shall stay the suit pending final proceedings. If no such proceedings are pending and the Court is satisfied that plea regarding the invalidity of the registration of the plaintiffs or defendants trademark is prima facie tenable, the Court has to first to frame the issue and adjourn the case for a period of three months from the date of the framing of the issue in order to enable the party to apply to the Appellate Board for rectification of the register. Under sub-section (2) of Section 124 of the Act, stay of the suit can be extended until the final disposal of the rectification proceedings. Interpreting this provision, a learned Single Judge of this Court in the case of **Astrazeneca UK Ltd. & Anr. Vs. Orchid Chemicals & Pharmaceuticals Ltd.,** 2006 (32) PTC 733 (Del.) held that application for rectification could not be filed without showing and obtaining prima facie satisfaction of the Court about their plea of the invalidity of the registration of the mark. The discussion in

this behalf is in Paras 28 to 32. We may reproduce Paras 30 to 32 for out benefit. These paras are as under:

"30. Under Section 124(b) if the application for rectification is already pending the suit can be stayed pending final disposal of such proceedings. In case the application for rectification or any such proceeding is not pending, then a party seeking rectification can apply for rectification subject to prima facie satisfaction of the Court regarding invalidity of the registration of the mark of the opposite party. In the present case the plaintiffs, however, have sought rectification of the trade mark of the defendant by filing an application first to the Registrar and thereafter to the Appellate Board without seeking prima facie satisfaction of this Court.

31. On plain reading of this provision, it is apparent that the plaintiffs could not file the application for rectification without showing and obtaining prima facie satisfaction of the Court about their plea of the invalidity of the registration of the mark of the Defendant. Section 124 of the Trade Marks Act, 1999 is similar to the Section 111 of the Trade and Merchandise Marks Act, 1958. Under the Trade and Merchandise Marks Act, 1958 AIR 1974 Delhi12 , **Kedar Nath v. Monga Perfumery and Flour Mills,** this Court had held that an application could not be filed subsequent to the institution of the suit under Section 111(1)(i) of the earlier Act. The Learned Single Judge had held as under:

19. The defendant cannot file an application subsequent to the institution of the suit under Section111(1)(i) and claim that the plaintiff suit for infringement must be stayed. If not proceeding for rectification of the register is pending on the date of the institution of the suit by the plaintiff then Section 111(1)(ii) is attracted and the Court may adjourn the case for a period of three months in order to enable the defendant to apply to the High Court for rectification of the register. In that case the court must be satisfied that the contention as to validity of the defendant's registration is bona fide and prime facie sustainable. In the present case I am not satisfied that the contention as to validity and raised by the defendant is bona fide and prima

facie sustainable. No material has been placed on the record to prove a prime facie case that the plaintiff's registration is invalid or that the defendant has been carrying on business since 1952 as alleged by him.' Reliance can also be placed on **Patel Field marshal Agencies v. P.M. Diesels Ltd.** 1999 IPLR 1425 where it was held that if the proceedings are not pending and the plea regarding invalidity of registration of the mark is raised, the Court trying the suit is to be prima facie satisfied about tenability of the issue. The Division bench of the Gujarat High Court had held:

10. As we notice, under Section 107, it has been provided that on such plea being raised, the plea can be decided only in an appropriate rectification proceedings. In conformity with that provision, Section 111 envisages that if proceeding for rectification of the register in relation to plaintiff or defendant's trademark, as the case may be, are pending before the registrar or the High Court, further proceedings in the suit shall be stayed, until final disposal of rectification proceedings. If proceeding are not pending, and the plea regarding invalidity of registration of concerned mark is raised, the Court trying the suit is to be prima facie satisfied about tenability of the issue, and if it is so satisfied, it shall frame an issue to that effect and adjourn the case for three months, from the date of framing of the issue, in order to enable the party concerned to apply to the High Court for rectification of register. The consequences of the raising of issue are twofold. In case, the party concerned, makes an application for rectification within the time allowed, under sub Clause (ii) of sub Clause (b) of sub section (1), whether originally specified or extended later on, the civil Court trying the suit has to stay the further proceedings of the suit until disposal of the rectification proceeding. At the same time, if no such application is made within the time allowed, the party, has raised the plea of invalidity of the opponent's registered mart, is deemed to have abandoned the issue. This provision permitting raising of an issue only on prima

facie satisfaction of the Court, with further requirement that the party, at whose instance an issue has been framed, is to apply for rectification before the High Court concerned, and failure to make such application within the time allowed results in deemed abandonment of plea, leads us to conclude that once a suit has been filed, the rectification proceedings at the instance of either party to the suit against the other, must take the course and envisaged under Section 111, that is to say, if proceedings for rectification are already pending before raising the plea of an invalidity, that is to say, the attention of an appropriate forum having already been invited to that issue, those proceedings must first be continued, decision thereon to be obtained and then civil suit for infringement can proceed in the light of that decision. In case, no such proceedings for rectification are pending at the time of raising the plea of invalidity, the prosecution of such plea by the reason raising it depends on prima facie satisfaction of the Court, about the tenability of this plea. If the plea has been found to be prima facie tenable and an issue is raised to that effect then the matter is to be adjourned for three months at least to enable the person raising such plea to approach the High Court concerned, with a rectification application. In case, the rectification proceedings are not already pending, and the Court is not even prima facie satisfied about the tenability of the plea raised before it, the matter rests there.

32. The Learned counsel for the plaintiffs has tried to distinguish these cases. According to him on the date of filing of the present suit, no application seeking invalidity of the registration of the defendant's trade mark was pending as the trade mark of the defendant has been registered during the pendency of the suit and the certificate of registration was issued after filing of the suit and Therefore, the application for rectification could not be filed prior to the institution of the suit. The plea of the plaintiffs Therefore, is that their application for rectification filed before the Appellate Board is maintainable without prima facie satisfaction of the tenability of their plea by the Court. If the application for

rectification of the defendant's trade mark is maintainable without prima facie satisfaction of this Court, then this suit is also liable to be stayed as claimed by the plaintiffs under Section 124(b) of the Act, though under Section of 124(5) of the Act, the application for injunction and for vacation or modification of an ex parte order can be considered and decided by this Court. The distinction between Section 124(b)(i) and 124(b)(ii) is on the basis of pendency of the proceedings for rectification of the register and not on the basis of whether the party initiating the proceedings for rectification could initiate such proceedings before the institution of the suit or not.

There can be other eventualities under which a party may not be able to initiate the proceedings for rectification before the institution of the suit, but that will not give them a right to circumvent the prima facie satisfaction of his plea for invalidity, by the Court. The distinguishing feature of the two sub clauses is only pendency of the proceedings and nothing more can be read into them. The plea of substantial compliance of the requirement of Section 124 by the plaintiffs is also not sustainable. Either there is compliance of the said provision or non compliance in the facts and circumstances. Compliance will be when after the institution of the suit, if an application for rectification is to be filed, prima facie invalidity of the opposing mark is to be demonstrated to the Court. The fact that the application could not be filed prior to the institution of the suit, will not entitle a party to circumvent the prima facie satisfaction of the Court. Consequently the proceedings for rectification of the defendant's mark could not be initiated by the plaintiffs without the prima facie satisfaction of their plea by this Court nor this case is liable to be adjourned or stayed for three months in terms of Section 124(b)(i) of the Act to await the outcome of the rectification proceedings initiated by the plaintiffs before the Appellate Board."

16. We may also record that the Gujarat High Court in the case of **Patel Field Marshal Agencies Vs. P.M. Diesels Ltd.,** 1999 PTC (19) 718 has taken the same view. Even the aforesaid view has been upheld by the Division Bench of this Court and the judgment is reported as **Astrazeneca UK Limited and Anr. Vs. Orchid Chemicals and Pharmaceuticals Ltd.** 2007 (34) PTC 469.

17. Thus, insofar as this Court is concerned, it has taken the view that the permission under Section 124 (b) of the Act is mandatory and if the proceedings are filed without obtaining such a permission, those would not be maintainable.

18. The situation as hand, of course, is not that simple. The matter has been complicated because of the reason that the Division Bench of Madras High Court has taken contrary vie in the case of **B. Mohamed Yousuff Vs. Prabha Singh Jaswant Singh, rep. by its Power of Attorney Mr. C. Raghu and Ors.,** MIPR 2007 (1) 107 holding that neither any such leave of the Court was required nor the Court is to frame issue and record prima facie satisfaction thereupon, before filing application for rectification. Raison d'ter for holding this view is explained by the Division Bench of the Madras High Court in the following words:

"(N) In our considered view, Section 124(1)(b)(ii) of the Act is only an enabling provision. Sub clause (i) and Sub clause (ii) of Clause (b) of Sub-section (1) of Section 124 operates at two different levels for two different situations. While Sub clause (i) deals with a situation where any proceeding for rectification is already pending, Sub clause (ii) deals with a situation where any proceeding for rectification is not pending. Both the sub clauses focus their field of operation only in relation to the stay of the civil suit. The conditions laid down in Sub Clause (ii) are intended to enable a party to obtain stay of the suit and not intended to provide for a discretion for the Court to permit or not to permit any application for rectification. Such a position is made clear by Sub sections (2) to (5) of Section 124, which deals with the consequences of filing and not filing an application for rectification and of the ultimate outcome of such application for rectification. In other words, the requirements of "raising an issue", "adjourning the case" and a "prima facie satisfaction" spelt out in Section 124(1)(b)(ii) should be read as the requirements for the grant of a stay of the suit and not as a requirement or pre-condition for filing an application for rectification. The plain reading of Section 124(1)(b)(ii)shows that it does not mandate a party to obtain the "leave of the Court" or "an order of the Court", for filing an application for rectification. The right to file an application for rectification is a statutory right conferred upon a party who is aggrieved by an entry made in the Register. The said statutory

right cannot be curtailed except by the very provisions of the statute. The said right is circumscribed by certain requirements such as the contravention of the provisions of the Act or failure to observe a condition entered on the Register etc., as spelt out under Sub sections (1) and (2) of Section 57 of the Act. In respect of the "Forum" in which such an application for rectification could be filed, there is a restriction under Section 125, in that such an application could be filed only before the Appellate Board if a suit for infringement was already pending. Apart from these restrictions, we do not see any other restriction with regard to the filing of an application for rectification. To interpret Section124(1)(b)(ii) to mean that an order should be obtained from the civil Court for filing an application for rectification, regarding prima facie satisfaction, would amount to imposing one more restriction upon the right of a person to seek rectification of the Register. We do not find any such restriction or requirement of the leave/permission of the court, under Section 124(1)(b)(ii). Therefore, with great respect to the learned Judges who were parties to the decisions of the Gujarat and Delhi High Courts, relied upon by the Delhi Party, we are of the considered view that the Tindivanam Party was right in filing an application for rectification, without obtaining the leave of this Court or without getting an issue framed and prima facie satisfaction recorded, in C.S. No. 726 of 2004."

19. In normal circumstances, the answer to be given was simple, viz., this Division Bench is bound by the view taken by the coordinate Bench of this Court and not the Madras High Court. However, the matter becomes complicated because of the reason that the respondent has filed a suit in the Madras High Court. Had the respondent approached the Madras High Court for framing of the issue, recording prima facie view and seeking permission, having regard its own judgment in the aforesaid case, the Court would have said that no such permission is required. On the other hand, the appellant argues that since circuit Bench of IPAB in Delhi dealt with the rectification application, due compliance of Section 124(b) was mandatory, as this Bench would be bound by the decision of this Court in **Astrazeneca UK ltd. And Anr** (supra). Learned counsel for the appellant also referred to the reasoned judgment of IPAB with the Circuit Bench sitting in Delhi in the case of **Kamadhenu Realtors Pvt. Ltd. Vs. Kamadhenu Ispat Limited & Anr.,** 2011 (46) PTC 93 (IPAB) where the IPAB followed the decision of this Court in **Astrazeneca UK ltd. And Anr** (supra).

20. Taking into consideration the position mentioned in the preceding paragraph, even when we proceed on the basis that IPAB was bound to follow the Division Bench judgment of this Court, the effect of that would have been to insist the respondent to seek compliance of Section 124(b) of the Act by filing application in the Madras High Court. We have to keep in mind that the suit is pending in Madras High Court and it is only the Madras High Court which would have considered such an application. However, even if such an application has been made by the respondent, the Madras High Court would have held that no such permission is required. Thus, approaching the Madras High for this reason, before filing the rectification application before IPAB would have been an empty formality. IPAB could not have, therefore, rejected the application on the aforesaid ground as the party cannot be directed to resort to the proceedings which may turn out to be infructuous. Had the case been before some other High Court, position would have been different. In the facts of this case, therefore, we hold that the application could not be dismissed as non-maintainable in the absence of specific permission of the Madras High Court under Section 124(1)(b) of the Trademark Act. This is more so when the plea of prior permission of the High Court of Madras was not even pressed when the writ petition was finally heard.

Re: The Claim of the respondent No.1 in the word "ORZID" (per se)

21. It was submitted by the learned counsel for the appellant that the respondent No.1's assertion of claiming statutory rights in the word "ORZID" (per se) is contrary to the express mandate of Section 17 of the Trademark Act. Argument proceeded on the basis that the registration of respondent No.1 is in respect of trademark ORZID (label mark) and it is only a label which is protected. Section 17 of the Trademark Act reads as under:

"17. Effect of registration of parts of a mark:

(1) When a trade mark consists of several matters, its registration shall confer on the proprietor exclusive right to the use of the trade mark taken as a whole.

(2) Notwithstanding anything contained in sub- section (1), when a trade mark-

(a) contains any part-

(i) which is not the subject of a separate application by the proprietor for registration as a trade mark; or

(ii) which is not separately registered by the proprietor as a trade mark; or

(b) contains any matter which is common to the trade or is otherwise of a non- distinctive character, the registration thereof shall not confer any exclusive right in the matter forming only a part of the whole of the trade mark so registered."

22. The argument was that as per sub-Section (1) of Section 17 of the Act, the exclusive right of the registered proprietor is to use the trademark "taken as a whole" and not "in part" which the respondent was trying to claim. It was argued that from the reading of the latter part of sub-Section(2) of the aforesaid provision. It was made abundantly clear that the registration would not confer any right in the matter forming only art of the whole of the trade mark was registered and the IPAB had ignored the words "not" and "in" occurring in this petition thereby committing a grave error. Relying upon the judgment in the case of **Aravind Laboratories Vs. Modicare** (decided on 05.07.2011), which is a Single Bench judgment of the Madras High Court. It was argued that the objects & reasons behind insertion of Section of the Trade Mark Act, 1999 were to omit the provision relating to requirement of disclaimer under Section 17 of the Trade and Merchandise Marks Act, 1958 and to explicitly state the general proposition that the registration of a trade mark confers exclusive right to the use of the trade mark taken as a whole and not separately to each of its constituent part. To buttress this submission, reference was made to Section 15 of the Act which permits a proprietor of a trade mark to apply for parts of a trade mark, if he claims to be entitled to the exclusive use of any part thereof separately. It was argued that since this was not done by the respondent in the instant case, it was permissible for the respondent to claim statutory right in the word "ORZID" (per se). Many other judgments in the same proposition were relied upon, which are as follows:

(a) **Three-N Products Pvt. Ltd. Vs. Emami Ltd.,** 2009 (41) PTC 689 (Cal.)

(b) **P.P. Jewellers Pvt. Ltd. Vs. P.P. Buildwell Pvt. Ltd.,** 2009 (41) PTC 217 (Del.)

(c) **Bhole Baba Milk Food Industries Ltd. Vs. Parul Food Specialities Pvt. Ltd.,** 2011 (48) PTC 235 (DB) (Del.)

(d) **Registrar of Trade Marks Vs. Ashok Chandra Rakhit,** AIR 1955 SC 558.

23. The learned counsel also argued that at Paragraph 27 of the impugned judgments, the learned Single Judge has wrongly relied upon the case of **Ramdev Food Products Ltd.** (supra). However, the learned Single Judge has grossly erred in ignoring an important fact that the **Ramdev Food Products Ltd.** (supra) was decided under the Trade and Merchandise Marks Act, 1958 which did not have a provision analogous to Section 17 of the Trade Mark Act, 1999. The distinction between the **Ramdev Food Products Ltd.** (supra) and cases under Section 17 of the Act has been elaborately dealt with in Aravind Laboratories (supra) from Para 25 to 28 of the said judgment. Observations in Para 27 of the impugned judgment is contrary to law. Para 27 of the impugned judgment discusses the argument that the label mark of respondent No.1 does not confer rights over the word "ORZID" to respondent No.1. However, while dealing with this argument, the learned Single Judge wrongly relied upon **Ramdev Food Products Ltd.** (supra). The learned Single Judge also wrongly relied upon the case of **Registrar of Trade Marks Vs. Ashok Chandra Rakhit,** AIR 1955 SC 558. The learned Single Judge failed to read paras 16 & 17 of **Ashok Rakhit** (supra), where it was held as under:

> "16. It is true that where a distinctive label is registered as a whole, such registration cannot possibly give any exclusive statutory right to the proprietor of the trade mark to the use of any particular word or name contained therein apart from the mark as a whole. As said by Lord Esher in **Pinto v. Badman** (8 R.P.C. 181):
>
> > "The truth is that the label does not consist of each particular part of it, but consists of the combination of them all".

Observations to the same effect will be found also in In re

Appollinaris Company's Trade Marks L.R. [1891] 2 Ch. 186, In re **Smokeless Powder Co.** (supra), In re Clement and Cie L.R. [1900] 1 Ch. 114 and In re **Albert Baker & Company** (supra) and finally in the Tudor case referred to above which was decided by Sargant, J. This circumstance, however, does not necessarily mean that in such a case disclaimer will always be unnecessary. It is significant that one of the facts which give rise to the jurisdiction of the tribunal to impose disclaimer is that the trade mark contains parts which are not separately registered. It is, therefore, clear that the section itself contemplates that there may be a disclaimer in respect of parts contained in a trade mark registered as a whole although the registration of the mark as a whole does not confer any statutory right with respect to that part."

24. The learned counsel concluded his submission on this aspect by submitting that the case of **P.P. Jewellers** (supra) decided by the same Judge who has rendered the impugned judgment, protection in the parts of the trade mark, when only the whole had been registered, was disallowed in Para 14 of THAT judgment which reads as under:

"14. In the instant case, PPJPL and LR Builders claim that PP is a 'house mark' and has been used since 1980 for jewellery and in relation to real estate since 1998. This is what needs to be examined first. PPJPL applied for CS (OS) Nos. 19/05 & 604/2008 Page 9 of 20 and obtained registrations for the marks PP Jewellers and PPJ in Class 14. Those are the marks under which it conducts its jewellery business. PPJPL never used PP alone. Even for the real estate business the brochures of the commercial complexes of the Plaintiffs depict the usage of the mark 'PP. Towers and the logo PPT. Section 17 (1) of the TM Act states that "when a trade mark consists of several matters, its registration shall confer on the proprietor exclusive right to use of the trade mark taken as a whole." This in effect incorporates the law explained by the Supreme Court in **Registrar of Trade Mark v. Ashok Chandra Rakhit Limited** AIR 1955 SC 558 where the following observations of Lord Esher in **Pinto v. Badman** 8 RPC 181 were quoted with approval: "The truth is that the label does not consist of each particular part of it, but consists of a combination of them all."

25. The entire arguments are on the wrong premise and it proceeds on the basis of common feature of the two marks suffix "ZID" and since the respondent has registration and trade mark "ORZID", it cannot bare a part of it, i.e., "ZID". What has been seen in a case like this is as to whether the mark "FORZID" is deceptively similar to "ORZID". That is the test which is to be applied and in a process, it is to be seen as to whether the two marks are structurally and phonetically similar and would cause deception in the minds of consumers. When we judge the matter from this angle, we find ourselves in agreement with the view taken by IPAB as well as the learned Single Judge. Although the mark "ORZID" is a label mark, the word mark "ORZID" is an essential feature which has been covered by the registration. Therefore, the learned counsel for the respondent appears to be right in his submission on this aspect, which is predicated on the Supreme Court decision in **Ramdev Food Products Ltd.** (supra). Following dicta on the said decision is pertinent:

"82. In **Ashok Chandra Rakhit Ltd.** (supra), whereupon reliance has been placed by Mr. Nariman, this Court was concerned with a proprietary mark of 'Shree'. It was claimed that the mark 'Shree' was a trade mark apart from the device as a whole and it was an important feature of its device. The respondents were carrying on business in the name and style of Shree Durga Charan Rakshit. It was in the peculiar factual background obtaining therein, this Court, referred to the decision of Lord Esher in **Pinto v. Badman** [8 RPC 181] to say that where a distinctive label is registered as a whole such registration cannot possibly give any exclusive statutory right to the proprietor of the trade mark to the use of any particular word or name contained therein apart from the mark as a whole. This Court in the aforementioned factual backdrop opined:

"This, as we have already stated, is not quite correct, for apart from the practice the Registrar did advert to the other important consideration, namely, that on the evidence before him and the statement of counsel it was quite clear that the reason for resisting the disclaimer in this particular case was that the Company thought, erroneously no doubt but quite seriously, that the registration of the trade mark as a whole would, in the circumstances of this case, give it a right to the exclusive use of the word "Shree" as if

separately and by itself it was also its registered trade mark and that it would be easier for it to be successful in an infringement action than in a passing off action. It was precisely the possibility of such an extravagant and untenable claim that called for a disclaimer for the purpose of defining the rights of the respondent company under the registration."

(Emphasis supplied)

83. The said decision has no application to the fact of this case.

84. Mr. Nariman is also not correct in contending that only a label has been registered and not the name 'Ramdev'. Definition of 'mark' as contained in Section 2(j) of the 1958 Act also includes name, signature, etc."

26. We find that the learned Single Judge rightly held that when a label mark is registered, it cannot be said that the word mark contained therein is not registered. We, thus, are of the opinion that although the word "ORZID" is a label mark, the word "ORZID" contained therein is also worthy of protection. The learned Single Judge has rightly observed that the judgment of the Supreme Court in **Ramdev Food Products Ltd.** (supra) is the complete answer. This aspect is considered and the argument of the appellant is rejected in the following words:

"27. On whether the OCPL could successfully ask for rectification for UBPL's word mark FORZID notwithstanding that OCPL held registration only for a label mark, the judgment of the Supreme Court in **Ramdev Food Products Ltd. v. Arvindbhai Rambhai Patel** AIR 2006 SC 3304 is a complete answer. The Court there referred to an earlier decision in **Registrar of Trade Marks v. Ashok Chandra Rakhit** AIR 1955 SC 558, which concerned the proprietory mark 'Shree' which formed part of the device as a whole and was an important feature of the device. The Supreme Court observed that registration of a trade mark as a whole would give the proprietor "a right to the exclusive use of word 'Shree' as if separately and by itself." Therefore it would not be correct for UBPL to contend that the registration held by OCPL does not cover the word mark ORZID."

27. We are in agreement with the aforesaid approach. Having regard

to the aforesaid discussion, the case laws cited by the appellant will have no applicability to the facts of this case.

Re: Deceptive Similarity Between the Two Competing Marks:

28. Numerous judgments were cited by the learned counsel for the appellant to contend that there was no deceptive similarity between the trade mark "ORZID" and trade mark "FORZID" which are as follows:

(i) **USV Limited Vs. Systopic Laboratories,** 2004 (1) CLT 418, judgment rendered by the Madras High Court where the marks PIO and PIOZ were held to be not deceptively similar.

(ii) **Cadila Laboratories Ltd. Vs. Dabur India Ltd.,** 1997 PTC (17) 417, where the marks ZEXATE and MEXATE were held to be not deceptively similar.

(iii) **Unichem Laboratories Ltd. Ipca Laboratories Ltd.,** 2011 (45) PTC 488 (Bom.) where the marks LORAM and SELORAM were held to be not deceptively similar.

(iv) **Reckitt d Colman of India Ltd. Vs. Medicross Pharmaceuticals Pvt. Ltd.,** 1992 (3) BomCr 408 where the marks DISPRIN and MEDISPRIN were held to be not deceptively similar.

(v) **Astrazeneca UK Ltd. Vs. Orchid Chemicals & Pharmaceuticals Ltd.,** 2006 (32) PTC 733 (Del.) where the marks MEROMER and MERONEM were held to be not deceptively similar. Affirmed in **Astrazeneca UK Ltd. Vs. Orchid Chemicals & Pharmaceuticals Ltd.,** 2007 (34) PTC 469 (DB) (Del.).

(vi) **Aviat Chemicals Pvt. Ltd. Vs. Intas Pharmaceuticals Ltd.,** 2001 PTC 601 (Del.) where the marks LIPICARD and LIPICOR were held to be not deceptively similar.

(vii) **Indo-Pharma Pharmaceuticals Works Ltd. Vs. Citadel Fine Pharmaceuticals Ltd.,** 1998 (18) PTC 775 (DB) (Mad.) where the marks ENERJEX and ENERJASE were held to be not deceptively similar.

(viii) **Kalindi Medicure Pvt. Ltd. Vs. Intas Pharmaceuticals Ltd.,** 2006 (33) PTC 477 (Del.) where the marks LOPRIN

and LOPARIN were held to be not deceptively similar.

(ix) **Ranbaxy Laboratories Ltd. Vs. Intas Pharmaceuticals Ltd.,** 2011 (47) PTC 433 (Del.) where the marks NIFTAS and NIFTRAN were held to be not deceptively similar.

(x) **Schering Corporation Vs. United Biotech Pvt. Ltd.,** decided on July 14, 2006, where the marks NETROMYCIN and NETMICIN were held to be not deceptively similar, which was affirmed in **Schering Corporation Vs. United Biotech Pvt. Ltd.** (DB) decided on October 08, 2010.

29. The learned counsel for the respondent argued to the contrary by submitting that but for the soft consonant "F" there is no difference between the rival marks. The marks ORZID and FORZID are structurally and phonetically similar. The marks are nearly identical to each other. It is misconception that the marks are not identical merely because the suffix ZID is taken from CEFTAZIDIME. Learned counsel highlighted that the appellant had taken the trademark of the Respondent No.1 and made a cosmetic change which would not be discernible by the public. He also submitted that it was a mala fide adoption of the mark with a view to encash upon the goodwill and reputation of the respondent No.1, which was clear from the fact that the appellant obtained manufacturing license for the use of trade mark FORZID in march, 2002 and filed an application for registration of the mark on 18.10.2002 under No.1144258 in Class-5. The mark was conceived and adopted by the appellant three years after the adoption and use of the nearly identical mark by the respondent No.1. It was, thus, a mala fide and tainted adoption.

30. The law on this aspect, where the Courts are called upon to consider the deceptive similarity between the two marks is firmly engraved in a series of judgments pronounced by the Courts in the last half century or more. Many are cited by the learned counsel for the appellant, note whereof is taken above. Judgment of Supreme Court in the case of **Cadila Health Care Limited** (supra), which deals with pharmaceutical preparations, is a milestone on law relating to drugs. Application of the principles laid down in this judgment can be found in scores of subsequent judgments of this Court and other High Courts. The position which emerges from the reading of all these judgments can be summarized in the following manner:

In such case, the central issue is as to whether the defendant's activities or proposed activities amount to a misrepresentation which is likely to injure the business or goodwill of the plaintiff and cause damage to his business or goodwill. To extend this use to answer this, focus has to be on the aspect as to whether the defendant is making some representation in course of trade to prospective customers which is calculated to injure the business or goodwill of the plaintiff thereby causing damage to him. In the process, difference between the confusion and deception is to be understood. This difference was explained by Lord Denning in "Difference: Confusion & Deception" in the following words:

> "Looking to the natural meaning of the words, I would make two observations: first, the offending mark must 'so nearly resemble' the registered mark as to be 'likely' to deceive or cause confusion. It is not necessary that it should be intended to deceive or intended to cause confusion. **You do not have to look into the mind of the user to see what he intended. It is its probable effect on ordinary people which you have to consider.** No doubt if you find that he did intend to deceive or cause confusion, you will give him credit for success in his intentions. You will not hesitate to hold that his use of it is likely to deceive or cause confusion. But if he had no such intention, and was completely honest, then you will look carefully to see whether it is likely to deceive or cause confusion before you find him guilty of infringement.
>
> Secondly, 'to deceive' is one thing. To 'cause confusion' is another. The difference is this: when you deceive a man, you tell him a lie. You make a false representation to him & thereby cause him to believe a thing to be true which is false. You may not do it knowingly, or intentionally, but you still do it, & so you deceive him. But you may cause confusion without telling him a lie at all, & without making any false representation to him. You may indeed tell him the truth, the whole truth & nothing but the truth, but still you may cause confusion in his mind, not by any fault of yours, but because he has not the knowledge or ability to distinguish it from the other pieces of truth known to him or because he may not even take the trouble to do so."

31. While examining the question of misrepresentation or deception,

comparison has to be made between the two trademarks as a whole. Rules of Comparison was explained by Justice Parker in the following words:

> "You must take the two words. You must judge of them, both by their look & by their sound. You must consider the goods to which they are to be applied. You must consider the nature & kind of customer who would be likely to busy those goods. In fact, you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trademark for the goods of the respective owners of the marks. If, considering all those circumstances, you come to the conclusion that there will be confusion- that is to say, not necessarily that one man will be injured& the other will gain illicit benefit, but that there will be confusion in the mind of the public which will lead to confusion in the goods- then you may refuse the registration, or rather you must refuse the registration in that case."

32. Following Rules of Comparison can be culled out from various pronouncements of the Courts from time to time.

I. Meticulous Comparison not the correct way.

II. Mark must be compared as a whole.

III. First Impression.

IV. Prima Facie view not conclusive.

V. Structural Resemblance.

VI. Similarity in Idea to be considered.

33. In this process, first, plaintiff is required to prove the following:

(i) The business consists of, or includes selling a class of goods to which the particular trade name applies;

(ii) That the class of goods is clearly defined & is distinguished in the public mind from other goods;

(iii) Because of the reputation of the goods, there is goodwill in the name;

(iv) The Plaintiff is a member of the class selling the goods is the owner of goodwill which is of substantial value;

(v) He has suffered or is likely to suffer damage.

34. While comparing the few marks in order to see as to whether there is likelihood of confusion or not, following words of wisdom of the Supreme Court in **Laxmikant V. Patel Vs. Chetanbhai Shah and Another,** (2002) 3 SCC 65 also need to be kept in mind:

> "10. A person may sell his goods or deliver his services such as in case of a profession under a trading name or style. With the lapse of time such business or services associated with a person acquire a reputation or goodwill which becomes a property which is protected by courts. A competitor initiating sale of goods or services in the same name or by imitating that name results in injury to the business of one who has the property in that name. The law does not permit any one to carry on his business in such a way as would persuade the customers or clients in believing that the goods or services belonging to someone else are his or are associated therewith. It does not matter whether the latter person does so fraudulently or otherwise. The reasons are two. Firstly, honesty and fair play are, and ought to be, the basic policies in the world of business. Secondly, when a person adopts or intends to adopt a name in connection with his business or services which already belongs to someone else it results in confusion and has propensity of diverting the customers and clients of someone else to himself and thereby resulting in injury."

35. We would like to quote from the following passage from the book "The Modern Law of Trade Marks" authored by Christopher Morcom, Butterworths 1999, which finds approval by the Supreme Court in **Ramdev Food Products Ltd.** (supra):

> "The concept of distinguishing goods or services of the proprietor from those of others was to be found in the requirements for a mark to be registrable. Essentially, whatever the wording used, a trade mark or a service mark was an indication which enabled the goods or services from a particular source to be indentified and thus distinguished from goods or services from other sources. In adopting a definition of 'trade mark' which simply describes the function in terms of capability of 'distinguishing the goods or services of one undertaking from those of other undertakings' the new law is really saying precisely the same thing."

36. We are of the view that in the present case, IPAB as well as the learned Single Judge has applied correct test in arriving at the conclusion that the two marks are deceptively similar and are likely to cause confusion in the mind of an average customer with imperfect recollection. The manner of comparison done by the IPAB can be found in Para 16 which we have already extracted above. The learned Single Judge contains detailed discussion on this aspect. With reference to Section 9(2)(a) of the Act, it is pointed out that the mark if it is of such nature as to deceive the public or cause confusion. It clearly follows that if a mark is deceptively similar to an earlier mark, it is not to be registered. As a fortiori, if it is registered, such a registration can be cancelled. Section 11 (1)(b) of the Act also provides that a trademark shall not be registered if because of its similarity to an earlier mark and the identity or similarity of the goods or services covered by the trade mark, there exists a likelihood of confusion on the part of the public, which included the likelihood of association with the earlier trade mark. It is only honest concurrent use or other special circumstances shown by the applicant that which may provide exception to the aforesaid Rule as for the provisions of Section 12 of the Act permits the Registrar to register such a mark. After taking note of these provisions, the learned Single Judge observed as under:

> "20. The word ZID which is common to both ORZID and FORZID is undoubtedly derived from the active pharmaceutical ingredient CEFTAZIDIME. However, this is not the only part of ORZID which is used by UBPL as part of its mark FORZID. It is obvious that FORZID is nothing but ORZID prefixed by a soft consonant F. Although it was repeatedly urged by Mr. Hemant Singh, learned counsel for UBPL that the generic part of FORZID and ORZID, viz., ZID had to be ignored while making comparison of the two competing marks, the fact remains that the entire word mark ORZID is being used as part of the word mark FORZID with only an addition of a single letter "F.. In the considered view of this Court, the mere prefixing of the letter F to the mark of OCPL fails to distinguish FORZID sufficiently from ORZID so as not to cause deception or confusion in the mind of an average customer with imperfect recall. The addition as a prefix of the soft consonant F to ORZID does not dilute the phonetic and structural similarity of the two marks. In the context of similar marks the "essential feature. test as evolved in Durga

> Dutt Sharma v. N.P. Laboratories AIR 1965 SC 980 for determining deceptive similarity requires examination "whether the essential features of the plaintiff's trade mark are to be found in that used by the defendant." In the instant case the entire word mark ORZID, and not merely its essential feature, is subsumed in UBPL's mark "FORZID."

37. The perusal of the judgment of the learned Single Judge would further demonstrate that 'Anti-dissection Rule' is discussed and applied holding that such a dissection is generally not permissible and can be applied only in exceptional cases. After taking note of the law on subject, the dissection of marks as suggested by the appellant is termed as 'artificial one'. We would do nothing but to extract the said discussion from the impugned order as we are in agreement with the same:

> "23. No fault can also be found with the approach of the IPAB in comparing the two competing marks as a whole. That is in fact the rule and the dissection of a mark is an exception which is generally not permitted. The anti-dissection rule is based upon a common sense observation of customer behaviour as explained in McCarthy on Trade Marks and Unfair Competition [J Thomas McCarthy, IV Ed., Clark Boardman Callaghan 2007] under the sub-heading "Comparing Marks: Differences and Similarities.. The treatise further states:
>
> > "23.15 .... The typical shopper does not retain all of the individual details of a composite mark in his or her mind, but retains only an overall, general impression created by the composite as a whole. It is the overall impression created by the mark from the ordinary shopper's cursory observation in the marketplace that will or will not lead to a likelihood of confusion, not the impression created from a meticulous comparison as expressed in carefully weighed analysis in legal briefs."
> >
> > "In litigation over the alleged similarity of marks, the owner will emphasize the similarities and the alleged infringer will emphasize the differences. The point is that the two marks should not be examined with a microscope to find the differences, for this is not the way the average purchaser views the marks. To the average buyer, the points of

similarity are the more important that minor points of difference. A court should not engage "technical gymnastics" in an attempt to find some minor differences between conflicting marks. However, where there are both similarities and differences in the marks, there must be weighed against one another to see which predominate."

24. The dissection of the marks as suggested by learned counsel for UBPL is an artificial one. He wanted 'ZID' which was the generic part of the marks to be substituted by some other word like 'TIS' or 'BES' and then the two marks to be compared. This submission is based on the decision in Astrazeneca UK Limited where 'Mero' was identified as the generic part of the mark derived from the active pharmaceutical ingredient. In the first place, no such submission appears to have been made before the IPAB. Secondly, the type of dissection suggested, i.e. separating 'FOR' and 'ZID' and then replacing 'ZID' with 'another word 'TIS' before comparing the marks does not appear to be permissible in law. As already noticed it is not just the generic part 'ZID' that is common to both marks. The further prefix 'OR' too is common. In other words, 'ORZID' is common to both marks. No parallel can therefore be drawn with the facts in Astrazeneca UK Limited. A person of average intelligence and imperfect recollection seeking to buy CEFTAZIDIME injection would hardly undertake any 'dissection' exercise, much less in the manner suggested by learned counsel for UBPL, to discern the fine distinction between the marks. Also, unlike a consumer durable product, the variations in the size of font, colour scheme, trade dress of the label for a medicine would not make much of a difference. In the considered view of the Court, the IPAB has applied the correct test in coming to the conclusion that FORZID is deceptively similar to ORZID."

38. The learned Single Judge also takes note of "Cadila Health Care Test", elaborately and based on that judgment, deceptive similarity which arises in the instant case is pointed out as follows:

"26. Viewed in light of the decision in Cadila Health Care Ltd. admittedly both FORZID and ORZID are prescription drugs. The dosages of FORZID and ORZID are not the same. It would pose

a grave risk to health if a person who has been prescribed a dosage of 250 mg CEFTAZIDIME injection (ORZID) is administered a 1000 mg dosage (FORZID). These are injections administered intravenously and can have a direct and immediate impact. In the circumstances, the mere fact that they are priced differently is not sufficient to hold that the unwary average purchaser of the drugs will not be confused into thinking one is as good as the other or in fact both are the same drug. Then there is the other real danger that a prescription written for ORZID may be mistaken by the dispenser at the pharmacy shop to be FORZID or vice versa. If it is asked for verbally the phonetic similarity is likely to cause confusion. The health of a person for whom the medicine is prescribed cannot possibly be put to such great risk. In the considered view of this Court on the question of deceptive similarity, the reasoning and conclusion of the IPAB does not call for interference."

39. These are the findings of fact arrived at by the IPAB and the learned Single Judge.

40. The appellant could not successfully pierce through the approach of the two authorities below, which had taken into consideration of the judgments and the test laid down therein and application of the said test in the facts of the present case. In the present LPA, we do not find any cause to take a different view or interfere with these findings of the fact.

41. The orders of the learned Single Judge and the Division bench of the Madras High Court were relied upon by the learned counsel for the appellant to contend that it was already held that there was no deceptive similarity between the appellant's trademark and that of the respondent No.1. This argument is rightly brushed aside by the learned Single Judge holding that those orders were passed in application for interim injunction. While passing such orders, the Court only takes prima facie view of the matter. IPAB, on the other hand, determined the issue finally on the basis of evidence produced before it and in this final determination it was not bound by the tentative observations which deciding the application for interim injunction under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure. The learned Single Judge has also remarked that the two findings of the learned Single Judge of the Madras High Court, viz., two competing marks were phonetically similar and that the

respondent No.1 was a prior registered user, were affirmed by the Division Bench of the Madras High Court. Moreover, the defence of the appellant herein before the learned Single Judge in the Madras High Court put forth by the appellant herein and the proceedings before the High Court was not accepted. The only factor which weighed, while taking prima facie view and refusing interim injunction was that the dosage of the two drugs and their respective prices were different. We would like to quote from the following judgment in the case of **Baker Hughes Limited Vs. Hiroo Khushalani,** [1998 PTC (18) 580] where the facet of likelihood of confusion even by the enlightened public was noticed in the following words:

> "Again in Grotrian, Helfferich, Schulz, Th. Steinweg Nachf, a **Corporation Vs. Steinway & Sons, a corporation,** 365 F.Supp. 707 (1973), striking a similar note the Court held as under:
>
> > "Plaintiff argues that purchaser will not be confused because of the degree of their sophistication and the price (**B & L Sales Associates Vs. H. Daroff & Sons, Inc.,** supra, 421 F.2d at 354). It is true that deliberate buyers of expensive pianos are not as vulnerable to confusion as to products as hasty buyers of inexpensive merchandise at a newsstand or drug store [Callmann, Unfair Competition Trademarks and Monopolies, (3d ed. 1971)]. The sophistication of buyers, however, does not always assure the absence of confusion [**Communications Satellite Corp. Vs. Comcet, Inc.,** 429 F.2d at 1252]. It is the subliminal confusion apparent in the record as to the relationship, past and present, between the corporate entities and the products that can transcend the competence of even the most sophisticated consumer. Misled into an initial interest, a potential Steinway buyer may satisfy himself that the less expensive Grotrian-Steinweg is at least as good, if not better, than a Steinway. Deception and confusion thus work to appropriate defendant's good will. This confusion, or mistaken beliefs as to the companies' interrelationships, can destroy the value of the trademark which is intended to point to only one company [**American Drill Busing Co. v. Rockwell Mfg. Co.,** 342 F.2d 1922, 52 CCPA 1173 (1965)]. Thus, the mere fact

> that purchasers may be sophisticated or discriminating is not sufficient to preclude the likelihood of confusion. "Being skilled in their own art does not necessarily preclude their mistaking one trademark for another when the marks are as similar as those here in issue, and cover merchandise in the same general field" [Id].

Having regard to the above discussion prima facie I am of the opinion that the word Baker occurring in the corporate name of the second defendant suggests its connection or nexus with 'Baker', which depicts a wrong picture as from February, 1995 'Baker' has terminated its relation with the defendants. The continuance of the word Baker as part of the corporate name of the second defendant is likely to cause deception and confusion in the mind of the customers. There would be no justification for the second defendant to use the word Baker as part of its corporate name after the ties between the first plaintiff and the second defendant have ceased to exist."

This decision was approved by the Supreme Court in the case of **Hiroo Khushlani and Another** (Supra).

42. We are, thus, of the opinion that the impugned judgment of the learned Single Judge does not call for any interference, as none of the arguments of the appellant is convincing enough to shake the correctness thereof. As a result, we dismiss this appeal being devoid of any merit with cost quantified at Rs. 25,000/-.

ILR (2012) V DELHI 363
O.M.P.

INDIABULLS FINANCIAL SERVICES LIMITED (INDIA) ....PETITIONER

VERSUS

AMAPROP LIMITED (CAYMAN ISLANDS) & ANR. ....RESPONDENTS

(S. MURALIDHAR, J.)

O.M.P. NO. : 287/2011 DATE OF DECISION: 18.05.2012

Arbitration and Conciliation Act, 1996—Section 34—Petitioner challenged award passed by International Arbitral Tribunal ('Tribunal') under International Centre for Dispute Resolution in dispute which arose between petitioner and Respondent no.1—Respondent raised objection to maintainability of petition on ground that Section 12.10 & Section 12.11 of Agreement clearly laid down that parties had agreed to jurisdiction of New York Court and had thus, excluded appellant of Indian Law not only on substance of dispute but also on conduct of Arbitration—On other hand, on behalf of petitioner it was urged that award was contrary to public policy of India and in view of Article V (2)(b) of New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958, recognition or enforcement of arbitral award may be refused, if competent authority of country where recognition or enforcement is sought, comes to conclusion that such recognition or enforcement of award could be contrary to public policy of that country—Also, as per clauses of agreement, there was no implied or express exclusion of jurisdiction of Indian Courts—Held:- A non-exclusive jurisdiction clause self evidently leaves open the possibility that there may be another

appropriate jurisdiction—Decree of appropriateness of an alternative jurisdiction must depend on all circumstances of case—In addition to usual factors, wording of non-exclusive jurisdiction clause may be relevant, because of light which it may throw on parties intentions—Petitioner cannot invoke jurisdiction of this Court under Section 34 to challenge impugned award.

Consequently, the use of the words 'non-exclusive jurisdiction' in Section 12.10 would not ipso facto imply that the parties have agreed to submit to the jurisdiction of Indian courts. The absence of an express exclusion of the jurisdiction of Indian courts is apparent. The question whether there is an implied exclusion has to be discerned from a collective reading of Section 12.10 and 12.11. Section 12.11 (c) which is titled "Binding Character" states that the Award shall be final and binding and "the judgment thereon may be entered by any state or federal court of competent jurisdiction." Given the context of the place of arbitration being New York and the jurisdiction of the courts in New York being expressly mentioned in Section 12.11, the words "state or federal court" has to necessarily imply courts in the U.S.A. It also requires to be seen if the intention was to avoid parallel proceedings in more than one jurisdiction. When the present petition was filed by IFSL under Section 34 of the Act, Amaprop had already filed the proceedings for confirmation of the Award which was pending in the SDNY. After receiving the notice in the suit CS (OS) No. 899 of 2011 filed by IFSL, Amaprop filed anti-suit injunction proceedings in New York Court in which a consent order was passed on 17th June 2011. The preamble to the said Order shows that the motion brought by Amaprop for anti-suit injunction was inter alia to restrain IFSL "from commencing or prosecuting any action or proceeding in India" that sought to prevent the prosecution of the confirmation proceeding. It was in the above context that it was agreed between the parties that at the next hearing of CS (OS) No. 899 of 2011 the said suit would be permanently withdrawn by IFSL. The fact that parties did not

require the present petition under Section 34 to be dismissed did not mean that Amaprop had conceded to the jurisdiction of this Court to entertain the petition. On the other hand, IFSL appears to have accepted the continuation of the confirmation proceedings in the New York Court. In Clause 4(b) of the consent order it was clarified that the said consent order would not "have any effect on the rights, claims and defenses of any party to that proceeding with respect to the enforceability of the Award within the Republic of India".

(Para 31)

The proceedings for confirmation i.e., for recognition of the Award under the laws of New York were akin to the procedure that was prevailing under the Arbitration Act, 1940. This was also consistent with what was stated in Article V (2) (b) of the New York Convention which is incorporated as such in the Schedule to the 1996 Act. IFSL was aware of the consequence of permitting the proceedings for recognition/ confirmation of the Award to continue in the New York Court. With IFSL having withdrawn the anti-injunction suit filed by it in this court questioning the continuation of the confirmation proceedings, there was no restraint as far as those proceedings were concerned. In terms of the New York law as well as New York Convention, it was open to IFSL to point out to the New York Court in the confirmation proceedings that recognition ought not to be granted since the Award was opposed to the public policy of India. IFSL did not avail of such opportunity. It was noted by the New York Court in the order dated 9th September 2011 confirming the Award that: "As of today's date, Indiabulls has filed no opposition papers. Accordingly, the Court will treat the petition as unopposed." This therefore meant that IFSL had an opportunity to question the Award which it did not avail of. The said order of the New York Court became final and judgment was entered by the New York Court on 14th September 2011. Thereafter the question of there being parallel proceedings in this Court under Section 34 of the Act to challenge the Award did not arise. Going by the

interpretation of the expression "nonexclusive jurisdiction" in **Highland Crusader Offshore Partners v. Deutsche Bank** as well as the discussion in *Cheshire North and Fawcett on Private International Law* (14th Ed, 2008), it appears that the parties understood that there ought not be parallel proceedings to challenge the Award as that could be 'vexatious and oppressive'. The other interpretation, as suggested by learned Senior counsel for Amaprop, and which seems plausible, is that the words "non-exclusive jurisdiction" have been used in the context of the steps that were contemplated for effecting the transfer, if any, of shares pursuant to the exercise of the put option and not in the context of the further stages of the arbitral proceedings. The fact remains that IFSL did not question the proceedings in the New York Court for confirmation/recognition of the Award. It could not now be heard to object to the said Award in separate proceedings in this Court under Section 34 of the Act. **(Para 32)**

A combined reading of Sections 12.10 and 12.11 of the Agreement leads to the position that although there was no express exclusion of the jurisdiction of the Indian courts, the parties intended that the further proceedings concerning the challenge, if any, to the Award had to take place in the New York Courts and that the judgment concerning the recognition of the Award may be entered by "any state or federal court of competent jurisdiction." **(Para 33)**

Important Issue Involved: A non-exclusive jurisdiction clause self evidently leaves open the possibility that there may be another appropriate jurisdiction—Degree of appropriateness of an alternative jurisdiction must depend on all circumstances of case—In addition to usual factors, wording of non-exclusive jurisdiction clause may be relevant, because of light which it may throw on parties intentions.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Rajiv Nayar, Senior Advocate with Ms. Mamta Tiwari, Ms. Veronica Mohan and Mr. Rishi Agarwala, Advocates.

FOR THE RESPONDENTS : Mr. T.R. Andhyarujina and Mr. Pradeep Sancheti, Senior Advocates with Mr. Vishal Maheswari. Mr. Lokesh Bhola and Mr. Vishnu Anand, Advocates for Respondent no.1/ Amaprop.

CASES REFERRED TO:

1. *Aitreya Limited* vs. *Dans Energy Pvt. Ltd.* 2012 (127) DRJ 565.
2. *Dozco India Private Limited* vs. *Doosan Infracore Company Limited* (2011) 6 SCC 179.
3. *Videocon Industries Limited* vs. *Union of India* (2011) 6 SCC 161.
4. *Yograj Infrastructure Limited* vs. *Ssang Yong Engineering & Construction Company Limited* (2011) 9 SCC 735.
5. *Highland Crusader Offshore Partners* vs. *Deutsche Bank* AG [2009] EWCA Civ 725.
6. *Venture Global Engineering* vs. *Satyam Computer Services Ltd.* AIR 2008 SC 1061.
7. *Bhatia International* vs. *Bulk Trading S.A.* (2002) 4 SCC 105.
8. *Ace Insurance SA-NV* vs. *Zurich Insurance Co* [2001] EWCA Civ 173, [2001] 1.
9. *British Aerospace PLC* vs. *Dee Howard & Co* [1993] 1 Lloyd's Rep 368, 376.
10. *S & W Berisford PLC* vs. *New Hampshire Insurance Co* [1990] 1 Lloyd's Rep 454.
11. *Abner Soleimany* vs. *Sion Soleimany* QBENI 97/0882 CMSI.

RESULT: Petition dismissed.

S. MURALIDHAR, J.

1. Indiabulls Financial Services Limited (India) ('IFSL') has filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act'), challenging an Award dated 21st March 2011 of the International Arbitral Tribunal ('Tribunal') under the International Centre for Dispute Resolution in the dispute between IFSL and Respondent No. 1 Amaprop Limited (Cayman Islands) ('Amaprop').

Background Facts

2. The disputes between IFSL and Amaprop arose out of a Share Subscription and Shareholders Agreement dated 31st May 2005 ('Agreement') entered into by them in terms of which Amaranth LLC, a company incorporated under the Laws of Cayman Islands, the predecessorin-interest of Amaprop, acquired 47.5% shareholding in Indiabulls Finance Company Private Limited (India) ('IFCPL') an unlisted company registered under the Indian Companies Act, 1956. The agreement gave a right to Amaprop to cause IFSL to purchase the aforementioned stake of Amaprop in IFCPL (the 'Put Right') at the price to be calculated in terms of the Agreement (the 'Put Price') subject to mandatory approvals under the Indian laws.

3. According to IFSL, both IFCPL and IFSL are subject to foreign exchange regulatory controls, and any transfer of their respective shares is subject to Indian laws. In the present proceedings, IFCPL has been arrayed as proforma Respondent No. 2.

4. It is stated that on 6th June 2005 an Amendment Agreement was entered into between IFSL, Amaranth LLC, Amaprop and IFCPL so as to replace Amaranth LLC with Amaprop as a party to the Agreement. On 26th June 2005, a Second Amendment Agreement was entered into between IFCPL, IFSL and Amaprop for further amendment in respect of "Key Man" under Section 13.1 of the Agreement; "Officer in Default" under Section 5 of the Agreement; Section 8.1 concerning "Investor Nominee Director"; Section 8.2 concerning "Parent Nominee Directors" and Section 8.3 concerning "Board Composition".

5. On 19th January 2010, Amaranth Advisors LLC issued a Put Notice calling upon IFSL to purchase the entire stake of 47.5% of IFCPL

at the Put Price. According to IFSL, since the Put Price demanded by Amaprop was O.M.P. No. 287 of 2011 Page 2 of 24 higher than the valuation prescribed under the Circular No. 16 dated 4th October 2004 of the Reserve Bank of India ('RBI') as well as the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 ('FEMA'), mandatory approval of the RBI was required for completion of the transaction at the agreed Put Price. Accordingly, IFSL applied to the RBI on 15th February 2010 seeking such approval. According to IFSL, the RBI rejected its application as a result of which IFSL could not transfer the shares at the Put Price as had been sought by Amaprop. This prompted Amaprop to seek reference of the disputes to arbitration in terms of the Agreement.

6. IFSL filed a suit in the Bombay High Court seeking to injunct the arbitral proceedings and an ad-interim stay was granted by Bombay High Court. However, Amaprop filed proceedings in the New York Court for a stay of legal proceedings in India. The Court of the Southern District of New York ('SDNY') granted an injunction against the proceedings in India. Meanwhile the RBI rejected the application filed by IFSL which then withdrew the suit from the Bombay High Court and joined the arbitration proceedings. IFSL states that it took the position that the Put Option could be performed at the Put Price consistent with the FEMA regulations and no higher, and that the contractual price was not capable of being paid by IFSL.

7. Before the Tribunal it was contended by Amaprop that IFSL could have paid it the Put Price without seeking any permission of the RBI. Amaprop also contended that IFSL was in breach of the Representations and Warranties under the contract and had misrepresented that the put contract which was lawful and enforceable under the Indian law. Amaprop claimed, therefore, that IFSL was liable for damages for breach of Warranty.

Award of the Tribunal

8. In the impugned Award dated 21st March 2011 the Tribunal accepted the plea of IFSL that the mandatory foreign exchange laws of India would apply. However, it took the view that IFSL was under a contractual obligation to pay the Put Price and that the Tribunal could 'craft' its Award to achieve the contractual intent. The Tribunal then relied on the Valuation Report of KPMG, a firm of Chartered Accountants

engaged by IFSL to undertake the valuation of the equity shares of IFCPL which gave the valuation of the Put Shares at Rs. 368 per share. The Tribunal observed that in terms of the RBI Circular No. 49 IFSL could purchase the Put Shares at that value without permission of the RBI. In para 152 of the impugned Award it observed that if the parties indeed prepared and presented a new application to the RBI for permission at the Put Price of Rs. 593.75 per share, RBI could reject such an application or authorize a price anywhere between Rs. 368 to Rs. 593.75 per share, and if RBI authorized the sale of Put Shares at a price higher than Rs. 368 per share, then the Tribunal's 'dispositive conclusions' would be adjusted pro tanto.

9. The Tribunal then divided the operative 'dispositive conclusions' into six segments. In para 175 the Tribunal explained that it was doing so "anticipating that the one enunciated in Para 217 may not be enforceable in India" and that "doing so will not be violative of the rule against indirection in Indian law" i.e. the rule which prohibits one to accomplish indirectly what the law forbids doing directly. First, the Tribunal dismissed Amaprop's claim against IFCPL. Secondly, it declared that IFCPL was contractually indebted to Amaprop for a sum of Rs. 1,92,00,07,000 calculated at 32,33,696 equity shares of IFCPL at the Put Price of Rs.593.75 per share. Thirdly, the parties were directed to proceed to carry out, not later than thirty O.M.P. No. 287 of 2011 Page 4 of 24 days of the final Award, the Put Closing as directed in Section 7.7.(d)(i)(B) and Section 7.7.(d)(iii)(A) and (B) of the Agreement at the price of Rs. 368 per share, for a total amount of Rs. 1,190,000,128. Fourthly, IFSL was directed to pay Amaprop the above sum within thirty days together with pre-Award interest at 14% as well as post-Award interest at 12% per annum till the date of payment. Fifthly, IFSL was directed to pay Amaprop a further sum of Rs. 73,00,06,872 together with interest at 14% per annum for the period 18th February 2010 to 20th April 2011 as well as post-Award interest at 12% per annum. Sixthly, the fees and expenses were directed to be shared equally by the parties. IFSL was asked to reimburse Amaprop a sum of USD 11,645.99 within thirty days. In para 219, the Tribunal directed the parties to present a new application to the RBI pursuant to the Circular No. 49 and if the RBI authorized the sale of Put Shares at a price higher than Rs. 368 per share, then the directions in the earlier paragraphs of the 'dispositive conclusions' were to be adjusted *pro tanto*.

10. After the Award, by a letter dated 13th April 2011 IFSL requested RBI to amend its earlier decision stating that the price of the shares of IFCPL was Rs. 225 per share as calculated by KPMG using the Discounted Free Cash Flow Method under A.P. (DIR Series) Circular No. 49 dated 4th May 2010 and that it should be permitted to remit Amaprop an amount of Rs. 2,18,88,24,148 towards the aggregate consideration for transfer of 32,33,696 equity shares of IFCPL at a price of Rs. 676.88 per equity share.

Proceedings in the present petition

11. IFSL filed the present petition on 18th April 2011. It was listed first for hearing on 19th April 2011 when this Court took note of the above application by IFSL to the RBI but expressed its doubts about the O.M.P. No. 287 of 2011 Page 5 of 24 appropriateness of the said application considering that the RBI had already rejected the application of IFSL valuing the share price at Rs. 593.75 per share. The Court felt that IFSL should approach the RBI seeking approval on the value determined by the Tribunal which was Rs. 368 per share which was likely to be accepted by the RBI as it was in compliance with the Circular No. 49 dated 4th May 2010. The Senior Counsel appearing for IFSL agreed to the said suggestion and stated that IFSL would approach the RBI in seeking aforementioned terms and within thirty days also filed a compliance affidavit.

12. This Court was informed at the subsequent hearing on 23rd May 2011 that pursuant to the order dated 19th April 2011 of the Court an application had been filed by IFSL with the RBI on 21st April 2011. In the said letter addressed by IFSL to the RBI it was stated that in the event RBI was not inclined to permit the transfer of shares in terms of the application dated 13th April 2011 then in the alternative, permission could be granted to IFSL to purchase the shares of IFCPL from Amaprop at Rs. 368 per share, which was the figure arrived at by KPMG following the Net Asset Value ('NAV') method for valuation of the shares of IFCPL.

13. On 24th June 2011, RBI wrote to IFSL and advised that "the parties to the agreement may arrive at mutually agreed price in accordance with the extant provisions of FEMA, 1999 rules/regulations/guidelines issued thereunder, within a reasonable time, say three months and carry

out the transaction accordingly". Consequent thereto, counsel for IFSL wrote to the counsel for Amaprop requesting it to nominate a representative to get in touch with its Indian counsel "in order to settle the dispute and conclude the transaction before the three months period granted by RBI which period O.M.P. No. 287 of 2011 Page 6 of 24 expires on September 23, 2011". On 22nd August 2011 Amaprop's counsel wrote to counsel for IFSL stating that in the event IFSL proposed to carry out a put closing at Rs. 225 per share by paying a sum of Rs. 1,19,24,25,400 plus interest at 1% per month from 18th February 2010 till the date of payment, they were "certainly willing to discuss such a proposal".

14. Even prior to the filing of the present petition on 23rd March 2011 Amaprop filed proceedings before the United States District Court, SDNY for confirmation of the Award. It was during the pendency of those proceedings for confirmation of the Award that the present petition was filed by IFSL on 18th April 2011. Simultaneous with the present petition, IFSL filed a suit, CS (OS) No. 899 of 2011 seeking an anti-suit injunction restraining Amaprop from continuing the aforementioned confirmation proceedings or seeking enforcement of the Award. An application for interim relief being IA No. 5913 of 2011 was also filed in the said suit.

15. Although notice was issued in the present petition on 19th April 2011 and notices were served on Amaprop on 3rd May 2011, the summons in the suit were not received on that date. Consequently on 13th May 2011 counsel for Amaprop wrote to the counsel for IFSL seeking clarification on the scope of the present petition. On 20th May 2011 counsel for IFSL informed the counsel for Amaprop that the present petition concerned only the enforcement of Award in India.

16. On 25th May 2011 Amaprop's counsel in India received a copy of the plaint in CS (OS) No. 899 of 2011. Soon thereafter Amaprop instituted anti-suit injunction proceedings in the New York Court in which a temporary restraint order was passed. Thereafter on 17th June 2011 a consent order was passed in the said proceedings in the New York Court in the following terms:

> "1. The Respondent (IFSL) shall not take any further action in the Indian Injunctive Action now pending in the New Delhi Court, except that it shall permanently withdraw that action at the next regularly scheduled sitting of the

New Delhi Court, which is July 4, 2011, at which point the Indian Injunctive Action will be terminated, and no relief may be granted thereon.

2. The Respondent, together with its officers, agents, servants, employees and attorneys, and all other persons who are in active concert or participation with the Respondent or any of its officers, agents, servants, employees or attorneys, are permanently restrained and enjoined from commencing or prosecuting any action or proceeding in the Republic of India; (a) that seeks to prevent, enjoin, restrain or interfere with the prosecution of the Confirmation Proceeding by Petitioner (Amaprop); or (b) that seeks to enjoin, annul, vacate, modify or otherwise affect, in any manner whatsoever, the recognition, enforcement or confirmation of the Award in any jurisdiction other than the Republic of India.

3. By their signature below, the attorneys for the Respondent confirm that they are duly authorized to enter into this stipulation and order for permanent injunction on Respondent's behalf. The Respondent agrees that, having authorized its attorneys to enter into this stipulation and order for permanent injunction, it is subject to the personal jurisdiction of this Court in any action or proceeding to enforce the terms of this stipulation and order for permanent injunction.

4. For the avoidance of doubt, nothing contained in this Stipulation and order (a) requires dismissal of the Indian Section 34 Proceeding, or (b) shall have any effect on the rights, claims and defences of any party to that proceeding with respect to the enforceability of the Award within the Republic of India."

17. On 8th July 2011, IFSL withdrew the suit, CS (OS) No. 899 of 2011. Thereafter by an order dated 9th September 2011 the New York Court confirmed the Award. Consequently, a judgment was entered in favour of Amaprop on 14th September 2011.

18. In accordance with the applicable arbitral rules of the New York Court, Amaprop served on IFSL restraining notices and information

subpoenas dated 4th October 2011 issued by the New York Court. Amaprop also served a restraint notice and *subpoena* dated 14th October 2011 on IFSL's counsel in USA. Subsequently, with the confirmation order dated 18th October 2011 of the New York Court, Amaprop also served notices on IFSL through courier. At this stage, IFSL filed CCP No. 101 of 2011 against Amaprop in this Court in which on 19th October 2011 notice was directed to be issued. This resulted in Amaprop again moving the New York Court for an anti-suit injunction vis-a-vis the contempt proceedings. The New York Court on 26th October 2011 granted a temporary injunction. By a stipulation dated 31st October 2011, IFSL's counsel in the USA consented to the restraint/injunction order continuing till the matter was heard by the New York Court on 7th /8th or 9th December 2011.

19. On 8th November 2011 IFSL stated before this Court that in view of Amaprop having instituted anti-suit proceedings in the New York Court, it was not pressing the contempt petition. Consequently, the contempt petition was disposed of as such.

Submissions of Counsel

20. Mr. T. R. Andhyarujina, learned Senior counsel for Amaprop, first raised an objection to the maintainability of the present petition under Section 34 of the Act. He submitted that under Sections 12.10 and 12.11 of the Agreement, the parties had agreed to the jurisdiction of the New York Court and thus had excluded the application of the Indian law not only on the substance of the dispute but also on the conduct of arbitration. Moreover, the venue of the arbitration was also outside India. It is submitted that IFSL's right to get the Award, which was agreed to be final and binding on the parties, modified or vacated should be made before the New York Court. It is further submitted that in terms of the consent order between the parties, all disputes arising thereunder or in relation to the Agreement had to be resolved only through arbitration at New York. By an order dated 9th September 2011 passed by the New York Court, the Award stood confirmed and a judgment was also entered in the said terms in favour of Amaprop. The said consent order contemplated a possible action by Amaprop to seek enforcement of the Award in India and the question of IFSL raising an objection as to the Award being opposed to the public policy of India under Section 48 of the Act would if at all arise only at that stage and not earlier.

21. Mr. Rajiv Nayar, learned Senior counsel appearing for IFSL, contended that in view of the decisions of Supreme Court in **Bhatia International v. Bulk Trading S.A.** (2002) 4 SCC 105 and **Venture Global Engineering v. Satyam Computer Services Ltd.** AIR 2008 SC 1061, the present petition is maintainable under Section 34 of the Act. A reference is also made to Article V (2) (b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ('New York Convention') which categorically laid down that the recognition or enforcement of an arbitral award may be refused, if the competent authority of the country where recognition or enforcement is sought, comes to the conclusion that such recognition or enforcement of the award could be contrary to the public policy of that country. Mr. Nayar referred to Sections 12.10 and 12.11 of the Agreement and submitted that there is no implied exclusion of Part-I of the Act much less an express exclusion of the jurisdiction of Indian courts. He laid emphasis on the expression "non-exclusive jurisdiction" in Article 12.11 of the Agreement and urged that the parties never intended to exclude the jurisdiction of Indian courts. He referred to the decisions in **Dozco India Private Limited v. Doosan Infracore Company Limited** (2011) 6 SCC 179; **Videocon Industries Limited v. Union of India** (2011) 6 SCC 161; **Yograj Infrastructure Limited v. Ssang Yong Engineering & Construction Company Limited** (2011) 9 SCC 735 and a decision of this Court in **Aitreya Limited v. Dans Energy Pvt. Ltd.** 2012 (127) DRJ 565.

22. Mr. Nayar further submitted that the impugned Award is opposed to the public policy of India. While on the one hand the Award recognized that the transaction of transfer of shares of IFCPL would be subject to the FEMA as well as the RBI Circular, on the other hand the Tribunal proceeded to 'craft' its Award which was totally opposed to that Circular. The impugned Award required IFCPL to apply before the Closing Date to the RBI for permission to transfer the shares in question at a price higher than that permitted by the RBI guidelines. Further the direction of the Tribunal to IFSL to pay Amaprop a further sum of Rs. 73 crores, i.e., equal to the difference between the contract price and the permissible price paid by IFSL as a money claim, was violative of the FEMA and, therefore, was in the teeth of the foreign exchange laws as well as public policy of India. It is contended that the Tribunal in para 131 of the impugned Award virtually compelled IFSL to transgress the applicable Indian law.

23. Countering the above contentions, Mr. T.R. Andhyarujina, learned Senior counsel for Amaprop, submitted that there was an implied exclusion of the Indian Courts. The proper law of the contract was the law of New O.M.P. No. 287 of 2011 Page 11 of 24 York. The words "non-exclusive jurisdiction" in Sections 12.10 and 12.11 of the Agreement did not relate to the arbitral proceedings as such but to the Agreement. He referred to the decision in **Highland Crusader Offshore Partners v. Deutsche Bank** AG [2009] EWCA Civ 725 and submitted that there was no clause in the Agreement which conferred any jurisdiction on Indian Courts. The parties had acted on the consent terms agreed between them in the New York Court pursuant to which IFSL had withdrawn its suit i.e. CS(OS) No. 899 of 2011.

Applicability of Part I of the Act to foreign Awards

24. The preliminary issue that requires to be decided is whether the present petition under Section 34 of the Act challenging the impugned foreign Award dated 21st March 2011 of the Tribunal is maintainable as such.

25. The question of applicability of Part-I of the Act to foreign arbitral proceedings was considered in **Bhatia International v. Bulk Trading S.A.** In the said case the contract between the parties contained an arbitration clause in terms of which the arbitration had to be as per the rules of the International Chamber of Commerce ('ICC'). Parties agreed that the arbitration could be held at Paris (France). Disputes were referred by the ICC to the sole Arbitrator. The Respondent in the said case, i.e., Bulk Trading SA filed an application under Section 9 of the Act before the Court of III Additional District Judge, Indore (MP) ('Civil Court') against the appellant Bhatia International and the second Respondent in the said case seeking interim reliefs. The objection raised by Bhatia International as to the maintainability of the petition under Section 9 of the Act was rejected by the Civil Court. Bhatia International then filed a writ petition in the High Court which came to be dismissed. Before the Supreme Court, learned Senior counsel for Bhatia International pointed out that Part-II of the Act would not apply to an international commercial arbitration which took place in a non-convention country. The Court then observed that the Act nowhere provided that its provisions were not to apply to international commercial arbitrations which took place in a non-convention country. Section 2 (1) (f) of the Act which defined an

international commercial arbitration made no distinction between international arbitrations held in India or outside India. It was observed in para 21 of the judgment that "by omitting to provide that Part I will not apply to international commercial arbitrations which take place outside India the effect would be that Part I would also apply to international commercial arbitrations held out of India." It was observed that in respect of arbitrations which took place outside India even the non-derogatory provisions of Part I would be applicable. However, the agreement to this effect by the parties could be either express or implied. It was clarified in Para 26 that "the arbitration not having taken place in India, all or some of the provisions of Part I may also get excluded by an express or implied agreement of parties". Thereafter it was concluded in Para 32 as under (SCC @ p.121):

> "32. To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply."

26. The facts in **Bhatia International** required the Court to consider specifically whether a petition under Section 9 is maintainable. The question of maintainability of a petition under Section 34 did not arise. The Supreme Court observed that under Article 23 of the ICC Rules even before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, "the parties may apply to any competent judicial authority for interim or conservatory measures". Consequently, it was concluded in (SCC para 34) that "in such cases an application can be made under Section 9 of the said Act".

27. In the cases decided by it after **Bhatia International**, the Supreme Court has had to examine whether there was an express or implied agreement to exclude jurisdiction of the Indian Courts. The decision in each cases depended on the answer to that question. Thus in **Venture**

Global Engineering v. Satyam Computer Services Ltd., the Court went by the shareholders' agreement which expressly provided that the laws in force in India including the Companies Act would apply. This was held to be in the nature of a non-obstante clause which "would override the entirety of the agreement including sub-section (b) which deals with the settlement of the dispute by arbitration and, therefore, section 3 would apply to the enforcement of the Award. In such event, necessarily enforcement has to be in India as declared by the very section which overrides every other section". Significantly, in that case the foreign Award went against the Appellant ('Venture') which was directed to transfer the shares to Respondent No. 1 Satyam Computer Services Ltd. ('Satyam'). Satyam had filed a petition "to recognize and enforce the award" before the United States District Court, Eastern District Court of Michigan ('US Court') in which Venture appeared and had filed a cross petition. It was contended by Venture that the enforcement of the Award was in violation of the FEMA. Venture also filed a suit in the Court of the 1st Additional Chief Judge, City Civil Court, Secunderabad seeking a declaration that the award was illegal. The City Civil Court initially passed an ad-interim ex parte order restraining Satyam from seeking or effecting the transfer of shares either in terms of the Award or otherwise. The said interim order was challenged by Satyam in the High Court which admitted the appeal and directed interim suspension of the order of the City Civil Court. Thereafter the trial court allowed Satyam's application under Order VII Rule 11 CPC and rejected Venture's plaint. Venture's appeal was dismissed by the High Court which held that the Award could not be challenged even if it was against the public policy. Venture then appealed to the Supreme Court. The matter was remanded by the Supreme Court to the City Civil Court for adjudication of Venture's suit on merits holding that Part-I of the Act was applicable to a foreign Award.

Interpretation of the Clauses in the Agreement

28. Turning to the case on hand, it is necessary to examine whether the relevant clauses of the Agreement envisage any express or implied exclusion of the jurisdiction of Indian courts. Sections 12.10 and 12.11 of the Agreement read as under:"

Section 12.10: Governing Law; Jurisdiction; Waiver of Jury Trial

(a) This Agreement shall be governed by and construed in

accordance with the laws of the State of New York, United States of America, without regard to the conflicts of law principles of such State.

(b) Each of the Company, Parent and each Investor hereby (i) agrees that any Action with respect to this Agreement or any Transaction Document may be brought in the courts of the State of New York located in New York, (ii) accepts for itself and in respect of its property, generally and unconditionally, the nonexclusive jurisdiction of such courts, (iii) irrevocably waives any objection, including, without limitation, any objection to the laying of venue or based on the grounds of forum non conveniens, which it may now or hereafter have to the bringing of any Action in those jurisdiction, and (iv) irrevocably consents to the service of process of any of the courts referred to above in any Action by the mailing of copies of the process to the parties hereto as provided in Section 12.6. Service effected as provided in this manner will become effective ten (10) calendar days after the mailing of the process.

(c) Each of the company, parent and each investor hereby waives any right to a trial by jury in any action to enforce or defend any right under this agreement or any transaction document or any amendment, instrument, document or agreement delivered or to be delivered in connection with this agreement or any transaction document and agrees that any action will be tried before a court and not before a jury.

Section 12.11: Arbitration

(a) **Arbitration.** Any Action arising relating to this Agreement or the other Transaction Documents shall be settled by arbitration in the State of New York in accordance with the rules of the American Arbitration Association; provided, however, that a party, without prejudice to these procedures may seek a preliminary injunction or order provisional relief if , in its judgment, such action is deemed necessary to avoid irreparable damages or to preserve status quo. The costs and expenses of the arbitration, including the

arbitrator's fees and expenses ("Arbitration Costs"), shall be borne by the parties as determined by the arbitrator to be fair and reasonable; provided, however, that each party shall pay for and bear the cost of its own experts, evidence and counsel. No award of punitive damages may be rendered by the arbitrator in such proceeding.

(b) **Arbitration Procedures.** Any arbitration hereof shall be conducted in accordance with the following procedures:

(i) Any party (the "Requesting Party") demanding arbitration hereunder shall give a written notice of such arbitration demand ("Arbitration Notice") to the other parties which Arbitration Notice shall describe in reasonable detail in the nature of the claim, dispute or controversy and any relief or remedy sought.

(ii) Within fifteen (15) calendar days after the receipt of an Arbitration Notice, the Requesting Party, on the one hand, and the other parties (the "Requesting Party") on the other hand, shall mutually select and designate in writing one reputable, independent, disinterested individual (a "Qualified Individual") willing to act as an arbitrator of the claim, dispute or controversy in question. In the event that the Requesting Party and the Responding Party are unable to agree on a Qualified Individual within the 15-day period referred to above , then, the Requesting Party and the Responding party shall each appoint a Qualified Individual as an arbitrator and the arbitrators so appointed will select and appoint a third Qualified Person as an arbitrator.

(iii) The presentations of the Requesting Party and the Responding Party in the arbitration proceeding shall be commenced and completed within sixty (60) days after the selection of the arbitrator pursuant to this clause (b) above, and the arbitrator shall render its decision in writing within thirty (30) days after the completion of such presentations.

(c) Binding Character. Any decision rendered by the arbitrator pursuant to this Section 12.11 shall be final and binding

on the parties thereto, and judgment thereon may be entered by any state or federal court of competent jurisdiction."

29. Section 12.10 (a) makes it clear that the Agreement was to be governed by the laws of the State of New York (USA), "without regard to the conflicts of law principles of such State". Any action in respect of the Agreement had to be brought in the courts of the State of New York and each party accepted unconditionally "the non-exclusive jurisdiction of such courts" and irrevocably waived any objection to the bringing of any action in those jurisdictions.

30. The expression "non-exclusive jurisdiction" was discussed in the decision of the Court of Appeal in **Highland Crusader Offshore Partners v. Deutsche Bank.** It was explained in paras 64 and 86 as under:

> "It stands to reason that by agreeing to submit to the nonexclusive jurisdiction of State X the parties implicitly agree that X is an appropriate jurisdiction, and therefore either party should have to show a strong reason for later arguing that it is not an appropriate jurisdiction. The cases support this approach: see **Cannon Screen Entertainment Limited v. Handmade Films (Distributors) Limited** (July 11, 1989, Commercial Court, unreported), **S & W Berisford PLC v New Hampshire Insurance Co** [1990] 1 Lloyd's Rep 454, **British Aerospace PLC v Dee Howard & Co** [1993] 1 Lloyd's Rep 368, 376 and **Ace Insurance SA-NV v Zurich Insurance Co** [2001] EWCA Civ 173, [2001] 1 Lloyd's Rep 618, para 62. On the other hand, a non-exclusive jurisdiction clause self evidently leaves open the possibility that there may be another appropriate jurisdiction. **The degree of appropriateness of an alternative jurisdiction must depend on all the circumstances of the case. In addition to the usual factors, the wording of the nonexclusive jurisdiction clause may be relevant, because of the light which it may throw on the parties' intentions.....**"
>
> .....
>
> .....
>
> "86. Cheshire North and Fawcett on Private International Law (14th Ed, 2008) adopt a similarly cautious approach to Sabah.

They say at 474:

> "Where the agreement provides for the non-exclusive jurisdiction of the English courts there is no breach of agreement in bringing proceedings abroad and therefore an injunction will not be granted on the basis of breach of an agreement. However, if one party (A) by way of a pre-emptive strike seeks an injunction abroad whereby the other party (B) will be permanently restrained from making any demand under a contract (containing a non-exclusive English jurisdiction clause) in the hope of preventing B from starting proceedings in England, this is a breach of contract and vexatious. An injunction restraining A from continuing the proceedings abroad will then be granted on the basis of vexation or oppression. Moreover, **the nature of the jurisdiction clause may be such that, although not exclusive, it does not contemplate parallel proceedings and pursuing proceedings abroad would be vexatious and oppressive.** Normally, though, a non-exclusive jurisdiction agreement will contemplate the possibility of simultaneous trials in England and abroad and, if trial is pursed abroad, there will not only be no breach of agreement but also no vexatious or oppressive conduct." " (emphasis supplied)

31. Consequently, the use of the words 'non-exclusive jurisdiction' in Section 12.10 would not ipso facto imply that the parties have agreed to submit to the jurisdiction of Indian courts. The absence of an express exclusion of the jurisdiction of Indian courts is apparent. The question whether there is an implied exclusion has to be discerned from a collective reading of Section 12.10 and 12.11. Section 12.11 (c) which is titled "Binding Character" states that the Award shall be final and binding and "the judgment thereon may be entered by any state or federal court of competent jurisdiction." Given the context of the place of arbitration being New York and the jurisdiction of the courts in New York being expressly mentioned in Section 12.11, the words "state or federal court" has to necessarily imply courts in the U.S.A. It also requires to be seen if the intention was to avoid parallel proceedings in more than one jurisdiction. When the present petition was filed by IFSL under Section 34 of the Act, Amaprop had already filed the proceedings for confirmation of the Award which was pending in the SDNY. After receiving the notice in the suit CS (OS) No. 899 of 2011 filed by IFSL, Amaprop filed anti-

suit injunction proceedings in New York Court in which a consent order was passed on 17th June 2011. The preamble to the said Order shows that the motion brought by Amaprop for anti-suit injunction was inter alia to restrain IFSL "from commencing or prosecuting any action or proceeding in India" that sought to prevent the prosecution of the confirmation proceeding. It was in the above context that it was agreed between the parties that at the next hearing of CS (OS) No. 899 of 2011 the said suit would be permanently withdrawn by IFSL. The fact that parties did not require the present petition under Section 34 to be dismissed did not mean that Amaprop had conceded to the jurisdiction of this Court to entertain the petition. On the other hand, IFSL appears to have accepted the continuation of the confirmation proceedings in the New York Court. In Clause 4(b) of the consent order it was clarified that the said consent order would not "have any effect on the rights, claims and defenses of any party to that proceeding with respect to the enforceability of the Award within the Republic of India".

32. The proceedings for confirmation i.e., for recognition of the Award under the laws of New York were akin to the procedure that was prevailing under the Arbitration Act, 1940. This was also consistent with what was stated in Article V (2) (b) of the New York Convention which is incorporated as such in the Schedule to the 1996 Act. IFSL was aware of the consequence of permitting the proceedings for recognition/ confirmation of the Award to continue in the New York Court. With IFSL having withdrawn the anti-injunction suit filed by it in this court questioning the continuation of the confirmation proceedings, there was no restraint as far as those proceedings were concerned. In terms of the New York law as well as New York Convention, it was open to IFSL to point out to the New York Court in the confirmation proceedings that recognition ought not to be granted since the Award was opposed to the public policy of India. IFSL did not avail of such opportunity. It was noted by the New York Court in the order dated 9th September 2011 confirming the Award that: "As of today's date, Indiabulls has filed no opposition papers. Accordingly, the Court will treat the petition as unopposed." This therefore meant that IFSL had an opportunity to question the Award which it did not avail of. The said order of the New York Court became final and judgment was entered by the New York Court on 14th September 2011. Thereafter the question of there being parallel proceedings in this Court under Section 34 of the Act to challenge the

Award did not arise. Going by the interpretation of the expression "nonexclusive jurisdiction" in **Highland Crusader Offshore Partners v. Deutsche Bank** as well as the discussion in *Cheshire North and Fawcett on Private International Law* (14th Ed, 2008), it appears that the parties understood that there ought not be parallel proceedings to challenge the Award as that could be 'vexatious and oppressive'. The other interpretation, as suggested by learned Senior counsel for Amaprop, and which seems plausible, is that the words "non-exclusive jurisdiction" have been used in the context of the steps that were contemplated for effecting the transfer, if any, of shares pursuant to the exercise of the put option and not in the context of the further stages of the arbitral proceedings. The fact remains that IFSL did not question the proceedings in the New York Court for confirmation/recognition of the Award. It could not now be heard to object to the said Award in separate proceedings in this Court under Section 34 of the Act.

33. A combined reading of Sections 12.10 and 12.11 of the Agreement leads to the position that although there was no express exclusion of the jurisdiction of the Indian courts, the parties intended that the further proceedings concerning the challenge, if any, to the Award had to take place in the New York Courts and that the judgment concerning the recognition of the Award may be entered by "any state or federal court of competent jurisdiction." The seat of arbitration being New York also had a bearing on the issue as is seen from the following passages from the treatise 'Dicey Morris & Collins' on 'The Conflict of Laws':

> "Prior to the entry into force of the 1996 Act there were potential problems concerning the borderline between issues of substance determined by the law governing the arbitration agreement and issues of procedure governed by the procedural law of the arbitration. Such problems are avoided under the 1996 Act, which clearly determines the scope of each of the various provisions of Part I. Although the general rule is that Part I applies in cases where England is the seat of the arbitration, it is also expressly provided that, where the seat is outside England or where the seat has not been determined or designated, Section 7 (which provides, subject to the parties' contrary agreement, that an arbitration agreement is to be treated as distinct from any contract of which it forms a part) and Section 8 (which provides that,

unless the parties agree otherwise, an arbitration agreement is not discharged by the death of a party) are applicable if English law is the law governing the arbitration agreement.

The arbitral process is an exercise of party autonomy, which nevertheless can only proceed (and subsequently be enforced) to the extent permitted by national law. Two trends in modern arbitration law have led to a convergence between party autonomy and state control. The first has been an acceptance in many modern arbitration laws of a much wider scope for the operation of party autonomy to choose the procedures applicable to an international commercial arbitration. This trend is exemplified by the Model Law, and is reflected in the 1996 Act. The second element has been a renewed explicit acceptance of the rule set out in Rule 57(2), namely that it is the law of the seat of the arbitration which governs the arbitral procedure.

Where, as in the case of the 1996 Act (or other Commonwealth legislation giving effect to the Model Law), the law of the seat in fact accords considerable freedom to the parties to choose their procedure and imposes few mandatory provisions upon it, the control of the law of the seat will be in practice limited, and its provisions are unlikely to be brought into conflict with arbitration procedures chosen by the parties. Nevertheless, the law of the seat will still perform vital functions: in supplementing the procedural rules chosen by the parties where these are incomplete; in supporting the arbitral procedure when the coercive powers of the state are needed; and in providing a forum for challenging arbitral awards, especially where they are said to exceed the jurisdiction vouchsafed to the arbitrators by the parties under the arbitration agreement, or where there has been a serious irregularity in the arbitral procedure. Finally, it is the law of the seat which endows the arbitral award with its binding character upon which enforcement may be sought internationally under th provisions of the New York Convention. The international arb tral institutions, which have developed to a considerable extent the autonomy of the arbitral procedure, also recognise the ultimately controlling function of the law of the seat."

34. The Court proposes to briefly discuss the other judgments cited by the parties each of which turned on its own facts. In **Yograj Infrastructure Limited v. Ssang Yong Engineering & Construction Company Limited,** there was an express exclusion of the Indian courts in view of Rule 32 of the Singapore International Arbitration Centre ('SIAC') Rules which was made applicable to all arbitrations which took place in Singapore. Therefore, applying the law explained both in **Bhatia International** as well as **Venture Global Engineering,** it was held that the Indian courts do not have jurisdiction. In **Videocon Industries Limited v. Union of India,** the Court came to the definite conclusion in para 33 that the parties had in terms of the arbitration agreement in that case impliedly agreed to exclude the provisions of Part I of the Act. Consequently, it was held that the Indian courts did not have the jurisdiction. In **Dozco India Pvt. Ltd. v. Doosan Infracore Co. Ltd.** it was held that the language of the clauses of the Agreement in that case were clearly indicative of the express exclusion of Part-I of the Act. Following the dictum in **Bhatia International,** it was held that the Indian courts had no jurisdiction. In **Aitreya Limited v. Dans Energy Pvt. Ltd.,** it was held that there was no implied exclusion of Indian law inasmuch as Clause 14.8 of the Investment Agreement in that case stated that "the parties shall have the right to approach any court or competent jurisdiction at any point of time for suitable interim relief, including injunction". Consequently, it was held that the Section 9 petition was maintainable in this Court. The judgment of the Court of Appeal in **Abner Soleimany v. Sion Soleimany** QBENI 97/0882 CMSI, which turned on its own facts, dealt with the question of enforcement of a foreign Award whereas the present proceedings are not under Section 48 of the Act seeking enforcement of a foreign Award.

35. For the aforementioned reasons, this Court is of the view that IFSL cannot invoke jurisdiction of this Court under Section 34 of the Act to challenge the impugned Award. Consequently, the Court does not consider it necessary to examine the question whether the Award is opposed to the public policy of India. It leaves the said contention to be decided at the appropriate stage as and when Amaprop seeks enforcement of the Award in India under the Act.

Conclusion

36. The petition is accordingly dismissed with costs of Rs. 50,000

which should be paid by IFSL to Amaprop within four weeks from today.

ILR (2012) V DELHI 387
CO. PET.

GLOBAL INFOSYSTEM LTD. ….PETITIONER

VERSUS

LUNAR FINANCE LTD. ….RESPONDENT

(MANMOHAN, J.)

CO. PET. NO. : 94/2000 DATE OF DECISION: 28.05.2012

The Companies Act, 1956—Section 433 (e) read with Section 434 and 439—Winding up petition filed as Respondent unable to pay its debts—Respondent company passed a Board Resolution guaranteeing the loan amount advanced by the petitioner to the principal debtor—By virtue of Board Resolution the Respondent Company pledged certain shares as Collateral Security—Tripartite Agreement cum Pledge was executed between the petitioner, principal debtor and Respondent-guarantor—On 12 February, 2000 the principal debtor defaulted in repaying the loan—Petitioner issued a statutory winding up the Respondent—Since no reply was received by the petitioner, present winding up petition was filed—On 9th August, 2004, Proceedings were stayed as the principal debtor had become a sick company—Principal debtor was wound up by BIFR, present proceedings revived—Respondents allege that statutory winding up notice was not served upon the registered office—Respondent alleges no agreement between the principal debtor and the surety or between creditor and the surety—Respondent alleges liability limited to the extent of the shares pledged—Held: Statutory winding up notice issued—Petitioner had discharged his duty—Respondent was a guarantor in consideration of loan advanced to the principal debtor—Agreement-cum-pledge constituted a composite Tripartie Agreement cum-pledge did not limit the liability of the Guarantor—Respondent's liability by the virtue of Section 128 of the Indian contract Act, 1872 is co-extensive with that of the principal debtor Petition admitted—Respondent company directed to be wound up Official liquidator attached to the court appointed as the provisional Liquidator—Directed that citations be published in the newspapers and Delhi gazette—Official liquidator directed to file fresh status report before the next date of hearing.

On a holistic reading of the Agreement-cum-Pledge, this Court is of the opinion that the respondent was a guarantor as in consideration of the loan advanced by the petitioner to a third person namely the principal debtor, the respondent had pledged shares owned by it in the event of default of repayment of loan. Moreover, in the opinion of this Court, the Agreement-cum-Pledge constituted a composite Tripartite Agreement amongst the Lender, Principal Debtor and Guarantor. In this regard, relevant clauses 4, 12 and 17 of the Agreement-cum-Pledge are reproduced hereinbelow :

> "4. In consideration of the said bill discounting facility, the original Securities mentioned in the Schedule attached to this Agreement, are hereby pledged in favour of the LENDER as an exclusive charge to the LENDER towards repayment of the principal etc. due to the LENDER under the bill discounting facility. Any change in the securities hereby pledged may be effected by the execution of supplementary schedule(s).

xxx xxx xxx

12. The said pledged securities and the promissory note would be a continuing security to the LENDER for all monies which are due from the BORROWER.

xxx xxx xxx

17.The provisions of this agreement, in particulars provisions of Clause 4, 11 and 12 shall, to the extent applicable, apply to the BORROWER and / or the GUARANTOR, as the case may be." **(Para 20)**

This Court is further of the opinion that Agreement-cum-Pledge did not limit the liability of the respondent-guarantor. In fact, the respondent's liability by virtue of Section 128 of the Indian Contract Act, 1872 has to be co-extensive with that of the principal debtor. Section 128 of the Indian Contract Act, 1872 is reproduced hereinbelow:

"128,. Surety's liability - The liability of the surety is coextensive with that of the principal debtor, unless it is otherwise provided by the contract." **(Para 24)**

Further, Sections 172 to 176 of the Indian Contract Act, 1872 defines the relationship amongst the Pledge, Pawnor and Pawnee and the rights of the Pawnee when the Pawnor commits a default. This Court is of the view that in the event of default in re-payment of the loan by the principal debtor, the petitioner under the Agreement-cum-Pledge was entitled to either sell the pledged shares or to sue the respondent-guarantor for recovery of amount due and payable under the loan agreement. Also in law, in the event there was any balance amount due and payable after the sale of the pledged shares, petitioner in law would be entitled to file recovery proceedings for the balance amount against the guarantor. Section 176 of the Indian Contract Act, 1872 reads as under:-

"176. Pawnee's right where pawnor makes default. - If the pawnor makes default in payment of the debt, or

performance; at the stipulated time or the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor."

(Para 25)

Important Issue Involved: Indian contract Act, 1872—Section 128—Liability of Guarantor co-extensive with that of principal debtor.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Virender Ganda, Sr. Adv. with S.K Giri, Ms. Runjita Das & Mr. Amarjit Singh, Advocates.

FOR THE RESPONDENT : Mr. Niraj Kumar Singh, Advocate.

CASES REFERRED TO:

1. *Nuchem Ltd.* vs. *C.S. Modi and Co. Pvt. Ltd.* 2002 Vol. 109 Company Cases 715 (P&H).
2. *State Bank of India* vs. *Smt. Neela Ashok Naik & Anr.* AIR 2000 Bombay 151.
3. *State Bank of India* vs. *Indexport Registered and others,* [1992] 75 Comp Cas 1 (SC).
4. *Bank of Maharashtra* vs. *M/s Racmann Auto (P) Ltd.,* AIR 1991 Delhi 278.
5. *Ramchandra B. Loyalka* vs. *Shapurji N. Bhownagree,* AIR 1940 Bombay 315.

6. *The Hukumchand Insurance Co. Ltd.* vs. *The Bank of Baroda and Ors.* MANU/KA/0042/1977 : AIR 1977 Kant 204.

RESULT: Appeal dismissed.

MANMOHAN, J.

1. Present winding up petition has been filed under Section 433(e) read with Sections 434 and 439 of the Companies Act, 1956 (for short 'Act') stating that respondent is unable to pay its debts.

2. The facts as stated in the petition are that on 04th September, 1996, the respondent company (Lunar Finance Limited) passed a Board Resolution guaranting the loan amount of Rs. 52,55,500/- advanced by the petitioner to the principal debtor. By virtue of the said Board Resolution, the respondent company pledged certain shares as Collateral Security. On 09th September, 1996, a Tripartite Agreement cum Pledge was executed between the petitioner (Lender), Lunar Diamonds Limited (Principal Debtor) and respondent-guarantor.

3. However, as the cheques issued by the principal debtor were dishonoured, the parties on 09th September, 1996 entered into a fresh Agreement cum Pledge amongst the petitioner, principal debtor and respondent-guarantor. Two cheques were also issued by the principal debtor towards the principal amount and interest.

4. In June, 1999, the petitioner's name was changed from M/s. CRA Global Securities to M/s. Global Infosystems Limited.

5. As the principal debtor defaulted in repaying the loan, on 12th February, 2000, petitioner issued statutory winding up notice to the respondent.

6. Since no reply was received by the petitioner, on 07th March, 2000, present winding up petition was filed.

7. On 09th August, 2004, proceedings were stayed as the principal debtor had become a sick company under Sick Industrial Companies (Special Provisions) Amendment Act, 1993

8. On 13th May, 2010, as the principal debtor was ordered to be wound up by BIFR, present proceedings were revived. 9. Mr. Virender Ganda, learned senior counsel for petitioner submitted that respondent

had guaranteed repayment of loan obtained by the debtor by way of bill discounting facility and the same was recoverable from the respondent independent of the principal debtor. He further stated that respondent-guarantor's liability was co-extensive with that of the principal debtor. 10. On the other hand, Mr. Niraj Kumar Singh, learned counsel for the respondent submitted that as the statutory winding up notice had not been served upon the registered office of the respondent company, the presumption of inability to pay debts under Section 434 of the Act did not arise in the present case. According to him, in view of the admitted fact that the statutory notice had not been served on the registered office of the respondent company, the present petition had to be dismissed at the threshold. In this connection, he relied upon a judgment of the Punjab & Haryana High Court in **Nuchem Ltd. v. C.S. Modi And Co. Pvt. Ltd.** 2002 Vol. 109 Company Cases 715 (P&H) wherein it has been held as under:-

> "It is clear from the aforesaid clause that requirement under the Negotiable Instruments Act is only of giving notice. There is no requirement of ensuring effective service of the said notice. For the aforesaid reason, it cannot be said that the deliberation of the Apex Court in the judgment relied upon by learned counsel for the petitioner can be applied to the facts and circumstances of the present case. So far as the issue of giving notice is concerned, the same would definitely be governed by the observations made by the Supreme Court.
>
> The Companies Act requires that a company which is to pay a debt must be informed of the same, and must be called upon to discharge its debt through a notice. The notice must actually be served on the respondent-company. Thereafter, if despite service of notice, the company does not discharge its debt, it is open to the creditor to file a winding up petition. Since I have already recorded above that in the facts and circumstances of the instant case, notice cannot be deemed to have been actually served on the respondent, it is, therefore, futile to proceed any further with this petition. Accordingly this petition is dismissed, as the statutory notice has not been served by the petitioner before filing the instant petition.
>
> Learned counsel for the petitioner at this stage has brought to

my notice that the petitioner has approached the Registrar of Companies and has been informed of the latest address of the respondent. He further states that he would now serve the notice on the respondent as contemplated under Section 434 of the Companies Act at its present address. In case the petitioner is able to effect service of the notice under Section 434 of the Companies Act upon the respondent even after disposal of this petition, it would be open to the petitioner to revive this petition by placing on record the averments of having effected service on the respondent.

11. Mr. Niraj Kumar Singh further submitted that though the respondent had been described in the Agreement-cum-Pledge dated 09th September, 1996 as a guarantor, it was a cardinal principle of law that it was not the nomenclature or designation which would determine the true status of a party. According to him, the respondent was not a guarantor under the said agreement as the borrower was solely responsible for the liability arising out of the loan facility along with an additional obligation to replenish the security in the event its value fell. He stated that other than the Agreement-cum-Pledge, there was no agreement either between the principal debtor and surety or between the creditor and surety to show that a contract of guarantee had been executed. In this connection he relied upon a judgment of the Bombay High Court in **Ramchandra B. Loyalka vs. Shapurji N. Bhownagree,** AIR 1940 Bombay 315 wherein it has been held as under:

> "It is I think true that a contract might fall within both those definitions, but it is clear from Section 126 that a contract of guarantee involves three parties,-the creditor, the surety and the principal debtor-, and I agree with the view taken by the Madras) High Court in **Periamanna Marakkayar v. Banians & Co.** 1925 I.L.R. 49 Mad.156 that a contract of guarantee involves a contract to which those parties are privy. Of course, the contract need not be embodied in a single document, but I think there must be a contract or contracts to which the three parties referred to in Section 126 are privy. There must be a contract, first of all, between the principal debtor and the creditor. That lays the foundation for the whole transaction. Then there must be a contract between the surety and the creditor, by which the surety guarantees the debt, and no doubt the consideration for that

> contract may move either from the creditor or from the principal debtor or both. But if those are the only contracts, in my opinion, the case is one of indemnity. In order to constitute a contract of guarantee there must be a third contract, by which the principal debtor expressly or impliedly requests the surety to act as surety. Unless that element is present, it is impossible in my view to work out the rights and liabilities of the surety under the Indian Contract Act. Section 145 provides that in every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety. It is impossible to imply a promise by the principal debtor to indemnify the surety, unless the principal debtor is privy to the contract of suretyship. A promise cannot be implied against a stranger to the transaction of guarantee. Again, the right of a surety to call upon the principal debtor to discharge the debt of the creditor which has become due,-a right which is referred to in Mulla's note to Section 145 of the Contract Act, and is illustrated by the English case there referred to, Asckerson v. Tredegar Dry Dock and Wharf Company, Limited, 1909 2 Ch. 401 cannot be worked out, unless the principal debtor has authorized the contract of suretyship. Unless he has done that, the surety is not in a position to compel the principal debtor to pay the debt. In my view, therefore, exhibit A is a contract of indemnity and not a contract of guarantee the principal debtors, namely the constituents introduced by the plaintiff not only knew nothing of the alleged guarantee, but were unascertained when the contract was made."

12. Mr. Niraj Kumar Singh also submitted that under the Agreementcum-Pledge, the respondent's liability was limited only to the extent of shares pledged by the respondent debtor. In this connection, Mr. Niraj Kumar Singh relied upon the preamble and Clauses 5 and 7 of the Agreement-cum-Pledge. The said clauses are reproduced hereinbelow:

> "AND WHEREAS THE GUARANTOR has agreed to provide security to secure the said bill discounting facility by way of pledging of certain marketable securities.
>
> xxx xxx xxx
>
> 5. The market value of all such securities included in the schedule / supplementary schedule attached hereto would be monitored by

the LENDER at intervals of 15 days If at any time the value of the said securities falls so as to create a deficiency in the margin requirement as specified in the Schedule hereto, specified by the LENDER from time to time or if there is an excess bill discounting facility, the BORROWER shall within seven days of notice from the LENDER deposit with the LENDER additional security in the form of cash or such other securities which may be acceptable to the LENDER failing which the LENDER may at its discretion sell, dispose off or realise any or all of the said securities without being liable for any loss or damage or diminution in value sustained hereby.

xxx xxx xxx

7. In case of expiry of term or in case of any of the events happening as stated herein above or in case of failure by the BORROWER to repay the bill discounting facility within the agreed period of time or to fulfill the terms & conditions of this against or expiry of the terms or in case of any of the events happening as stated herein before, the LENDER would have the full rights to sell, dispose off or realise the said securities on such terms and for such price that the LENDER thinks, and apply the proceeds towards the satisfaction of the bill discounting facility amount, bill discounting charges and penal bill discounting charges outstanding against the said penal bill discounting charges outstanding against the BORROWER including legal charges and incidental expenses etc."

13. Lastly, Mr. Niraj Kumar Singh submitted that the present petition was not maintainable as the petitioner had failed to first encash the securities furnished in its favour by the principal debtor inasmuch as it had failed to act upon the Bills of Exchange as well as cheques given by the principal debtor.

14. In rejoinder, Mr. Virender Ganda, learned senior counsel for petitioner submitted that Section 434 had to be read with Sections 51 and 53 of the Act. The relevant portion of the said Sections are reproduced hereinbelow:

"51. Service of documents on company.ùA document may be served on a company or an officer thereof by sending it to the

company or officer at the registered office of the company by post under a certificate of posting or by registered post, or by leaving it at its registered office.

[Provided that where the securities are held in a depository. The records of the beneficial ownership may be served by such depository on the company by means of electronic mode or by delivery of floppies or discs.]

xxx xxx xxx

53. Service of documents on members by company. -

xxx xxx xxx

(2) Where a document is sent by post - (a) service thereof shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document, provided that where a member has intimated to the company in advance that documents should be sent to him under a certificate of posting or by registered post with or without acknowledgement due and has deposited with the company a sum sufficient to defray the expenses of doing so, service of the document shall not be deemed to be effected unless it is sent in the manner intimated by the member;"

15. According to Mr. Ganda, statutory notice sent in the present case in accordance with the said Sections by properly addressing, prepaying and posting the notice by registered A.D. constituted proper service. In support of his submission, he relied upon a judgment of the Bombay High Court in **Ispat Industries Limited, In Re.** 2005, 2 CLJ, 235 Bombay, wherein it has been held as under:

"15. The judgment would apply to a notice under Section 434(a)(1) of the Companies Act with greater force. Section 138 of the Negotiable Instruments Act entails criminal consequences, whereas Section 434(1)(a) involves only civil consequences. Moreover the requirements of a notice under Section 138 of the Negotiable Instruments Act are stricter and wider. Despite the same, the Supreme Court held that a person who properly addresses a notice and mails it would be deemed to have fulfilled his obligation of sending the notice even if the same is returned

unclaimed. On a parity of reasoning, it must be held that a notice though returned unclaimed, if duly mailed by registered post addressed to the registered office of the company, must be deemed to have been "delivered" within the meaning of that expression in Section 434(1)(a) of the Companies Act.

16. I would come to this conclusion even or principle. Any other view would permit a dishonest company to avoid service of a notice in a variety of ways by refusing to claim the same from the postal authorities despite intimation of the delivery thereof. Take a simple example. Companies are known to have their registered office in premises where they do not carry on any significant manufacturing, trading or administrative activities. The premises are used as a registered office only for the purpose of convenience and for complying with statutory provisions. In such a case, the company could well avoid service of notices and then refuse to claim the same despite notification from the postal authority to do so.

17. In **K. Bhaskaran** (supra) the Supreme Court in paragraph 21 held that Section 138 of the Negotiable Instruments Act invites a liberal interpretation in so far as it relates to the giving of a notice. The Supreme Court in relation to a notice under Section 138 of the Negotiable Instruments Act applied the principle in Maxwell's Interpretation of Statutes that provisions relating to giving a notice often received a liberal interpretation. In my view this principle is equally applicable and ought to be applied in respect of a question regarding the delivery of a notice issued under Section 434(1)(a) of the Companies Act. Indeed such an interpretation would cause no prejudice to the company either. If in a given case the concerned officers of a company genuinely do not have the benefit of reading the notice for any reason whatever the same would furnish a valid ground for contending in the petition that may be filed that no presumption should be drawn against the company merely by virtue of the company not having replied to the said notice. On the other hand a view to the contrary would not only cause great prejudice to the creditors of a company but would in fact have the effect of rendering the provisions of sections 433 and 434 of the Companies Act otiose."

16. Mr. Ganda emphatically denied that under the Agreement-cum-

Pledge, the petitioner could have only sold the shares pledged by the respondent debtor.

17. Having heard the parties and having perused the papers, this Court finds that statutory winding up notice had been issued by the petitioner to both the principal debtor as well as to the respondent guarantor at their respective registered office and administrative office. In fact, the statutory notices sent to the respondent by registered A.D. at its registered office had been returned back unserved with the remarks "no such firm at such address". In the opinion of this Court, the petitioner had discharged the duty cast on it under the Act by sending the winding up notice at the respondent's last known registered office. The respondent's argument that the respondent should have been served at its registered address even when none was present on behalf of the respondent cannot be accepted by this Court as that would amount to asking a party to do an impossible act!

18. In the case of **Nuchem Ltd.** (supra) relied upon by the respondent, there was a change of address of the registered office of the company. In the present case, the notice was dispatched by the petitioner not only to the administrative office of the respondent but also to its last known registered office. Consequently, the judgment in **Nuchem Ltd.** (supra) is inapplicable to the facts of the present case.

19. Section 126 of the Indian Contract Act, 1872, defines the contract of guarantee, surety, principal debtor and creditor. The said Section reads as under:"

> 126. Contract of guarantee', 'surety', 'principal debtor' and 'creditor'ùA 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety', the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written."

20. On a holistic reading of the Agreement-cum-Pledge, this Court is of the opinion that the respondent was a guarantor as in consideration of the loan advanced by the petitioner to a third person namely the principal debtor, the respondent had pledged shares owned by it in the event of default of repayment of loan. Moreover, in the opinion of this

Court, the Agreement-cum-Pledge constituted a composite Tripartite Agreement amongst the Lender, Principal Debtor and Guarantor. In this regard, relevant clauses 4, 12 and 17 of the Agreement-cum-Pledge are reproduced hereinbelow :

> "4. In consideration of the said bill discounting facility, the original Securities mentioned in the Schedule attached to this Agreement, are hereby pledged in favour of the LENDER as an exclusive charge to the LENDER towards repayment of the principal etc. due to the LENDER under the bill discounting facility. Any change in the securities hereby pledged may be effected by the execution of supplementary schedule(s).
>
> xxx xxx xxx
>
> 12. The said pledged securities and the promissory note would be a continuing security to the LENDER for all monies which are due from the BORROWER.
>
> xxx xxx xxx
>
> 17.The provisions of this agreement, in particulars provisions of Clause 4, 11 and 12 shall, to the extent applicable, apply to the BORROWER and / or the GUARANTOR, as the case may be."

21. The Board Resolution dated 04th September, 1996 passed by the respondent company also proves beyond doubt that the respondent was a guarantor. The relevant portion of the said resolution is reproduced hereinbelow:

> "RESOLVED that the consent of the Board is hereby accorded for giving guarantee to M/s. CRA Global Securities Limited, New Delhi for the amount of Rs.52,55,500/- (Rupees Fifty two lacs Fifty five thousand five hundred only) being granted by way of Bill Discounting facility to M/s. Lunar Diamonds Limited by them."
>
> "RESOLVED FURTHER that Mr. S.L. Maloo, Director of the
>
> Company be and is hereby authorised to pledge and following shares of Sunrise Securities Limited held by the company as collateral security with M/s. CRA Global Securities Limited:

Share Certificate No.	Distn. No.	No of Shares
13173	2214701-2652700	438000

> "RESOLVED FURTHER that Mr. SL. Maloo, Director be and is hereby authorised to sign, execute deed and other necessary documents in this connection."

(emphasis supplied)

22. The judgment of the Bombay High Court in **Ramchandra B. Loyalka** (supra) is clearly distinguishable. In the said case as the main broker had entered into a settlement agreement directly with the client without involving the sub-contractor who was the guarantor, the Court held that the guarantor stood discharged. Since in the present case there was no settlement/compromise entered into by the petitioner, the said judgment offers no assistance to the respondent.

23. The respondent's submission that under the Agreement-cum-Pledge, the petitioner had only one security, namely, the pledged shares is contrary to facts and untenable in law. In fact, if that were so, this Court is of the view that the respondent would not have assumed the role of a guarantor and would not have described itself as a guarantor in the Agreement-cum-Pledge. In the opinion of this Court, the argument advanced by the learned counsel for the respondent-guarantor is contrary to the written document executed between the parties.

24. This Court is further of the opinion that Agreement-cum-Pledge did not limit the liability of the respondent-guarantor. In fact, the respondent's liability by virtue of Section 128 of the Indian Contract Act, 1872 has to be co-extensive with that of the principal debtor. Section 128 of the Indian Contract Act, 1872 is reproduced hereinbelow:

> "128,. Surety's liability-The liability of the surety is coextensive with that of the principal debtor, unless it is otherwise provided by the contract."

25. Further, Sections 172 to 176 of the Indian Contract Act, 1872 defines the relationship amongst the Pledge, Pawnor and Pawnee and the rights of the Pawnee when the Pawnor commits a default. This Court is of the view that in the event of default in re-payment of the loan by the principal debtor, the petitioner under the Agreement-cum-Pledge was

entitled to either sell the pledged shares or to sue the respondent-guarantor for recovery of amount due and payable under the loan agreement. Also in law, in the event there was any balance amount due and payable after the sale of the pledged shares, petitioner in law would be entitled to file recovery proceedings for the balance amount against the guarantor. Section 176 of the Indian Contract Act, 1872 reads as under:-

> "176. Pawnee's right where pawnor makes default.ùIf the pawnor makes default in payment of the debt, or performance; at the stipulated time or the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.
>
> If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor."

26. The Bombay High Court in **State Bank of India vs. Smt. Neela Ashok Naik & Anr.** AIR 2000 Bombay 151 has held as under:

> "12. We may notice that in the present appeal there are no disputes on facts. The contentions are purely legal. Now we would consider the first contention regarding applicability of section 176 of the Contract Act. Section 176 provides for pawnee's right where pawnor makes default. It inter alia stipulates that on pawnor making default in payment of the debt, at the stipulated time, in respect of which the goods are pledged, the pawnee may bring a suit against the pawnor on the debt and retain the goods pledged as a collateral security; or he may sell the goods pledged, on giving the pawnor reasonable notice of the sale and if the sale proceeds are deficient the pawnor would be liable to pay the balance and if more, the surplus amount shall be paid to the pawnor. The contention of Mr. Nadkarni is that the only effect of aforenoticed Clause 6 is that the Bank can dispose of the security without giving any notice to the respondents. It is only a waiver of the stipulation of right of the respondents to a reasonable notice before the Bank decides to

appropriate the security. Learned Counsel relies upon a decision of the Delhi High Court in **Bank of Maharashtra v. M/s Racmann Auto (P) Ltd.,** AIR 1991 Delhi 278. In the said decision, the question which came up for considerations was whether there was any legal duty cast on the plaintiff Bank to take early steps for disposing of the pledged goods. Construing Section 176, it was held that the very wording of the section makes it clear that it is the discretion of the pawnee to sell the goods in case the pawnor makes default but if the pawnee does not exercise that discretion no blame can be put on the pawnee and pawnee has the right to bring a suit for recovery of the debt and retain the goods pledged as collateral security. Doubt was also expressed whether a defendant as pawnor could force the pawnee to dispose of the pledged goods without defendant clearing the debt. However, on the facts of the present case, we need not go into this latter aspect on which doubt has been expressed. It has been categorically held in the cited decision that it is the discretion of the plaintiff Bank to have filed the suit for recovery of the debt and retain the pledged goods as collateral security or in the alternative it could resort to selling the pledged goods after giving reasonable notice of sale to the defendants. In that case the plaintiff Bank had in its wisdom exercised the first option of filing the suit and retaining the collateral security.

13. We are in respectful agreement with the legal proposition propounded in the aforesaid decision and thus there would be no question of judicious or arbitrary exercise of discretion by the Bank as to the time of appropriation of the amount from the collateral security given to it in the form of FDRs."

27. The Supreme Court in **State Bank of India vs. Indexport Registered and others,** [1992] 75 Comp Cas 1 (SC) has held as under:

> "14. In Pollock & Mulla on Indian Contract and Specific Relief Act, Tenth Edition, at page 728 it is observed thus: Co-extensive—Surety's liability is co-extensive with that of the principal debtor...
>
> xxx xxx xxxx
>
> 17. In **The Hukumchand Insurance Co. Ltd. v. The Bank of**

Baroda and Ors. MANU/KA/0042/1977 : AIR 1977 Kant 204, a Division Bench of the High Court of Karnataka had an occasion to consider the question of liability of the surety vis-a-vis the principal debtor. Venkatachaliah, J. (as His Lordship then was) observed:

> The question as to the liability of the surety, its extent and the manner of its enforcement have to be decided on first principles as to the nature and incidents of suretyship. The liability of a principal debtor and the liability of a surety which is co-extensive with that of the former are really separate liabilities, although arising out of the same transaction. Notwithstanding the fact that they may stem from the same transaction, the two liabilities are distinct. The liability of the surety does not also, in all cases, arise simultaneously.
>
> 18. It will be noticed that the guarantor alone could have been sued, without even suing the principal debtor, so long as the creditor satisfies the court that the principal debtor is in default."

28. In view of the aforesaid conclusions, it is apparent that the defence set up by the respondent is a sham and moonshine. Consequently, this Court is of the opinion that respondent company is unable to pay its debts. Accordingly, present petition is admitted and respondent company is directed to be wound up. The Official Liquidator attached to this Court is appointed as Provisional Liquidator of the respondent company and is directed to forthwith take over the assets and records of the respondent company. For this purpose, Provisional Liquidator would be entitled to obtain police aid and the local police is directed to render all assistance to the Provisional Liquidator.

29. In the meantime, respondent-company, its Directors, officers, employers, authorised representatives are restrained from selling, transferring, alienating, encumbering and parting with the possession of any movable and immovable assets and funds of the respondent company. They are also restrained from withdrawing any money from the accounts of the respondent company.

30. The Directors of the respondent company are directed to forthwith hand over all the records of the respondent company to the Provisional Liquidator including its books of account. The Directors of

respondent company are also directed to provide the statement of affairs and file their statements under Rule 130 within a period of twenty one days as provided for in the Act.

31. Citations are directed to be published in the newspapers, namely, 'The Statesman (English edition) and 'Veer Arjun' (Hindi edition) as well as in 'Delhi Gazette'. The petitioner is directed to deposit a sum of Rs. 50,000/- with the Official Liquidator to meet the expenses for publication within a period of two weeks.

32. The Official liquidator is directed to file a fresh status report before the next date of hearing. List on 08th October, 2012.

ILR (2012) V DELHI 404
W.P. (C)

C.B. JOSHI ….PETITIONER

VERSUS

NATIONAL INSTITUTE OF HEALTH AND FAMILY WELFARE ….RESPONDENT

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

W.P. (C) NO. : 5414/2011 DATE OF DECISION: 28.05.2012

Constitution of India, 1950—Article 226—Writ Petitions arising out of the common order passed by the Administrative Tribunal, Principal Bench New Delhi—Petitioners were working in the National Institute of Health and Family Welfare (NIHFW)—The issue before the Tribunal was with regard to the age of superannuation of the Petitioners—Claim of the Petitioners was that they were governed by the University Grants Commission (UGC) package of

24.12.1998 whereby the age of superannuation had been increased from 60 to 62—Whereas, the claim of NIHF was the UGC package of 24.12..1998 did not apply to NIHFW and had not been adopted by NIHFW further, it was contended by the Respondent that in fact a conscious decision had taken by the Governing Body of NIHFW not to adopt the UGC package of 24.12.1998—Held—In order to fall within the ambit of the UGC package of 24.12.1998, it is not just affiliation which was to be taken into account but also the fact that the affiliated college must also be recognized by the UGC-Since the Petitioners could not produce evidence which indicated that the NIHFW was firstly, an affiliated college and secondly, was recognized by the UGC, it is abundantly clear that the UGC package of 1998 is not applicable to NIHFW—Even though the UGC package is not ipso fact applicable it can always be adopted by the NIHFW—But the Governing Body vide its decision taken 16.08.2000 took a conscious decision that the age of superannuation should remain at 60 years—Hence neither was the UGC package, by itself applicable nor had it been made applicable to NIHFW by adoption.

It is, therefore, apparent that neither was UGC package, by itself applicable to NIHFW nor had it been made applicable to NIHFW by adoption. Therefore, the plea of the petitioners that their age of superannuation should be 62 years and not 60 years is not tenable. **(Para 8)**

Important Issue Involved: For UGC packages to apply to an institution-mere affiliation not enough-UGC must recognize the institute along with affiliation.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Randhir Jain, Mr. Dhananjai Jain, Ruchika Jain, Advocates.

FOR THE RESPONDENT : Mr. Mukul Gupta, Sr. Advocate. with Mr. Rajat Katyal Advocate.

RESULT: Appeal dismissed.

BADAR DURREZ AHMED, J. (ORAL)

1. These writ petitions arise out of the common order passed on 18.06.2010 in T.A. Nos. 6 & 7 of 2008. The said order dated 18.06.2010 was that of the Vice Chairman (A) of the Central Administrative Tribunal, Principal Bench, New Delhi. Earlier the said T.A's were heard before a Division Bench of the said Tribunal. However, there was a difference of opinion between the members of the said Division Bench. As a result, the matter was referred by the Chairman of the Central Administrative Tribunal to the Vice Chairman (A) by virtue of the provisions of Section 26 of the Administrative Tribunal Act, 1985. The decision taken by the said Vice Chairman (A) by virtue of the order dated 18.06.2010 is therefore be determinative decision in the said T.A's.

2. The entire issue before the Tribunal was with regard to the age of superannuation of the petitioners herein. There was also a supplemental issue with regard to the curtailment of the period of extension of one of the petitioners, namely, Dr P.L. Trakroo. We shall first consider the question with regard to the age of superannuation.

3. The petitioners were working in the National Institute of Health and Family Welfare (NIHFW). The claim of the petitioners before the Tribunal was that they were governed by the University Grants Commission (UGC) package of 24.12.1998 whereby the age of superannuation had been increased from 60 to 62. On the other hand the case of the NIHFW was that the UGC package of 24.12.1998 did not at all apply to NIHFW nor was it adopted by the NIHFW. It was further contended that in fact, a conscious decision was taken by the Governing Body of the NIHFW not to adopt the UGC package of 24.12.1998. This is apparent, according to the learned counsel for the respondent, from the decision of the Governing Body taken on 16.08.2011.

4. The learned counsel for the petitioners, in rejoinder pointed to the office order dated 17.05.1993 issued by the NIHFW which, according to him, indicates that the UGC package was adopted and implemented by NIHFW.

5. After the 5th Central Pay Commission recommendations the University Grants Commission took out a notification on revision of pay scales, minimum qualifications for the appointment of teachers in universities and colleges and other measures for the maintenance of standards in 1998. The entire package was known as the UGC package of 24.12.1998. In the communication dated 24.12.1998 issued by the UGC to the Vice Chancellors of all the universities, Education Secretaries of all the States/ Union Territories, it was specifically provided in paragraph 1.0 thereof as under:"

> 1.0 These shall apply to every University established or incorporated by or under a Central Act, Provincial Act or a State Act, every institution including a constituent or an affiliated college recognized by the Commission, in consultation with the concerned University under Clause (f) of Section 2 of the University Grants Commission Act, 1956, and every institution Deemed to be a University under Section 3 of the said Act."

6. A plain reading of the said paragraph 1.0 makes it clear that the UGC package was to apply to every university, established or incorporated by or under a Central Act, Provincial Act or a State Act. It was also to apply to every institution including a constituent or an affiliated college recognized by the Commission. It was also to apply to every institution deemed to be a university under section 3 of the University Grants Commission Act, 1956. It is an admitted position that NIHFW is neither a university falling within the definition of section 2 (f) of the University Grants Commission Act, 1956 nor is it a deemed university as defined in section (3) thereof. It was contended by the learned counsel for the petitioner that NIHFW would fall within the ambit of an affiliated college. However, we find it is not just the affiliation which has to be taken into account but the fact that the affiliated college must also be recognized by the UGC. When we asked the learned counsel for the petitioner to produce any document or piece of evidence to indicate that NIHFW was, firstly, an affiliated college and secondly, was recognized by the UGC, he was unable to do so. It is also the positive case of the respondent that NIHFW is not an affiliated college recognized by the UGC. As such, it is abundantly clear that the UGC package of 1998 is not applicable to NIHFW.

7. However, even though the UGC package of 1998 may not ipso facto apply to NIHFW there is always the possibility that it could have been adopted by the NIHFW. But, the indication is to the contrary. This would be clear from the Governing Body decision taken on 16.08.2000. The said Governing Body decision taken in the meeting held on 16.08.2000 in respect of the agenda item No. 5 reads as under:"

> Agenda Item No. 5: To consider the report of the committee of members of Governing Body regarding adoption of UGC Package 1998 containing age of superannuation, career advancement etc. for faculty of NIHFW.

The Governing Body held detailed discussion on the adoption of UGC package 1998 for faculty of NIHFW and on the report of the committee of members of the Governing Body constituted for the purpose. The Governing Body took following decisions:

> (a) The age of superannuation for faculty of the Institute consisting of Professors, Readers and Lecturers should remain 60 years. However, extension of service beyond 60 years and up to 62 years for the faculty should be granted by the Appointing Authority on the recommendation of the Standing Screening Committee, based on the objective parameters of excellence. The Standing Screening Committee will be constituted by the Chairman of the Governing Body. The objective parameters of excellence will be decided by Standing Screening Committee.
>
> (b) Other points of the UGC Package 1998 regarding career advancement etc, will be considered by Governing Body in its next meeting, which would be held within a time frame of two months." (underlining added)

From the above decision it is clear that the Governing Body of NIHFW actively considered the issue of adoption of the UGC package of 1998 pertaining to the age of superannuation, career advancement etc., insofar as the faculty NIHFW was concerned. However, the Governing Body after a detailed discussion on the subject, inter alia, took the conscious decision that the age of superannuation for the faculty of the institute, which comprises of Professors, Readers and Lecturers, should remain

60 years. At the same time it was decided that extension of service beyond 60 years could be granted up to the age of 62 years for the faculty by the Appointing Authority on the recommendation of the Standing Screening Committee based on objective parameters of excellence which were to be decided by the Standing Screening Committee.

8. It is, therefore, apparent that neither was UGC package, by itself applicable to NIHFW nor had it been made applicable to NIHFW by adoption. Therefore, the plea of the petitioners that their age of superannuation should be 62 years and not 60 years is not tenable.

9. The petitioner had also placed reliance on the office order dated 17.05.1993 issued by the NIHFW, the relevant portion of the office order reads as under:"

> With the approval of the Governing Body of the Institute in its meeting held on 30.09.92 the UGC package is extended to the faculty of the Institute in toto as per guidelines contained in the Ministry of Human Resources Development, Department of Education, letter No. F-1-21/87-VI dated 22nd July, 1988 as amended from time to time."

In our view, the petitioners cannot take advantage of this officer order inasmuch as it was issued prior to the UGC package of 1998. The office order merely extended the UGC package which was then in existence to the faculty of the institute as amended from time to time. It did not mean that whenever the UGC package would be amended the same would automatically stand extended to the faculty of NIHFW. All that it meant was that the UGC package as amended from time to time as it existed on 30.09.1992 would be extended to the faculty of NIHFW. In any event, the UGC package of 1998 was subsequent to the package referred to in the said office order of 17.05.1993. Furthermore, the Governing Body of NIHFW had taken a conscious decision on 16.08.2000, not to adopt the UGC package of 1998 insofar as the age of superannuation was concerned.

Therefore, the contention of the learned counsel for the petitioner based on the said office order dated 17.05.1993 is of no consequence.

10. The learned counsel for the petitioner drew our attention to a memorandum dated 31.05.1999 issued by the NIHFW in respect of a representation dated 20.05.1999 which had been submitted by one Dr

V.K. Singh, Research Officer. The relevant portion of the said memorandum reads as under:

> "age of superannuation UGC scheme has been adopted in the institute with the approval of the Governing Body only for the faculty posts. The post of Research Officer cannot be treated at par with the faculty post of institute because of there being different recruitment rules, recruitment qualifications, duties....."

11. Although, the memorandum dated 31.05.1999 does indicate that the age of superannuation as indicated in the UGC scheme has been adopted in the NIHFW with the approval of the Governing Body for faculty post, it is not clear as to which UGC scheme is being referred to. In any event, it is not at all clear as to whether the memorandum was concerned with the UGC package of 1998 or not? On the contrary, we have a clear decision of the Governing Body of NIHFW which was taken subsequently on 16.08.2000 where a conscious decision was taken not to adopt the age of superannuation of 62 years but to retain the age of superannuation 60 years, which was also the case under the earlier UGC package, that is, prior to the 1998 UGC package. To make it clear, the age of superannuation under the pre-1998 UGC package was 60 years and it was only in the 1998 UGC package that the age of superannuation was raised to 62 years. Though, there may be some evidence of adoption of the pre-1998 UGC package but that would be of no help to the petitioners as the age of superannuation under that package was only 60 years. Thus, this plea of the petitioners is also not tenable.

12. We now come to the case of Professor P.L. Trakroo, who had superannuated at the age of 60 years on 21.10.2000 but had been granted extension for one year by the Chairman of the Governing Body on the recommendations of the Standing Screening Committee of NIHFW. This is evident from the office order dated 31.10.2000. The period of extension was for one year with effect from 01.11.2000. However, before that period of one year could be completed, the extension was cancelled by a letter dated 17.05.2001 on the ground that the ACC had not approved the proposal for extension of tenure of the service of Dr P.L. Trakroo, Professor and Head of the Department of Communication, NIHFW. Though, the Committee had regularized his service with effect from 01.11.2000 till he was relieved, as on contract. Two things need to be kept in mind while considering this aspect of the matter. The first being

that the Chairman was the Appointing Authority insofar as Dr P.L. Trakroo was concerned and, therefore, he had the authority to grant the extension of one year. The second thing to be noted is that the said extension was not subject to the further approval from the ACC. In view of these two factors, we are of the opinion that the extension period of the petitioner Dr P.L. Trakroo ought not to have been curtailed and ought to have been permitted to run its course. The said extension was wrongly curtailed by a period of five months. Consequently, Dr P.L. Trakroo needs to be compensated for the same. After considering all the facts and circumstances of the case, we feel that if a sum of Rs. 35,000/-, which roughly works out to 25% of his emoluments, is given to him by way of compensation for the period of five months, the ends of justice would be met.

13. The writ petitions are accordingly disposed of as indicated above. The said payment be made by NIHFW to Dr. P.L. Trakroo within eight weeks.

ILR (2012) V DELHI 411
W.P.

ALCATEL-LUCENT INDIA LTD. ….PETITIONER

VERSUS

USHA INDIA LTD. ….RESPONDENT

(A.K. SIKRI, ACJ. & RAJIV SAHAI ENDLAW, J.)

W.P. NO. : 12723/2012 DATE OF DECISION: 01.06.2012

Sick Industrial Companies (Special Provisions) Act, 1985, (SICA)—Section 15, Section 22—Repeated references before BIFR by the Respondent for getting itself protection under the SICA—Petitioner aggrieved by actions of Respondent in making repeated references before BIFR and appeals therefrom before

AAIFR, even when previous references made were rejected—Repeated reference and keeping them pending leads to the Respondent illegally enjoying protection under SICA—Petitioner alleges that it amounts to continuous and systematic abuse of process by the Respondent with the sole motive of defeating the rights of its creditors—In 2004 and 2005 Respondent was enjoying protection under the SICA, no references were filed—Respondent pleads that alternative and equally efficacious remedy was available to be the petitioner as protection under Section 22 is not absolute—Held: Even though no reference is pending at present, the case eloquently demonstrates that there has been misuse of the machinery provided under the SICA. When the effect submission of reference under Section 15 is that Section 22 gets triggered, appropriate steps need to be taken to ensure that this provision is not misused. Present case appears to be one where prima facia the provisions of Sections 22 are taken undue advantage of Guidelines can be issued to ensure that the fresh reference in subsequent years should not be mechanically entertained. Writ petition disposed of with direction that BIFR should formulate necessary Practice Directions in light of the discussion in this case within three months-issue the same for compliance.

Thus, when the effect of submission of reference under Section 15 is that Section 22 of SICA gets triggered, appropriate steps needs to be taken to ensure that this provision is not misused. It is a matter of concern that over a period there has been rampant abuse of this provision. **(Para 21)**

We, thus, dispose of this writ petition with the direction that BIFR should formulate necessary Practice Directions in the light of our aforesaid discussion within three months and issue the same for compliance. **(Para 25)**

Important Issue Involved: Misuse of machinery under provisions of Section 22 of SICA taken undue advantage. Guidelines to be issued to ensure that future references are not mechanically entertained.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. N.K. Kaul, Sr. Advocate with Mr. Samrat Singh Kachwaha, Advocate.

FOR THE RESPONDENT : Mr. Vibhu Bhakru, Sr. Advocate, with Mr. Anand Mishra, Advocate. for R-1 Mr. Sachin Data, CGSC for BIFR

CASES REFERRED TO:

1. *Shri Hari Mills P. Ltd.* vs. *Hanumantha Reddy and Co.* (2009) 148 Com Cas 81 (Kar.).
2. *Rishabh Agro Industries Ltd.* vs. *P.N. B. Capital Services Ltd.* (2000) 5 SCC 515.
3. *BSI Ltd.* vs. *Gift Holding Pvt. Ltd.* (2000) 100 Comp Cas 436.
4. *Maruti Udhyog Ltd.* vs. *Instrumentation Ltd.* (1995) 82 Comp Cas 455 (Guj.)}.
5. *C.J. Gelatine Products Ltd.* In re (1994) 81 Comp Cas 890 (Bom.).

RESULT: Appeal dismissed.

A.K. SIKRI, ACTING CHIEF JUSTICE:

1. The petitioner feels aggrieved by the action of the respondent Usha India Limited in making repeated references before the BIFR and appeals therefrom before the AAIFR, even when previous references made by the petitioner were rejected. The grievances of the petitioner is that it amounts to continuous and systematic abuse of process resorted to by Usha India limited with the sole motive of delaying and defeating

the rights of its creditors. Usha has been filing repeated references before the BIFR and getting for itself protection of the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 which it is otherwise not entitled to. To highlight the purported mala fides and abuse on the part of the Usha, the petitioner traced the following events in its petition.

2. On 30.7.2002 Usha filed its first Reference before BIFR which was registered as Reference no. 117/2002, claiming losses of rs. 1015.24 Crores. In just three months, the said Reference was rejected. The BIFR, vide a detailed order recorded that far from losses, the net worth of Usha is positive by Rs. 800.73 Crores. The following findings of the BIFR's order dated 28.10.2002 are relevant:

> "...The Company made investments of Rs. 504 crores in these companies during 1996-2000. The profit of the company during this period was Rs. 66.25 cores. The company disinvested in many of the sister concern companies. These were both quoted and unquoted investments. The company has not disclosed to whom these investments were sold and as to how the funds were realized."

> "...AS explained above, funds aggregating Rs. 504 crores were made in preference shares, 0% FCDs and these investments were not entirely made out of the profits of the company. The system adopted by the Company about valuation of unquoted investments was neither transparent nor consistent. The investments cannot be considered having completely eroded, especially when UIL was the promoter of these companies and the investments were made as promoter's contribution to draw long term benefits.... The contention of the company that it had raised cash by dis-investing in sister concerns during 1997-98 to 1999-2000 is also not supported with any evidence as to how and to whom these investments were sold. The company has been manipulating its investment portfolio..."

> "...The net worth of the company would become positive by Rs. 800.73 crores after disallowing the losses to the extent of Rs. 1015.24 crores as discussed".

3. On 12.03.2003, Usha filed an appeal against the aforesaid order dated 28.10.2002 before the AAIFR. On 4.8.2006 i.e. after about three

and half years, the above appeal (appeal against the first reference rejection) was finally disposed off by the AAIFR, which affirmed that there has been manipulation of accounts by Usha in order to establish sickness. Some portions of the AAIFR order which may be noted are:-

> "à.No doubt a company is not barred from making investments outside. However, such huge investments outside, all of which has turned bad, at the cost of running the appellant company itself cannot be considered as an example of bona fide wrong intention. This company had net worth nearly 833 crores but as early as 30.6.1996 it had invested Rs. 1554 crores outside itself; such huge investments outside the company cannot be considered as bonafide mistakes. No company can be absolved of the action of investing outside consciously, at the detriment of the parent company, and therefore claim sickness."

4. The findings of the BIFR as affirmed by the AAIFR on 4.8.2006 were not challenged by Usha. Therefore, the same became final and binding. Yet, Usha continues to illegally carry forward these disallowed losses in subsequent references which act according to the petitioner is a complete abuse of legal process and claiming protection for years on a reference based on such losses is patently illegal, and designed solely to deny creditors the window for execution.

5. While the appeal against the first reference was pending before the AAIFR, Usha in the year 2003 filed another Reference (second Reference) before BIFR which was registered as Reference No. 316/2003. This was in relation to the accounting year 2003. Usha carried forward the disallowed losses in its books for the year 2003 and further exaggerated the losses for the year 2003 to Rs. 1198.28 crores. This reference was finally rejected by BIFR on 8.2.2006 with the following crucial findings:

> "BIFR records that Usha's auditors themselves stated in their report for the year 2004 that the accounts do not give a true and fair view in conformity with the accounting principles."

> "...the sickness of the company has been brought upon itself deliberately and the company has not become sick in the normal course.."

6. The BIFR records that the net worth of the company is Rs. 845.27 crores as on 31.3.2003.On 9.11.2006 Usha filed an appeal before AAIFR against BIFR's above order of 8.2.2006 (Appeal No. 322/2006). This appeal was dismissed on 2.9.2008 i.e. after about two years. AAIFR has found that the second reference was not based on any new fact that Usha had merely carried forward disallowed losses. Again this finding of the AAIFR has not been challenged. This clearly indicates that Usha is not concerned with supporting its position. It finds it simpler to file repeated references and keep them pending for years and thus illegally enjoys the protection granted under SICA.

7. It is further averred that as Usha was enjoying the protection of SICA, it deliberately did not file any reference for the years 2004 and 2005, thereby further showing that it was only interested in defeating/delaying its creditors. After waiting for all these years, Usha filed a fresh Reference (Third Reference) to BIFR being case No. 26/2008 (filed on 12.11.2007). On 14.8.2008 the said Reference was taken up for consideration to determine the status of Usha's sickness. It was brought to the BIFR's notice by representatives of the IFCI, the Export-Import Bank of India and other creditors that two earlier References No. 117/2002 and 316/2003 had been rejected as the net worth of Usha was positive. It was also recorded by BIFR that there was insufficient information submitted by Usha in its Form 'A' no Factory License was submitted and there were reservations in the Auditors report. Then the BIFR records that in fact the advocate for Usha admitted that the company was not in operation since 2002. Nonetheless, instead of rejecting this reference on the ground that admittedly Usha lacked "industrial character. and there could be no claim to sickness, the BIFR continued with the matter though it was a regular case and fixed 24.9.2008 as the next date of hearing.

8. The third reference was finally disposed off on 11.11.2009 i.e. after two years, with the BIFR noting that Usha has admittedly remained closed since 2002, and it did not possess an industrial license on the date of filling the reference. Thus, the BIFR held that Usha did not qualify to apply for SICA protection as it was not an "industry" within the meaning of Section 3 (1) (o) of the SICA. On 12.1.2010 Usha filed an appeal against the above order. (Appeal No. 9/20100. The appeal was admitted and notices were issued on 15.3.2010.

9. Based on the aforesaid averments in the petition, the submission of the petitioner is that there is not an iota of genuineness in these references and the BIFR and AAIFR have repeatedly held so. This has now been going on for nearly 10 years (the first Reference being made in July, 2002). Conclusive findings of the BIFR and AAIFR, to the effect that Usha has fudged/maintained irregular accounts to illegally depict sickness are on record. In fact, even its statutory auditors do not accept/ approve of Usha's accounting practices. Yet, Usha continues to file references based on the same losses, which the BIFR and AAIFR have repeatedly disallowed and/or with incomplete information and/or with caveats and disclaimers by its auditors. Though these references are finally rejected, by the time the order rejecting the same is passed (and affirmed in appeal), Usha has enjoyed protection under the provisions of the SICA and its creditors have been denied their rights under the decree.

10. It is pout that the petitioner has a monetary decree dated 6.9.2004 in its favour but has not been able to execute the same because of the protection enjoyed by the Usha under SICA.

11. Mr. Neeraj Kaul, learned Senior Counsel appearing for the petitioner submitted that the law has to be enforced in such a manner that the dubious persons are not able to misuse and abuse the process and/ or exploit the provisions to their advantage in a malafide manner. It was argued that this Court has been vested with very wide powers under Article 227 to ensure that the stream of justice remains pure and unadulterated. The said power includes the power to guide the supervise subordinate courts and tribunals in order to ensure the ends of justice. Various judgments in this regard have been cited during the course of hearing. According to the petitioner, in light of the facts set out above, it is only with judicial intervention that the perpetual malpractices being carried out by Usha would come to an end. Mr. Kaul, thus, pleaded that this Court should lay down suitable guidelines directing the BIFR to perform a pre-registration scrutiny (as required in law) before registering future references filed by Usha to ensure that there are new and genuine grounds entitling Usha to file the reference and that the reference is not based on the same grounds which the BIFR and AAIFR have repeatedly disallowed. It was submitted that as per the post registration stage, (which will come into play only after the pre-registration scrutiny described above), the statute stipulates time and again that the enquiry be completed within 60 days but that has not happened even once (though the first

reference was disposed of within 3 months). Mr. Kaul concluded his submissions by making a passionate plea for issuance of necessary and appropriate directions/orders in the interest of justice or otherwise Usha shall continue the abuse of process and rights of its creditors permanently defeated.

12. The petition is contested by Usha. The learned counsel for the Usha raised preliminary objection by submitting that writ petition had become infructuous as the reference of Usha before the BIFR had been rejected vide order dated 11.11.2009 and at present there are no proceedings pending before the BIFR with respect to Usha. It was also argued that the petitioner has an alternative and equally efficacious remedy. Replying to the allegation of making repeated references by Usha resulting in availing protection under Section 22 of the SICA, it was submitted that the protection available to the sick company under Section 22 of SICA is not absolute and any person seeking to proceed against the Company has a right to apply and take leave of the BIFR or AAIFR in this regard and proceed against the company. In this context, the learned counsel emphasized the following aspects:-

(i) That the petitioner is not pressing any application under Section 22 (1) of the SICA before AAIFR to proceed against the respondent company.

(ii) The petitioner has filed execution proceeding against the respondent M/s Koshika Telecom Ltd. and there has been no impediment, on account of reference filed by the respondent company, preventing the petitioner from pursuing with the execution proceedings. On the contrary, the execution proceedings were delayed as M/s Koshika Telecom Ltd. is in liquidation and all its assets are in possession of the Official Liquidator attached to this Court and the petitioner had not approached the Company Court despite the liberty granted by the Ld. Single Judge 5 years ago and has failed to file its claim before the official liquidator attached to this Court. Even the execution proceedings have since been concluded for want of available assets with the judgment debtor.

13. It was also submitted that when the law permits making of reference under Section 15 (1) of the SICA in the event the final accounts

of an Industrial Company for the relevant period indicate that the net worth of the company has been eroded and Usha had been making reference since satisfying the aforesaid condition. It was argued that though the first reference for the year ending 30.11.2001 had been rejected on the ground that Usha's networth was positive, if certain amount advanced by the Company which had been written off are not considered. In the subsequent year, the Usha had clearly disclosed that there was no possibility of recovering the amount and therefore, there was no question of networth of the company being considered as positive.

14. Refuting the contention of the petitioner, it was contended that there was no such power with the Register, BIFR under BIFR Regulations or in the BIFR Rules as it amounts to discharge of judicial function which Registrar could not undertake. He argued that BIFR and AAIFR are statutory bodies, established under Section 4 and 5 of the SICA respectively. Section 4 (1) provides for Establishment of BIFR to exercise the jurisdiction and powers and discharge the functions and duties conferred or imposed on the Board by or under this Act. Section 12 of the SICA further expressly provides that

> "(1) The jurisdiction, power and authority of the Board or the Appellate Authority may be exercised by the Benches.
>
> (2) The Benches shall be constituted by the Chairman and each Bench shall consist of not less than two Members.
>
> (3) If the Members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority but if the Member are equally divided, they shall state the point or points on which they differ and make a reference to the Chairman of the Board, or as the case may be, the Appellate Authority who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other Members and such point or points shall be decided according to the opinion of the majority of the Members who have heard the case including those who first heard it."

15. He also referred to Section 36 of the SICA which provides that the Central Government may make Rules to carry out the provisions of SICA, but such subordinate legislation cannot supplant, repugnant and

contrary to the statute itself. Relying upon the provision of Section 16 of the SICA, he submitted that the power and duty to enquire into the working of the Sick Company is expressly conferred upon the BIFR by virtue of Section 16 of the SICA only and it would not be open for the Secretary, BIFR or any other functionary of BIFR except the Bench to enquire and determine as to whether the company is a sick company or not. According to the learned counsel the role of Registrar, BIFR is thus limited to examining whether reference under Section 15 is complete and that the same can be put up before a competent Bench of the BIFR. Regulation 19 of the BIFR Regulations indicates the same, whilst sub regulation (1),(2) and (3) of Regulation 19 of the BIFR Regulations provide for manner of making and communicating the reference to the BIFR. Sub Regulation (4) and (5) of Regulation 19 provide for the receipt and scrutiny of the reference respectively. A harmonious reading of Section 16 of SICA and Regulation 19 of the BIFR Regulation indicate that scrutiny of the reference by the Registrar is limited to ensure that the same is in the form as provided under Regulation 19 (1) or 19(2) has been received alongwith the prescribed documents. In terms of Regulation 19 (3) it would not be open for either the Registrar or the Secretary, BIFR to adjudicate any contentious issues or to embark upon the enquiry whether the company making the reference is a sick company or not in exercise of its powers under Section 19 (5). Similarly, Rule 4 of BIFR Rules cannot be interpreted to empower the Secretary BIFR to decide as to the sickness of the company. Any issue arising out of the reference would necessarily have to be limited in relation to the form, extent of information and receipt of the reference and the issues relating to the inquiry into the sickness of a company is not contemplated. It is further submitted that the contention that the Registrar or the Secretary itself determine or adjudicate the contentious issue as to whether a company is sick or not at the time of receipt of the reference and before its registration, is patently erroneous and liable to be rejected.

16. We have considered these submissions of counsel for the parties, made at the Bar.

17. At the outset, we would like to remark that even though no reference is pending at present and looking from this angle, we could have disposed of the writ petition without passing any effective order. However, the matter cannot be treated in the manner projected by the learned counsel for the respondent. Present case itself eloquently

demonstrates that there can be misuse of the machinery provided under the SICA by making repeated references year after year; taking advantage of the manner in which such references are admitted, consequence of which is that all proceedings against such a company shall stand stayed under Section 22 of the SICA; to gain time endlessly with repeated references even when previous references are rejected on merits.

18. We would like to start our discussion by stating that in any insolvency regime, there is an apparent conflict between the issues involved, namely, recovery of the dues of the creditors from a company, restructuring/rehabilitation of an insolvent company and effective liquidation process/system to ensure timely liquidation of the companies which cannot be revived. Interests of all groups concerned with these aspects are paramount: whether it be of creditors in the recovery of their debts or that of an insolvent company seeking revival. Above all, public interest including the economic interest of the nation which is paramount is subserved only when interest of all the aforesaid groups is protected. It is for this reason balancing of these purported rival and antagonist interests becomes a delicate task. All kinds of creditors and investors in a company would like to put their money at stakes only if they are reasonably confident that they would be able to recover the money invested; be it shareholder, debenture holder or a financial institution giving credit to such a company. Not only they want reasonable returns on the money invested, they want recovery of their investment also in the time of need. If a feeling is generated that money invested may be put in jeopardy, investors may stop making investments.

19. It is equally important that when an industrial company becomes insolvent first attempt has to be made to rehabilitate and restructure such a company. The reason is obvious. Insolvent industrial companies, when remain insolvent, result in blockage of sizeable national resources which may have cascading effect on all sectors of economic and social life of the nation. It may, in addition, put the creditors in a spot as it becomes difficult to recover their dues in such an eventuality. The ill-effects of insolvency in industrial companies would be loss of production, loss of employment, loss of revenue to Central and State Governments and locking up of investible funds of banks and financial institutions. This became cause of serious concern to the Government and the society at large and this concern was accentuated by the alarming increase in the incidence of insolvency in industrial companies. The Parliament of India

enacted the insolvent Industrial Companies (Special Provisions) Act, 1985 (SICA) . The enactment of this legislation was recognition of the fact that in order to fully utilise the productive industrial assets, afford maximum protection of employment and optimise the use of funds of the banks and financial institutions, it would be imperative to revive and rehabilitate the potentially viable insolvent industrial companies as quickly as possible. It would also be equally imperative to salvage the productive assets and realise the amounts due to banks and financial institutions, to the extent possible, from the non-viable insolvent industrial companies through liquidation of those companies. It was felt that the existing institutional arrangements and procedures for revival and rehabilitation of potentially viable insolvent industrial company were both inadequate and time consuming and a comprehensive law was needed. The Act as originally enacted, made provisions for identification of insolventness in industrial companies fixing on the Board of Directors of such a company the responsibility to report such insolventness to the Board of Industrial and Financial Reconstruction (BIFR) which has been set up under this Act for evolving suitable measures to rehabilitate/revive the company. This Act operates and is sought to be implemented through a three-tier system, namely, (i) Operating Agency, (ii) the Board, and (iii) the Appellate Authority. The Operating Agency is essentially the hand-tool of the Board to carry out some investigations and legislation provisions. The scheme of the Act visualises:-

(a) the initiation of a reference and determination by the Board of the insolventness of a company;

(b) the enquiry, consideration and determination by the Board whether the insolvent industrial company can on its own within a reasonable time make its 'net worth positive', and if not, then the formulation of a scheme of revival in respect thereof;

(c) the further determination by the Board are due consideration that the hopes of the company are belied and it cannot or has failed to make its net worth positive and, therefore, the permanent sanction of a scheme of revival is necessary. The further consideration is that such a scheme is not practicable or that the financial assistance, concessions and reliefs necessary to make the scheme successful are not forthcoming and, therefore, the formation of an opinion by the Board that it is just and equitable

> to wind up the company. These are essential jurisdictional parameters of the Board and beyond these it cannot and need not travel. Till the whole exercise is gone through, the jurisdiction and parallel proceedings under all other Acts (to the extent provided in Sections 22 and 23) cannot lie or be proceeded with."

Thus one of the salient features is contained in Section 22 of SICA which mandates that no proceedings against the company for recovery of dues shall proceed with during the pendency of proceedings before BIFR.

20. Once reference is admitted, the provision of Section 22 of the SICA, gets triggered and it comes to the aid of such a company. Section 22 (1) provides that in case the inquiry under Section 16 is pending or any scheme referred to under Section 17 is under preparation or consideration by BIFR or any appeal under Section 25 is pending then certain proceedings against the industrial company are to be suspended or presumed to be suspended. The nature of proceedings which automatically attract the provisions of the suspension are:-

- Winding-up of the industrial company.
- Proceedings for execution of distress against the properties of sick industrial company.
- Proceedings for the appointment of receiver.

The Sick Industrial Companies (Special Provisions) Amendment Act, 1993 has brought the following proceedings also within the purview of the provisions of Section 22(1):

- Suit for recovery of money.
- Suit for enforcement of any security or any guarantee in respect of any loans or advances granted to the company.

It has been stated that such proceedings shall be suspended and if it is intended by the concerned party that the proceedings are to be continued against the sick industrial company then prior consent or approval of BIFR should be taken. Once the enquiry under Section 16 is treated to be pending, the provisions of Section 22 are attracted and the company court cannot proceed further the matter. {see **Maruti Udhyog Ltd. Vs. Instrumentation Ltd.** (1995) 82 Comp Cas 455 (Guj.)}. Thus the suspension of the proceedings would commence as

soon as the inquiry under Section 16 is ordered by the Board. Section 16 (3) provides that the inquiry should be completed as expeditiously as possible and preferably within sixty days. The Board may appoint Operating Agency for the purpose of completion of the inquiry. Depending upon the outcome of the inquiry, the BIFR can order actions to be taken by the sick industrial company under the provisions of Section 17. It is clear from the provisions of Section 22 (1) that proceedings in a civil suit are liable to be suspended or stayed only when an enquiry under Section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending. (See **Shri Hari Mills P. Ltd. Vs. Hanumantha Reddy and Co.** (2009) 148 Com Cas 81 (Kar.) The starting point of suspension of proceedings is the commencement of the inquiry under Section 16 and the terminal point is the implementation of the scheme or, as the case may be, the disposal of the appeal by the appellate authority. (see **C.J. Gelatine Products Ltd. In re** (1994) 81 Comp Cas 890 (Bom.)). The settled law is that the deemed date of commencement of inquiry for the purpose of section 22 of the Act is the date of submission of reference under Section 15. In other words once a company is registered with the Board for Industrial and Financial Reconstruction, all proceedings filed against a company must be stayed forthwith and shall not be proceeded with without the consent of the Board.(See **Rishabh Agro Industries Ltd. Vs. P.N. B. Capital Services Ltd.** (2000) 5 SCC 515.) This was so held by the Supreme Court in the case of **BSI Ltd. Vs. Gift Holding Pvt. Ltd.** (2000) 100 Comp Cas 436 in the following words:-

> "The word "suit" envisaged in section 22(1) cannot be stretched to criminal prosecutions. The suit mentioned therein is restricted to "recovery of money or for enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company". As the suit is clearly delineated in the provision itself, the context would not admit of any other stretching process."

21. Thus, when the effect of submission of reference under Section 15 is that Section 22 of SICA gets triggered, appropriate steps needs to be taken to ensure that this provision is not misused. It is a matter of concern that over a period there has been rampant abuse of this provision.

22. The experience of the working of the SICA has been far from satisfactory. This enactment was formulated as an alternative to the process of recovery through civil courts, which was a very time consuming process and the winding up through the companies Act where hardly any recoveries could be made by the financial sector, while at the same time, ensuring that social and economic fallout of the said two routes of recovery could be avoided. However, unfortunately the new system set up in place of SICA met with only limited success. On the contrary it lent itself to gross misuse of some of its provisions particularly Section 22 of the Act.

23. As mentioned above, present case appears to be one where prima facie the provisions of Section 22 of the SICA are taken undue advantage of. Therefore, at least in those cases where the reference was rejected in previous years on merits by the BIFR, guidelines can be issued to ensure that fresh references in subsequent years should not be mechanically entertained.

24. Learned counsel for the respondent may be right in contending that while registering the references, the Registrar cannot act as quasi judicial authority which is the function of the Board. However, in order to ensure that such situation does not recur, at least in those cases where the reference is rejected earlier, matter can be referred to directly to the BIFR and BIFR should look into the same and to decide whether it is a case for admitting the reference. Even if BIFR decides it to admit after finding that the conditions for the same are satisfied, it can still take a decision as to whether the provisions of Section 22 should be allowed to prevail or not. Section 22 stipulates that proceedings can go on with the consent of the Board/BIFR and the Board can in such cases pass a general order giving such a consent. At that stage, in such cases, where the references were rejected previously, the BIFR can pass appropriate directions refusing to extend the benefit of Section 22 of the SICA.

25. We, thus, dispose of this writ petition with the direction that BIFR should formulate necessary Practice Directions in the light of our aforesaid discussion within three months and issue the same for compliance.

26. Writ petition stands disposed of in the aforesaid terms.

ILR (2012) V DELHI 426
CRL. A.

SANDEEP ….APPELLANT

VERSUS

STATE ….RESPONDENT

(SURESH KAIT, J.)

CRL. A. NO. : 273/2005 DATE OF DECISION: 02.07.2012

Indian Penal Code, 1860—Section 307, 34—Appellant challenged his conviction U/s 307/34 of the Code and pointed out various lacunae and contradictions in prosecution case—He urged that benefit should have been given to him specifically as witnesses had turned hostile—On the other hand, it was urged on behalf of State that evidence led by it was sufficient and convincing to up hold conviction of appellant—Arguments raised regarding witnesses turning hostile, was also countered—Held:— Evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him—The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on careful scrutiny thereof.

Of the hostile witness, the settled law is that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. **(Para 67)**

Important Issue Involved: Evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him—The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on careful scrutiny thereof.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Rajat Aneja, Advocate.

FOR THE RESPONDENT : Ms. Rajdipa Behura, APP for the State.

CASES REFERRED TO:

1. *Bhajju @ Karan Singh* vs. *State of M.P.* 2012 STPL (Web) 173 SC.
2. *Himanshu @ Chintu* vs. *State of NCT of Delhi* [2011] 2 SCC 36/[2011] 1.
3. *Prithi* vs. *State of Haryana* MANU/SC/0532/2010 : (2010) 8 SCC 536.
4. *Sidhartha Vashisht @ Manu Sharma* vs. *State (NCT of Delhi)* MANU/SC/0268/2010 : (2010) 6 SCC 1.
5. *Ramkrushna* vs. *State of Maharashtra* MANU/SC/7352/2007 : (2007) 13 SCC 525.
6. *Koli Lakhmanbhai Chanabhai* vs. *State of Gujarat* MANU/SC/0719/1999 : (1999) 8 SCC 624.
7. *Jaswant Singh and Anr.* vs. *State* 1992(22)DRJ555.
8. *Khujji @ Surendra Tiwari* vs. *State of M.P.* MANU/SC/0418/1991 : (1991) 3 SCC 627.
9. *Hari Kishan and State of Haryana* vs. *Sukhbir Singh & Ors.* 1989Cri.L.J.116.
10. *Syad Akbar* vs. *State of Karnataka* MANU/SC/0275/1979 : (1980) 1 SCC 30.

11. *Bhagwan Singh* vs. *State of Haryana* MANU/SC/0093/1975 : (1976) 1 SCC 389.
12. *Sri Rabindra Kumar Dey* vs. *State of Orissa* MANU/SC/0176/1976 : (1976) 4 SCC 233.

RESULT: Appeal dismissed.

SURESH KAIT, J.

1. The present appeal is being filed while challenging the judgment dated 11th March, 2005 passed by learned Additional Sessions Judge, Karkardooma Courts, Delhi, whereby, the appellant has been held guilty under Section 307 read with Section 34 of I.P.C.

2. Appellant also challenged the order on sentence, whereby, he has been sentenced to undergo R.I for two years and also to pay a fine in sum of Rs.7,000/- each and in default of which, to further undergo SI for four months.

3. The case of the prosecution in brief that the complainant Ramesh used to reside in House No. D-156, Gokalpuri, Delhi. On 12th August, 1999, the appellant along with co-accused Ranjan and Anil, who, according the complainant, were vagabonds came to his house. Complainant Ramesh got annoyed and asked them not to visit his house in future. All the accused threatened him that they would see to it.

4. Thereafter on 13th August, 1999, complainant Ramesh along with his friend Anil went to recover the bills on two-wheeler scooter. After recovery of his dues, they were going back to their respective houses. At about 10:30 a.m, they arrived at A-Block, DDA Park, Gokalpuri. All the three accused accosted them and got their scooter stopped. On enquiry, they told Ramesh that he would be taken to task. They removed him from the scooter. The co-accused Anil brought out a dagger from his 'unti' and tried to plunge it into Ramesh. Complainant Ramesh tried to ward it off with his right hand. Co-accused Ranjan and appellant Sandeep caught hold of him and Anil thrust the dagger into his abdomen. Accordingly, Ramesh raised an alarm. Co-accused Anil, Ranjan and appellant Sandeep took to their heels. Many people collected at the spot including Dharam Pal, brother of Ramesh. Dharam Pal took Ramesh to the hospital and police was informed.

5. Sub-Inspector Sewa Singh investigated this case. He recorded

the statement of injured Ramesh and got this case registered vide FIR No. 377/1999 at Police Station Gokalpuri, Delhi for the offences punishable under Sections 307/34 Indian Penal Code, 1860.

6. After the investigation, the prosecution filed the charge-sheet. Thereafter, learned trial court framed charges under Sections 307/34 Indian Penal Code, 1860 vide its order dated 30th April, 2001. They all pleaded not guilty and claimed trial including the appellant.

7. The prosecution examined 11 witnesses in all to prove its case. PW2 Ramesh, PW3 Jugal Kishore and PW5 Anil were the eye witnesses.

8. Dharam Pal, brother of the complainant Ramesh took his injured brother to the hospital after the incident. Banarsi another brother of injured, PW6 stated that accused persons had indulged in incident. Banarsi raised the objection but they threatened and abuse him. He narrated this incident to Naresh, who, got annoyed and scold to him and directed him not to meet these boys again. He testified that on 13th August, 1999, the accused persons had stopped his brother. PW7 Hukum Singh is another brother of the injured. He also arrived at the spot after the incident. He stated that he caught hold of appellant and took him to the police station while other accused namely Anil and Ranjan had escaped from the spot.

9. PW8 Dr. Adarsh, CMO, proved MLC Ex-PW-8/A which depicts the following injuries.

> "1. There were two incised wounds one on right side of umblicus measuring 2 cm x 1 cm x depth not known and other on left lumbar and of the same dimension. 2. 2 x 5...on right palm near the thumb."

10. Dr. Marut Dass referred the patient to Senior Resident Surgery, after Dr. Pankaj Wadhwa gave him first aid. Dr. Adarsh identified the hand-writing of Dr. Marut Dass Bansal and Dr. Pankaj Wadhwa on Ex-PW8/A.

11. He stated that Dr. Wadhwa had opined at the encircled portion Mark X on the MLC ExPW8/A that the injuries caused on the person of Injured was grievous. Dr. Adarsh stated that these doctors had left the hospital and their present whereabouts were not known.

12. PW-3 Head Constable Pawan Kumar and PW10 Head Constable Lal Singh accompanied PW11 Sub Inspector Sewa Singh who investigated this case.

13. PW9 Jage Ram, ASI, the then Head Constable recorded FIR Ex-PW9/A and DD No. 8A ExPW9/B.

14. Statement of accused persons were recorded under Section 313 of Cr.P.C, wherein, they sought permission to bring defence witnesses. Accordingly, they produced DW1 Ganga Ram who stated that appellant, who is a retail grocery shopkeeper was taken by police officials on 13th August, 1999 at 8:30 a.m. He further stated that he had never made any complaint to the higher authorities that appellant had been framed in this case.

15. DW2, Ram Nath stated that on 13th August, 1999 he saw Ramesh etc. who were going on a scooter and when they reached near a corner, due to patti (iron strip), the scooter lost his balance and they fell down. He denied having made report to the higher authorities that accused had been falsely implicated in this case.

16. Learned Defence Counsel argued before the trial court that Anil Kumar, the most important witness in this case, stated about the presence of accused Anil only and he did not whisper a word or syllable about the presence of the remaining two accused persons. The aforesaid Anil Kumar further stated in clear, specific and unequivocal terms that he had not seen anyone else quarrelling with Ramesh.

17. This witness was declared hostile and cross-examined by learned Additional Public Prosecutor, and he again reiterated his stand. He, however, deposed that an altercation between Ramesh and Anil took place in his presence. He also saw that Anil was having knife in his hand and Ramesh tried to save himself. Meanwhile, he went to call Dharampal and when he returned, he saw Ramesh was having injuries in his stomach.

18. Jugal Kishore, another eye witness, firstly deposed that he had seen that Anil gave knife blows on the person of Anil, subsequently he corrected himself by mentioning the name of Ramesh. He had seen Sandeep/appellant and did not see anyone else with Anil. The appellant

Sandeep was apprehended by the public and when the police came there, he was handed over to the police. Accused Anil had run away from the spot.

19. This witness also declared hostile. With the permission of the Court, learned Additional Public Prosecutor cross-examined him, wherein, he admitted having made a statement to the police in which he had named appellant Sandeep, co-accused Anil and Ranjan. The appellant and Ranjan had caught hold of Ramesh and Anil had plunged the knife into his person.

20. PW2 Ramesh, has however, supported the prosecution case from top to toe. Although PW Anil Kumar supported the prosecution case to some extent, the depositions of Ramesh and Jugal Kishore cannot be pushed under the carpet. They have clearly and unambiguously stated that all the three accused persons were present at the spot. Both these witnesses have stated that Sandeep and Ranjan had caught hold of the victim and co-accused Anil gave knife blows. They have supported the prosecution case in tandem.

21. Due to the discussion recorded above, the learned trial Judge was of the opinion that there was no reason to discard their testimonies. Therefore, the offence stands proved against all the three persons involved as they took part in the aforesaid incident.

22. The contention raised by the learned Defence Counsel before the trial court was that there is a contradiction whether appellant Sandeep was apprehended at the spot or not. In this context, learned counsel drawn the attention of the learned trial judge towards the statement of PW3 Head Constable Pawan Kumar. He contradicted the prosecution story by stating that none of the accused was found present at the spot. On the other hand, the public witnesses as well as the Investigating Officer, SI Sewa Singh, stated that one of the accused was apprehended at the spot.

23. The learned trial judge has recorded that this is a small contradiction which does not cut much ice. The incident happens on 13th August, 1999 and the statement of Head Constable Pawan Kumar was recorded in the Court on 13th August, 2001. The learned trial judge

was of the opinion that the Courts must be borne in mind that police officials have to work day in and day out. Human memory is vicissitudinary. Therefore, he was of the considered view that this argument must be eschewed out of consideration.

24. The learned defence counsel also pointed out that few witnesses described the weapon of offence as knife and others mentioned it as Chhuri i.e. Dagger. On this argument, the learned trial judge has recorded its opinion that he was unable to locate much significance in this argument. There is a wafer thin difference between two. This is a common knowledge that rustic and illiterate people also call the knife as dagger and vice versa.

25. Finally, the trial judge recorded its opinion that two accused caught hold of the victim and third inflicted injuries with a sharp weapon, on a very vital part. The intention on part of the accused is crystal clear. There is no hinge nor loop to hang a doubt on. Such like defence story, having no legs to stand can be created at any time. It all boils down to a case of attempt to murder. Thus he convicted all the accused persons for the offence punishable under Section 307 read with Section 34 of IPC.

26. Mr. Rajat Aneja, Learned counsel appearing on behalf of the appellant has argued that the learned trial court, while passing the impugned judgment dated 11th March, 2005 did not take into consideration the evidence adduced by the prosecution which was absolutely contradictory and wanting whereby the prosecution failed to prove its case miserably and therefore, the learned trial judge fell in grave error by misconstruing the evidence on record which clearly show that false implication of the appellant at the behest of the complainant and thus the judgment and order dated 11th March, 2005 respectively and 14th March, 2005 respectively are liable to be set aside.

27. It is pertinent to mention here that though there were three accused involved in this case, however only appellant Sandeep is before this court.

28. To strength his arguments, the learned counsel for the appellant submitted that the learned trial judge fell in grave error by relying on the

testimony of PW-2 Ramesh & PW-4 Jugal Kishore, who were real brothers in relation having a common vested interest against the appellant and thus the deposition of such interested witnesses was wholly incredulous and unreliable.

29. He further submitted that the complainant/injured, Ramesh Kumar who appeared as PW-2 before the trial court was cross-examined at length, wherein, he clearly stated that in the witness box that in pursuance to the threat extended to him by the appellant along with other two accused persons in the night of 12th August, 1999, he did not complaint either to the police authorities or the parents of the accused persons regarding the same. Moreover, PW-2 has deposed that many people had collected but since he was asked he did not know the number of people who had collected at the spot. On the contrary, it has come on record through the deposition of the brother of the injured/complainant that one of his brother Dharampal came at the spot and picked up his brother. Therefore, the injured did not even show the presence of his brother Dharampal whereas Dharampal who appeared as PW-1 in the witness box, stated that on 13th August, 1999, he saw his brother Ramesh in injured condition at DDA Park at A-Block. He took his injured brother to the police station and after that he removed to GTB Hospital.

30. Learned counsel has pointed out that the entire testimony of the brother of the injured, who did not utter a word about the presence of other persons at the spot nor could he say anything about the role on any of the accused persons. Whereas, on the contrary, the injured i.e. PW2 Ramesh stated nothing about the arrival of his brother Dharampal at the spot, therefore, the possibility of false implication at the behest of the complainant cannot be ruled out particularly keeping in view the fact that he was on inimical terms with the appellant who was having a small grocery shop in the same vicinity.

31. Mr. Aneja further submitted, undisputedly, according to injured/complainant, the knife wound was inflicted by the other co-accused persons Anil, and the role of the appellant has been confined to the extent of holding one of the hands of the injured. Therefore, the learned trial judge did not notice material contradictions in the depositions of the witnesses which went to the root of the matter and clearly established

that the appellant Sandeep was falsely implicated.

32. He has further argued that the complainant injured has deposed that he was going on his scooter along with his friend Anil, who was also an eye witness to the occurrence. Thus, the testimony of the said eye witness, Anil, assumed paramount importance in precedence to all other prosecution witnesses. The said Anil Kumar appeared as PW-5 before the trial court who categorically stated that it was only one accused Anil who had stabbed Ramesh and except him nobody else was present. He was the only eye witness who is an independent witness and was accompanied the injured on the scooter at the time of occurrence.

33. PW5 has further deposed to the following effect:-

> "Ramesh was driving the scooter. When we reached A-Block in front of park in Gokal Puri somebody had stoped the scooter of Ramesh. He stepped down from the scooter. I remained sitting on the scooter. Ramesh went inside the Gali and I saw Ramesh and Anil, accused present in the Court, were doing 'Tu-Tu' 'Main-Main' and Anil was having a knife in his hand. Ramesh tried to save himself. After seeing this incident I immediately left the spot and went at the house of Ramesh at the same scooter to inform his brother. At the some distance brother of Ramesh Dharam Pal met me and I informed him about the incident. I came back to the spot but none was found there. We went to the P. Station Gokal Puri. I saw Ramesh was having injury in his stomach and he was being taken to the hospital. I have not seen anybody else quarrelling with Ramesh"

34. Mr. Aneja, learned counsel has further argued that PW-5 Anil who was accompanied the injured at the time of incident and saw the incident thread-bar with his own eyes, his testimonies has assumed significant proportions in order to determined the role of each accused person. From the aforesaid testimony, he had categorically deposed that it was accused Anil only who stopped the scooter whereas he remained sitting on the scooter and the injured went inside the gali where Ramesh and accused Anil were stating "Tu Tu Main Main" and Anil was having a knife in his hand. With regard to the role of appellant Sandeep PW-5,

Anil clearly deposed that **"I have not seen anybody else quarrelling with Ramesh"**.

35. At this stage, learned prosecutor cross-examined PW-5 Anil and the witness was entirely consistent in his statement even during his cross-examination by learned public prosecutor.

36. Thus, in view of the testimony of PW5 Anil, there remains no room for doubt that the appellant Sandeep was not present at the time of incident and he was picked up by the police subsequently in order to falsely implicate him. All other witnesses who had deposed are real brothers of the injured who were holding grudges against the appellant and thus motive of false implication is writ large on its face.

37. Learned counsel has further argued that it is also indeed pertinent to mention that even the other witnesses i.e. brother of injured, namely Banarsi (PW6), Jugal Kishore (PW4), Hukam Singh (PW7) & Dharampal (PW1) deposed in an entirely contradictory fashion and in case their testimonies are read together as a whole, they cannot be reconciled with the stories of the prosecution.

38. The learned counsel further argued that the learned trial judge also failed to consider the testimony of PW-4 Jugal Kishore, wherein, he has stated that he was playing cricket in DDA park, he saw accused Anil stopping the scooter of Ramesh who quarrelled with Anil and further he saw that accused Anil gave a knife blow on the person of injured Anil.

39. Further, he submitted that the learned trial judge also did not take into consideration that it was not Anil who was injured in this incident and on the contrary it was his brother Ramesh who had been injured. Therefore, PW-4 even did not know who the injured was. Further more, the said PW-4, also did not utter a word about the presence of the appellant at the site of occurrence in his examination-in-chief.

40. Learned counsel has further argued that the trial judge also failed to appreciate that PW-1 Dharampal who also happens to be a real brother of injured Ramesh, did not utter a word about the presence of the appellant at the site. Moreover, PW-1 stated that he took his injured brother to the police station whereas all the contrary, PW-4 Jugal Kishore

stated in his cross-examination that he took the injured to the hospital on the scooter of Dharampal. However, Dharampal did not say anything to this effect in his own testimony.

41. PW5 stated in his cross-examination that the 'injured Ramesh had gone himself to the Police Station'. Therefore, there were large scale of contradictions in the depositions of all the witnesses which could have thwarted the learned Sessions Judge by passing an order of conviction against the appellant and therefore, the findings returned by the trial judge are totally perverse and liable to be set aside.

42. On the conviction for the offence under Section 307, learned counsel has argued that the injuries on the person of injured Ramesh were opined by Dr. Pankaj Wadhwa and the MLC was prepared by one Dr. Marut Dutt Bansal, both of whom were never produced by the prosecution despite being mentioned in the list of witnesses. In the absence of the aforesaid witnesses, the injuries on the person of the injured could not be adjudged by the learned trial judge on the basis of testimony of Dr. Adarsh from GTB Hospital who came to the witness box and deposed that as per record there were two incised wounds – one on the right side of umbilicus measuring 2cm. X 1 cm. X depth not known and other on the left lumber, which were opined as grievous by Dr. Pankaj Wadhwa.

43. Learned counsel submitted that the said injuries could not be termed as so fatal with a view to attract the provisions of Section 307 and therefore, in the absence of the witnesses as aforesaid who examined the injured the charge of Section 307 could not be attracted because the intention of the accused persons could not be ascertained in regard to the fact that whether the said injuries were sufficient to cause death of a person or inflicted with such an intention and therefore the impugned judgment is bad in law and is liable to be set aside.

44. According to the eye witness the incident took place at about 10:30 a.m and then 15 minutes thereof, the injured was allegedly taken to the police station and thereafter to the hospital, whereas on the contrary, PW-10 Constable Lal Singh stated that he received the intimation at about 2:00 p.m on 12th August, 1999.

45. Learned counsel submitted that both of the aforesaid aspects

are absolutely contradictory because the story of the prosecution alleges that it was at 11:00 a.m on 13th August, 1999. On this aspect, learned Additional Public Prosecutor cross-examined PW10 Lal Singh but nothing material could be elicited from him and the said witness remained firm on his stand. The said contradictions also went to the root of the matter and the impugned judgment suffers from grave illegality and is liable to be set aside.

46. He further submitted that the learned trial judge failed to consider the evidence of PW-3 HC Pawan Kumar who deposed that as soon as he reached at the spot on 13th August, 1999 with SI Sewa Ram, none was found there.

47. Mr. Aneja learned counsel has argued that the learned trial court failed to take into consideration the ingredients of provision of Section 307 Indian Penal Code, 1860 which states to the following effect:-

> **Attempt to murder-** Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned.

48. Learned counsel submitted, from the reading of the aforesaid provision as well as the illustration provided with the said provision, it is crystal clear that the pre-requisite and the *sine qua non* of the provision is the establishment of intention on the part of the accused which could only be inferred by the facts and circumstances of the case in as much as the nature of injury, the organ on which it was inflicted and the surrounding circumstances.

49. He submitted in the present case it has not been proved that the injury was caused with an intention to cause death and even the matter of injuries were not proved in accordance with law.

50. On the other hand, learned prosecutor Ms. Rajdipa Behura has

argued that Jugal Kishore PW4 is not a brother of the injured/complainant however in some relation and all the three accused came one day before i.e. on 12th August, 1999 and threatened the complainant. The appellant and co-accused Ranjan caught hold the injured and the third accused Anil stabbed with knife. Eight injuries in grievous nature and all on vital parts of the body.

51. Learned APP has further submitted that PW2 Ramesh/complainant deposed that accused persons namely Anil, Ranjan and appellant Sandeep they came on 12th August, 1999 and threatened and thereafter very next day on 13th August, 1999, they committed this offence.

52. She further submitted that PW-1 Dharampal was not the eye witness of the incident who stated that on 13th August, 1999 he saw his brother Ramesh in injured condition at DDA Park at A-Block. He took his injured brother to the police station and after that he was sent to GTB Hospital.

53. The appellant was apprehended at the spot by the public persons, therefore, he was arrested on 13th August, 1999 itself. The other co-accused namely Anil and Ranjan ran away from the spot, therefore, they were arrested on 19th August, 1999 and 13th February, 2000 respectively.

54. As PW5 Anil Kumar resiled from his statement and declared hostile. He seems to be own over witness as stated that he left his friend in injured condition and went on the scooter to call his brother.

55. In cross-examination by learned APP, he deposed that he knew Sandeep, he did not know Ranjan. The accused persons told that "Abhi Batate Hain" and injured Ramesh was brought down from the scooter by them. The accused Anil took off a Churi from his unti and attacked on the person of Ramesh which was guarded of by the Ramesh and thereafter, the accused Ranjan and appellant caught hold Ramesh and Anil gave a knife blow on the stomach of Ramesh and he further gave another blow on the right side of stomach of Ramesh.

56. Learned APP has further submitted that PW-7 Hukam Singh who heard the noise of incident, he saw some persons of public had caught hold of appellant. Co-accused Ranjan and Anil had escaped from

the spot. He saw Ramesh was in injured condition was having knife injury in his stomach and he was being taken to the police station. He along with other persons took Sandeep to the hospital.

57. In cross-examination, he deposed that when he reached at the spot appellant was in custody of public persons. Thereafter, he took him to the police station.

58. This witness has further deposed in his cross-examination that his statement was recorded at 11:30 a.m from the spot. He immediately went to the police station along with Sandeep and remained there for about one and half hour.

59. Learned APP has further submitted that PW-11, SI Sewa Singh, the IO of the case has suggested the arrest of the appellant though the trial judge has not given any opinion of causing injuries, however, it would not vital the case as the appellant was arrested by apprehend at the spot and the other co-accused ran away and arrested thereafter. Therefore, the learned trial judge by considering all the submissions of the parties and record came to the conclusion that the accused persons including the appellant was the person who committed the offence, therefore, they have been rightly convicted by the learned trial court.

60. Since the prosecution witnesses were discussed above who have been declared hostile, therefore, she has relied upon a judgment of **Himanshu @ Chintu Vs. State of NCT of Delhi** [2011] 2 SCC 36/ [2011] 1 wherein it is held as under:-

> In **Prithi v. State of Haryana** (2010) 8 SCC 5363 decided recently, one of us (R.M. Lodha, J.) noticed the legal position with regard to a hostile witness in the light of Section 154 of the Evidence Act, 1872 and few decisions of this Court as under:
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> > 25. Section 154 of the Evidence Act, 1872 enables the court in its discretion to permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. Some High Courts had earlier taken the view that when a witness is cross- examined by the party calling him, his evidence

> > cannot be believed in part and disbelieved in part, but must be excluded altogether. However this view has not found acceptance in later decisions. As a matter of fact, the decisions of this Court are to the contrary. In **Khujji @ Surendra Tiwari v. State of M.P.** MANU/SC/0418/ 1991 : (1991) 3 SCC 627, a three-Judge Bench of this Court relying upon earlier decisions of this Court in **Bhagwan Singh v. State of Haryana** MANU/SC/0093/ 1975 : (1976) 1 SCC 389, **Sri Rabindra Kumar Dey v. State of Orissa** MANU/SC/0176/1976 : (1976) 4 SCC 233 and **Syad Akbar v. State of Karnataka** MANU/SC/ 0275/1979 : (1980) 1 SCC 30 reiterated the legal position that: (Khujji case, SCC p. 635, para 6)
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> > 6. ...the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on careful scrutiny thereof.

61. Learned counsel has also relied upon another judgment on the same issue in a case of the Apex Court reported 2012 STPL (Web) 173 SC titled **Bhajju @ Karan Singh Vs. State of M.P.** has held in as under:-

> 19. Now, we shall discuss the effect of hostile witnesses as well as the worth of the defence put forward on behalf of the Appellant/accused. Normally, when a witness deposes contrary to the stand of the prosecution and his own statement recorded under Section 161 of the Code of Criminal Procedure., the prosecutor, with the permission of the Court, can pray to the Court for declaring that witness hostile and for granting leave to cross-examine the said witness. If such a permission is granted by the Court then the witness is subjected to cross-examination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witnesses, if he so desires. In

other words, there is a limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness in so far as it supports the case of the prosecution. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Act enables the Court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The Courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled cannon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. These principles have been encompassed in the judgments of this Court in the cases:

a. **Koli Lakhmanbhai Chanabhai v. State of Gujarat** MANU/SC/0719/1999 : (1999) 8 SCC 624

b. **Prithi v. State of Haryana** MANU/SC/0532/2010 : (2010) 8 SCC 536

c. **Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi)** MANU/SC/0268/2010 : (2010) 6 SCC 1

d. **Ramkrushna v. State of Maharashtra** MANU/SC/7352/2007 : (2007) 13 SCC 525

62. A recent judgment delivered by the Apex Court in a case of **Mano Dutt & Anr. Vs. State of U.P.** The judgment delivered on 29th

February, 2012 and held as under:-

> In our view, non-examination of Nankoo, to which the accused raised the objection, would not materially affect the case of the prosecution. Normally, an injured witness would enjoy greater credibility because he is the sufferer himself and thus, there will be no occasion for such a person to state an incorrect version of the occurrence, or to involve anybody falsely and in the bargain, protect the real culprit. We need not discuss more elaborately the weightage that should be attached by the Court to the testimony of an injured witness. In fact, this aspect of criminal jurisprudence is no more res integra, as has been consistently stated by this Court in uniform language. We may merely refer to the case of **Abdul Sayeed v. State of Madhya Pradesh** MANU/SC/0702/2010 : (2010) 10 SCC 259, where this Court held as under:
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> 28. 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." (Vide **Ramlagan Singh v. State of Bihar, Malkhan Singh v. State of U.P., Machhi Singh v. State of Punjab, Appabhai v. State of Gujarat, Bonkya v. State of Maharashtra, Bhag Singh, Mohar v. State of U.P.** (SCC p. 606b-c), **Dinesh Kumar v. State of Rajasthan, Vishnu v. State of Rajasthan, Annareddy Sambasiva Reddy v. State of A.P.** and **Balraje v. State of Maharashtra.**)
>
> 29. While deciding this issue, a similar view was taken in **Jarnail Singh v. State of Punjab,** where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-

27, paras 28-29)

28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In Shivalingappa Kallayanappa v. State of Karnataka this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

29. In **State of U.P. v. Kishan Chand** a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide **Krishan v. State of Haryana**). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below.

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.

63. I have heard the learned counsel for the parties.

64. The appellant along with co-accused Ranjan and Anil came to the residence of the complainant Ramesh on 12.08.1999 and threatened

him that they would see to it. Next day i.e. on 13.08.1999 complainant along with his friend Anil went to recover the bills on two-wheeler scooter. After recovery of the same, they were going back to their houses. At about 10:30 a.m., when they arrived at A-Block, DDA Park, Gokalpuri, all the three accused accosted them and got their scooter stopped. Co-accused Anil brought out a dagger from his unti and tried to plunge it into Ramesh. Complainant Ramesh tried to ward it off with his right hand. Co-accused Ranjan and appellant caught hold of him and co-accused Anil thrust the dagger into his abdomen. Complainant Ramesh raised an alarm. Co-accused Anil, Ranjan and appellant took to their heels. Many people collected at the spot including Dharam Pal, brother of Ramesh and the appellant was apprehended by the public collected over there and took him to police station while the other co-accused Anil and Ranjan had escaped from the spot. Though PW4 Jugal Kishore was declared hostile by the prosecution, but on cross-examination by ld. APP, he admitted having made a statement to the police station, in which he had named the appellant and along with two other accused namely Anil and Ranjan. He also stated that appellant and Ranjan had caught hold of Ramesh and Anil had plunged a knife into his person.

65. PW-2 Ramesh, has supported the prosecution case from top to toe. Although PW-5 Anil Kumar supported the prosecution case to some extent, the depositions of complainant Ramesh and Jugal Kishore (PW4) cannot be pushed under the carpet. They have clearly and unambiguously stated that all the three accused persons including appellant were present at the spot. Both these witnesses have stated that appellant and co-accused Ranjan had caught hold of the victim and co-accused Anil gave knife blows. By this act all the accused persons, caused 8 injuries in the person of complainant Ramesh, which are grievous in nature are all are in vital parts of the body.

66. Law has been settled by the Apex Court in a case of **Himanshu @ Chintu** (Supra) wherein Their Lordships observed that evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on careful scrutiny thereof.

67. Of the hostile witness, the settled law is that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence.

68. Normally, an injured witness would enjoy greater credibility because he is the sufferer himself and thus there will be no occasion for such a person to state an incorrect version of the occurrence, or to involve anybody falsely and in the bargain, protect the real culprit.

69. 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 assailants in order to falsely implicate someone.

70. In the present case, complainant Ramesh sustained injuries at that time place of occurrence lend support to his testimony that he was present during the occurrence. The said witness was cross-examined and nothing can be elicited to discard his testimony. The two accused persons caught hold of the victim and third inflicted injuries with a sharp weapon on vital parts of the complainant. The intention on the part of the accused was crystal clear. There is no hinge nor loop to hang a doubt on. Such like defence story, having no leg to stand, can be created any time.

71. Therefore, I find no discrepancy in the judgement and order delivered by the ld. Trial Judge.

72. Before parting with the instant petition, I note that instant case was of the year 1999. The appellant has suffered about 13 years and no other case prior to this incident and even thereafter have ever been reported against the appellant till date. He never remained in jail. He has been on anticipatory bail and at the time of conviction, he was admitted on bail. Thereafter, from the very first day on admitting the appeal, he was released on bail by this Court vide order dated 05.04.2005.

73. The appellant was 18 years of age at the time of incident, has old parents and two children as recorded in the order on sentence. However, keeping in view the antecedents of the appellant, he may be given benefit of Probation of Offenders Act under Section 361 of Cr.P.C, as he was less than 21 years of age at the time of incident and also have unblemished record.

74. Appellant has been rehabilitated in life and no useful purpose would be served in uprooting and sending him back to serve the remaining sentence, as similar view has been taken by the Coordinate Bench of this Court in **Jaswant Singh and Anr. vs. State** 1992(22)DRJ555 while referring the case of **Hari Kishan and State of Haryana vs. Sukhbir Singh & Ors** 1989Cri.L.J.116.

75. Accordingly, while maintaining the conviction, appellant is released on probation. He shall furnish a bond of good conduct for a sum of Rs.10,000/- for a period of one year to the satisfaction of the ld. Trial Court.

76. Instant petition stands disposed of with no order as to cost. Consequently, appellant shall appear before the ld. Trial court on 19.07.2012 at 2 Pm for further direction.

77. Ld. Trial Court shall be at liberty to call for the report of the Probationary Officer if it is deemed fit in the facts of the case.

78. TCR be sent back to the court concerned forthwith.

ILR (2012) V DELHI 447
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ALFA BHOJ PVT. LTD. ….PLAINTIFF

VERSUS

NEW DELHI MUNICIPAL COUNCIL ….DEFENDANT

(VALMIKI J. MEHTA, J.)

CS(OS) NO. : 3129/1996 DATE OF DECISION: 09.07.2012

Indian Contract Act, 1872—Section 74—Measure of damages—Brief Facts—Defendant invited tenders for licence of an air conditioned restaurant space measuring 5426 sq. ft. (approximately) located at Palika Parking Complex, Connaught Place, New Delhi—Since the first highest tenderer failed to complete the formalities, therefore, after forfeiting the earnest money amount of such tenderer, the plaintiff was offered the restaurant on licence of the defendant—As per the terms and conditions of auction, Plaintiff deposited Rs. 50,000/- as earnest money, and Rs. 20 lacs being two months advance licence fee—Plaintiff failed to comply the formalities of the contract—Filed suit for recovery contending that defendant was guilty of concealment of facts—Defendant relying on the terms and conditions of the tender to show that what was offered was "as is where is basis" and the plaintiff was in fact duty bound to inspect the premises and not raise any objection on any ground thereafter—Plaintiff has committed breach by not completing the formalities and because of which the contract of license could not be entered into between the parties—On that basis it was argued that in terms of Clause 2 of the terms and conditions of the allotment, the defendant had only a right to forfeit the earnest amount of 50,000/- and no right to forfeit any other/more amount. Held:— Liquidated damages are the subject matter of Section 74 Which deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty—Measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for—Even if there is a clause of forfeiture of an amount in addition to the earnest money deposited, such a clause entitling forfeiture of what is part price paid as advance, is hit by the bar of Section 74 of the Contract Act, 1872—Merely because there is a provision in the contract for forfeiture of part of the price in addition to earnest money, that clause cannot be given effect to unless the defendant pleads and proves losses caused to him on account of breach by the plaintiff—Section 74 of the Contract Act prescribes the upper limit of damages which can be imposed, and the Court is empowered subject to loss being proved, only to award reasonable compensation, the upper limit being the liquidated amount specified in the contract. Once parties specifically in the terms and conditions provided that in case of the eventuality of non-completion of the formalities only the forfeiture of earnest money can take place, nothing further can be claimed by the defendant—When the defendant illegally retains the amount of the plaintiff, defendant is liable to pay compensation to the plaintiff, whatever name it be called, interest or otherwise—Suit of the plaintiff will stand decreed against the defendant for a sum of 20 lacs along with pendente lite and future interest at 9% per annum simple till realization.

A reading of the aforesaid paras shows the following:-

(i) Even if there is a clause of forfeiture of an amount in addition to the earnest money deposited, such a clause entitling forfeiture of what is part price paid as advance, is hit by the bar of Section 74 of the Contract Act, 1872.

(ii) Merely because there is a provision in the contract for forfeiture of part of the price in addition to earnest money, that clause cannot be given effect to unless the defendant pleads and proves losses caused to him on account of breach by the plaintiff.

(iii) Section 74 of the Contract Act prescribes the upper limit of damages which can be imposed, and the Court is empowered subject of course to loss being proved, only to award reasonable compensation, the upper limit being the liquidated amount specified in the contract. **(Para 13)**

In fact, in my opinion, defendant would have been even prevented from claiming any further loss merely on account of non entering into a proper license contract by the plaintiff with the defendant, inasmuch as, Clause 2 specifically restricts eventuality in case of non compliance of the formalities, to an amount of Rs. 50,000/- of the earnest money. Once parties specifically in the terms and conditions provided that in case of the eventuality of non-completion of the formalities only the forfeiture of earnest money can take place i.e. parties consciously provided that in the eventuality of non completion of the formalities only the amount of Rs. 50,000/- could be forfeited, consequently, as per the ratio of the judgment of **Fateh Chand** (supra) under Section 74 of the Contract Act liquidated damages provided in the contract are the upper limit, nothing further can be claimed by the defendant. **(Para 15)**

Important Issue Involved: Indian Contract Act—Section 74—Measure of damages—Merely because there is a provision in the contract for forfeiture of part of the price in addition to earnest money, that clause cannot be given effect to unless the defendant pleads and proves losses caused to him on account of breach by the plaintiff—Section 74 of the Contract Act prescribes the upper limit of damages which can be imposed, and the Court is empowered subject to loss being proved, only to award reasonable compensation, the upper limit being the liquidated amount specified in the contract.

[Sa Gh]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Anil Airi, Ms. Sadhna Sharma, Mr. Ravi Kishan & Mr. Prityush Sharma, Adv.

FOR THE RESPONDENT : Mr. Ashutosh Lohia, Standing Counsel for NDMC.

CASES REFERRED TO:

1. *State of Maharashtra* vs. *A.P.Paper Mills Ltd.* 2006 (4) SCC 209
2. *National Highways Authority of India* vs. *Ganga Enterprises*, 2003 (7) SCC 410
3. *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa and Others* vs. *N.C.Budharaj* (2001)2 SCC 721.
4. *United Bank of India* vs. *Naresh Kumar & Ors.* AIR 1997 SC 3.
5. *Fateh Chand* vs. *Balkishan Dass*, (1964) 1 SCR 515; AIR 1963 SC 1405.

RESULT: Suit decreed against the defendant.

VALMIKI J. MEHTA, J. (ORAL)

1. The present suit has been filed by the plaintiff for recovery of Rs. 30,90,000/- alongwith interest at 24% per annum. The total amount of Rs. 30,90,000/- is split up into four parts, one amount of Rs. 50,000/- being the earnest money amount, second amount of Rs. 20 lacs being two months advance licence fee, thirdly of interest claim of Rs. 40,000/- upto the date of the suit, and fourthly the claim of Rs. 10 lacs towards loss of reputation.

2. The causes of action which are stated in the plaint, though run into several parts, however, learned counsel for the plaintiff at the stage of final arguments confined his claim to the recovery of Rs. 20 lacs arguing that on account of failure of the plaintiff to comply with the formalities for creation of a licence for the restaurant space, at best the defendant in terms of Clause 2 of the general terms and conditions of the tender could have forfeited an amount of Rs. 50,000/- but not the entire amount with it of Rs. 20,50,000/-. It is prayed that the plaintiff be refunded the amount of Rs. 20 lacs, and the defendant be held entitled to forfeit only the sum of Rs. 50,000/-.

3. The facts of the case are that the defendant on 12.2.1996 by insertion of advertisements in newspapers invited tenders for licence of an air conditioned restaurant space measuring 5426 sq. ft. (approximately) located at Palika Parking Complex, Connaught Place, New Delhi. Since the first highest tenderer failed to complete the formalities, therefore, after forfeiting the earnest money amount of such tenderer, the plaintiff was offered the restaurant on licence vide the letter dated 30.7.1996 (Ex.PW1/4) of the defendant. As per the terms and conditions of auction (Ex.P-2), the plaintiff had to deposit a total amount of six months' license fee, of which, an amount of Rs.20 lacs was the advance licence fee for two months, and Rs. 40 lacs was to be kept as interest fee security deposit by the defendant. The plaintiff was also liable to pay advance AC charges for one month. Though there are allegations and counter-allegations, the plaintiff alleging that defendant was guilty of concealment of facts etc etc, and, the defendant relying on the terms and conditions of the tender to show that what was offered was "as is where is basis" and the plaintiff was in fact duty bound to inspect the premises and not raise any objection on any ground thereafter, I am not required

to go into such aspects in the present judgment.

4. I have already stated above that counsel for the plaintiff has gone on the basis that the plaintiff has committed breach by not completing the formalities and because of which the contract of license could not be entered into between the parties. On that basis it was argued that in terms of Clause 2 of the terms and conditions of the allotment, the defendant had only a right to forfeit the earnest amount of Rs. 50,000/- and no right to forfeit any other/more amount. Relying on the term no.2, it is argued that in case of non completion of formalities, the specific forfeiture which has been provided is only of Rs. 50,000/- and nothing more. It is also argued that there is no other clause of forfeiture in the terms and conditions as per which the amounts were given by the plaintiff to the defendant and thus neither advance license fee nor security deposit (if the same had been deposited) could be forfeited.

5. The following issues were framed by this Court on 9.9.1997:-

"1. Whether the plaintiff is a company duly incorporated under the companies Act and Shri Harish Bhasin is competent to institute the present suit? OPP

2. Whether the defendant is entitled to forfeit the earnest money and the security deposit amount, of the plaintiff? OPD

3. Whether the plaintiff is entitled to claim damages, if so, to what amount? OPP

4. Whether the plaintiff is entitled to claim interest, if so, at what rate and on which amount? OPP

5. To what amount the plaintiff is entitled to recover from the defendant?OPP

6. Relief."

6. So far issue no.3 is concerned, as already stated above, the same is not pressed by the plaintiff. Issue no.1 is not pressed by the defendant, especially in view of the decision of the Supreme Court in the case of **United Bank of India Vs. Naresh Kumar & Ors.** AIR 1997 SC 3.

7. The main issue is therefore issue no.2 as to the entitlement of the defendant to forfeit the earnest money and the advance licence fee

paid of Rs. 20 lacs (wrongly called security deposit amount in this issue). As already stated, there is no objection to the defendant forfeiting the earnest money of Rs. 50,000/-, and what is pleaded is that the defendant wrongly forfeited the advance license fee of two months totaling to Rs. 20 lacs and hence plaintiff is entitled to refund of the same.

8. In order to appreciate the issue at hand, it is necessary to reproduce Clause 2 of the terms and conditions of allotment/tender, and which reads as under:-

> " Each Tenderer shall attach to the tender application earnest money in the shape of Bank Draft drawn in favour of the Secretary, NDMC equal to the amount of Rs. 50,000/- (Rs. Fifty Thousand only). The earnest money so deposited by a tenderer whose tender is not accepted shall be refunded after the Council has taken a decision regarding acceptance/rejection of the tenders. **The Earnest money is liable to be forfeited in case the tenderer on acceptance of his offer fails to complete any of the formalities of allotment or withdraws or amends his offer after submitting the tender application."** (underlining is mine)

9. The aforesaid underlined portion of Clause 2 leaves no manner of doubt that in case the plaintiff fails to comply with the formalities of allotment or withdraws his offer after submitting the tender application, the entitlement of the defendant is specifically restricted to its entitlement to forfeit the earnest money deposit of Rs.50,000/-. Learned counsel for the defendant could not show me any other clause in the terms and conditions of allotment which refers to entitlement of the defendant to forfeit any other amounts including the security deposit amount or any advance licence fee deposited.

10. Counsel for the defendant had placed reliance on Clauses 4,48 and 51 of the said tender conditions to argue that even the advance license fee amount deposited with the defendant by the plaintiff can be forfeited. In order to appreciate the arguments, Clauses 4,48 and 51 are reproduced here-in-below.

> "4. The licensee shall be required to deposit six months licence fee in cash or Bank Draft in the Council Treasury on receipt of acceptance of the offer. Out of this deposit, licence fee equal to four months licence fee will be reckoned and adjusted towards security for due fulfillment of the contractual obligations and the balance amount will be adjusted against monthly licence fee becoming due for two months from the date of commencement of licence fee. No interest will be payable on this deposit. Earnest money deposited by the tenderer/applicant shall be adjusted in the security deposit referred to above. The security will be returnable only on successful completion of the period/term of licence and fulfillment of contractual obligations on the part of the licensee. In this regard, the decision of the licenser shall be final and binding on the licensee.
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> 48. In the event of breach of any of the terms and conditions of licence and on cancellation with or without assigning any reasons, the licensee shall hand over the vacant possession of the cancellation of allotment and the licensee shall be liable to pay the damages at the rates as may be determined by the licensor from time to time from the date of cancellation of licence till the date of vacant possession of the premises is handed over to the licensor besides forfeiting the security in the event of breach of any of the terms and conditions of the licence and default in payment of monthly licence fee.
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> 51. In the event of breach of terms and conditions of the licence, the council shall be entitled to forfeit the whole or part of the security deposit besides terminating and revoking the licence and on the revocation of licence it shall be the duty of the licensee to quit and vacate the promises without any resistance and obstruction and give complete control of the restaurant to the council."

11. Surely Clause 4 has no application to the present case inasmuch as this nowhere entitles or provides for the defendant to forfeit the advance license fee deposited. Clause 48 only comes into play once there is a contract of license which is entered into by the parties. Though counsel for the defendant sought to contend that contract of the license was completed when the defendant sent its letter dated 30.7.1996, however, this argument is one of the futility inasmuch as admittedly, the plaintiff was never given possession of the licensed premises and when we look

at the various terms as stated in the terms and conditions, the contract of license is only complete after the formalities are completed by the plaintiff. Once the formalities were not completed, and more so because possession of proposed licensed premises could not have been and was not transferred to the plaintiff without the completion of the formalities, the contractual relationship never came into existence. At best the contract was till the stage of acceptance of tender, and for the contractual position till this date, there is a specific term no.2 which deals with this eventuality in entitling the forfeiture of the earnest money deposited of Rs. 50,000/-. Useful reference can be had to the judgments of the Supreme Court in the cases of **National Highways Authority of India Vs. Ganga Enterprises,** 2003 (7) SCC 410 and **State of Maharashtra Vs. A.P.Paper Mills Ltd.** 2006 (4) SCC 209 which hold that there is a contract with respect to invitation to tender and which contract is independent of the main contract which is subsequently entered into. Accordingly, I hold that the argument of the defendant has no substance. Clause 48 comes into play post the contractual license being entered into i.e. on the formalities being completed including of the plaintiff giving the amount towards the security deposit being four months license fee and AC charges of one month and possibly entering into of the licence deed. Clause 51 also accordingly will have no application in the present case inasmuch as this clause deals with the breach of terms and conditions of the license i.e. post the main contract of license coming into existence.

12. Clause 2 of the terms and conditions stated above clearly provides for liquidated damages. Liquidated damages are the subject matter of Section 74 of the Contract Act, 1872. The law with respect to Section 74 of the Contract Act is contained in the Constitution Bench judgment of the Supreme Court in the case of **Fateh Chand Vs Balkishan Dass,** (1964) 1 SCR 515; AIR 1963 SC 1405. Paras 7,8 10, 11 and 15 of the said judgment are relevant and which read as under:-

> **7. The Attorney-General appearing on behalf of the defendant has not challenged the plaintiff's right to forfeit Rs. 1,000/- which were expressly named and paid as earnest money. He has, however, contended that the covenant which gave to the plaintiff the right to forfeit Rs. 24,000/- out of the amount paid by the defendant was stipulation in the nature**

> **of penalty, and the plaintiff can retain that amount or part thereof only if he establishes that in consequence of the breach by the defendant, he suffered loss, and in the view of the Court the amount or part thereof is reasonable compensation for that loss. We agree with the Attorney-General that the amount of Rs. 24,000/- was not of the nature of earnest money. The agreement expressly provided for payment of Rs. 1,000/- as earnest money, and that amount was paid by the defendant.** The amount of Rs. 24,000/- was to be paid when vacant possession of the land and building was delivered, and it was expressly referred to as "out of the sale price." If this amount was also to be regarded as earnest money, there was no reason why the parties would not have so named it in the agreement of sale. We are unable to agree with the High Court that this amount was paid as security for due performance of the contract. No such case appears to have been made out in the plaint and the finding of the High Court on that point is based on no evidence. It cannot be assumed that because there is a stipulation for forfeiture the amount paid must bear the character of a deposit for due performance of the contract.
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> 8. The claim made by the plaintiff to forfeit the amount of Rs 24,000 may be adjudged in the light of Section 74 of the Indian Contract Act, which in its material part provides:-
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> "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or as the case may be, the penalty stipulated for."
>
> The section is clearly an attempt to eliminate the sometime elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual

agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.

10. Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. **The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case.** Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damage"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.

11. Before turning to the question about the compensation which may be awarded to the plaintiff, it is necessary to consider whether s. 74 applies to stipulations for forfeiture of amounts deposited or paid under the contract. It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that s. 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression "the contract contains any other stipulation by way of penalty" comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by s. 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture. We may briefly refer to certain illustrative cases decided by the High Courts in India which have expressed a different view.

15. Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named

or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression "to receive from the party who has broken the contract" does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach.

(Underlining added)

13. A reading of the aforesaid paras shows the following:-

(i) Even if there is a clause of forfeiture of an amount in addition to the earnest money deposited, such a clause entitling forfeiture of what is part price paid as advance, is hit by the bar of Section 74 of the Contract Act, 1872.

(ii) Merely because there is a provision in the contract for forfeiture of part of the price in addition to earnest money, that clause cannot be given effect to unless the defendant pleads and proves losses caused to him on account of breach by the plaintiff.

(iii) Section 74 of the Contract Act prescribes the upper limit of damages which can be imposed, and the Court is empowered subject of course to loss being proved, only to award reasonable compensation, the upper limit being the liquidated amount specified in the contract.

14. In the facts of the case before the Supreme Court in **Fateh Chand** (supra) there was an Agreement to Sell which provided for forfeiture of earnest money of Rs. 1000/-, and there was also an additional clause entitling forfeiture of the part price paid in advance of Rs. 24,000/-. In the absence of any pleading and proof as to loss suffered, the Supreme Court disallowed the claim to forfeit the amount of Rs. 24,000/-. The facts of the case before the Supreme Court are strikingly similar to the facts of the present case, and in fact the facts of the case before

me are on much stronger footing than the facts of the case of the Supreme Court in the case of **Fateh Chand** (supra) for applicability of the provision of Section 74 of the Contract Act. This I say so because whereas in the case of **Fateh Chand** (supra) there was a specific clause entitling forfeiture even of the advance price, in the present case there is no term/condition of the tender whereby the defendant is entitled to forfeit the part of the advance licence fee paid. Accordingly, once there is no clause entitling forfeiture of the advance license fee and there is no loss which is pleaded and proved by the defendant (i.e even assuming there was a clause of forfeiture of advance license fee paid), yet, in terms of the decision of the Supreme Court in **Fateh Chand** (supra), the defendant is not entitled to forfeit the advance license fee paid. Admittedly, and as already stated above, there is no pleading and proof of any loss having been caused to the defendant.

15. In fact, in my opinion, defendant would have been even prevented from claiming any further loss merely on account of non entering into a proper license contract by the plaintiff with the defendant, inasmuch as, Clause 2 specifically restricts eventuality in case of non compliance of the formalities, to an amount of Rs. 50,000/- of the earnest money. Once parties specifically in the terms and conditions provided that in case of the eventuality of non-completion of the formalities only the forfeiture of earnest money can take place i.e. parties consciously provided that in the eventuality of non completion of the formalities only the amount of Rs. 50,000/- could be forfeited, consequently, as per the ratio of the judgment of **Fateh Chand** (supra) under Section 74 of the Contract Act liquidated damages provided in the contract are the upper limit, nothing further can be claimed by the defendant.

16. Counsel for the defendant states that the defendant has moved an application two days back in the Registry seeking amendment in the written statement to plead the case of entitlement to adjustment by forfeiting of the advance license fee deposited. In my opinion, besides the fact that the application is hopelessly delayed as the same has been filed only to come up during the course of final arguments, even if such a defence was contained in the existing written statement, the same would have no legs to stand upon inasmuch as the parties with open eyes specifically provided that in case the formalities are not completed, then, maximum amount of entitlement of the defendant to forfeit was the

earnest money of Rs. 50,000/- and nothing more. Once that is so and the parties have provided for an upper limit of damages in case of the eventuality of non completion of the formalities, there does not arise the issue of forfeiture or adjustment of any other amounts.

17. So far as the issue no.4 is concerned, and which pertains to the entitlement of the plaintiff to claim interest, in the facts of the present case I deem it fit that since the defendant has taken advantage of the monies deposited by the plaintiff, and would have in fact made profits thereon and which really are in the nature of interest, and since the plaintiff has lost benefit of interest on this amount of Rs. 20 lacs, I deem it fit that the plaintiff be and is awarded pendente lite and future interest till realization at 9% per annum simple. I do not find any reason to agree with the counsel for the defendant not to award interest inasmuch as by whatever expression, the loss to the plaintiff is called i.e. interest or loss of return on the amount of Rs.20 lacs or damages on the amount of Rs. 20 lacs, it is settled law that when the defendant illegally retains the amount of the plaintiff, the defendant is liable to pay compensation to the plaintiff, by whatever name it be called, interest or otherwise vide para 22 of **Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa and Others Vs. N.C.Budharaj** (2001)2 SCC 721.

18. Issue nos. 2,4 and 5 are therefore answered in favour of the plaintiff and the suit of the plaintiff will stand decreed against the defendant for a sum of Rs. 20 lacs along with pendente lite and future interest at 9% per annum simple till realization. Parties are left to bear their own costs.

,ILR (2012) V DELHI 462

FAO (OS)

YOUNG ACHIEVERS ….APPELLANT

VERSUS

IMS LEARNING RESOURCES PVT. LTD. ….RESPONDENT

(SANJAY KISHAN KAUL & VIPIN SANGHI, JJ.)

FAO (OS) NO. : 290/2012 DATE OF DECISION: 10.07.2012

Arbitration and Conciliation Act, 1996—Section 8—Respondent filed suit for permanent injunction seeking restrain against infringement of Registered Trade Mark etc. against appellant—In course of business respondent had entered into arrangements to carry out its business through its business partners and franchisees—One such arrangement was arrived with appellant, which was to be carried under written agreement valid for three years—On expiry of agreement by efflux of time, fresh agreement was executed but it was mutually terminated prematurely between parties—Prior to institution of suit, respondent complained about appellant's breach of contractual obligations and instituted suit for permanent injunction—Appellant preferred application u/s 8 of the Act praying for appointment of Arbitrator in virtue of Arbitration Clause incorporated in both previous agreements arrived between the parties—Application was dismissed and aggrieved appellant moved appeal urging that subsequent document mutually terminating agreement between parties, does not bring arbitration clause to an end but only terminates agreement inter se parties. Held—If previous agreements mentioning arbitration clause are superseded/novated by a fresh document creating

fresh agreement with no arbitration clause then dispute cannot be referred to Arbitration seeking help of previous agreement.

It is important to note that the Supreme Court made the aforesaid observation in respect of a "settlement" of disputes arising under the original contract, including the dispute as to the breach of the contract and its consequences. In the present case, the parties have clearly entered into a fresh contract contained in the exit agreement, which, as noticed above, is not even in dispute. The exit agreement does not even whisper about any dispute arising under the original agreements or about settlement thereof. It is pure and simple novation of the original contract by mutual agreement of parties. **(Para 6)**

Important Issue Involved: If previous agreements mentioning arbitration clause are superseded/novated by a fresh document creating fresh agreement with no arbitration clause then dispute cannot be referred to Arbitration seeking help of previous agreements.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Manu T. Ramachandran, Advocate.

FOR THE RESPONDENT : Mr. Vaibhav V., Mr. Shantanu Sood & Ms. Aamna Hasan, Advocate.

CASES REFERRED TO:

1. *M/s. Magma Leasing & Finance Limited and Anr.* vs. *Potluri Madhavilata & Anr.* (2009) 10 SCC 103.
2. *National Agriculcural Cooperative Marketing Federation India Ltd.* vs. *Gains Trading Ltd.,* (2007) 5 SCC 692.
3. *Heymen* vs. *Darwins Ltd.,* 1942 AC 356 : 1942 1 All ER 337 (HL).

4. *Union of India* vs. *Kishorilal Gupta & Bros.,* AIR 1959 SC 1362.

RESULT: Appeal dismissed.

SANJAY KISHAN KAUL, J. (Oral)

CM No.11407/2012 (Exemption)

Allowed subject to just exceptions.

FAO (OS) No.290/2012

The respondent filed a suit for permanent injunction seeking a restraint against infringement of a registered trademark, infringement of copyright, passing off of damages, rendition of accounts of profits, delivery up, etc. qua the trademark/words IMS of the respondent. The respondent claims to be a leading player in management entrance test coaching with specific focus on Common Admission Test (CAT). In the course of business, the respondent entered into arrangements to carry out its business through its business partners and franchisees, making available its proprietary and copyrighted course material and the benefit of its trademark 'IMS'. One such arrangement was arrived at with the appellant under an agreement dated 1.4.2007, which was valid for a period of three (3) years. On expiry of the said agreement by efflux of time a fresh agreement was executed on 1.4.2010 on similar terms & conditions. This agreement was to be valid till 31.3.2013. However, this agreement was mutually terminated prematurely in terms of a document called Exit Paper. This Exit Paper dated 1.2.2011 records the mutually agreed terms bringing the arrangement *inter se* the parties to an end.

It appears that prior to institution of the suit, the respondent complained about the appellant's breach of the contractual obligations contained in the Exit Paper dated 1.2.2011 including the use of the trademark IMS but to no avail, resulting in institution of the suit.

The appellant filed IA No.818/2012 under Section 8 of the Arbitration & Conciliation Act, 1996 predicated on clause 20, an arbitration clause, incorporated in both the agreements dated 1.4.2007 and 1.4.2010. This application has been dismissed by the impugned order dated 16.4.2012 of the learned single Judge.

We have heard learned counsels for the parties. It is the say of learned counsel for the appellant that in view of wide arbitration clause, the dispute inter se the parties was liable to be referred to arbitration. Learned counsel contends that the Exit Paper dated 1.2.2011 does not bring to an end the arbitration clause but only terminates the agreement inter se the parties by mutual consent (we may notice that no challenge is laid to the Exit Paper dated 1.2.2011).

Learned counsel in this behalf relies upon the judgment of the Supreme Court in The Branch Manager, **M/s. Magma Leasing & Finance Limited and Anr. Vs. Potluri Madhavilata & Anr.** (2009) 10 SCC 103. Learned counsel contends that the Supreme Court has held that the mere termination of the agreement on account of alleged breach, does not bring the agreement qua resolution of disputes by arbitration to an end.

The question for adjudication as framed in para 1 by the Supreme Court itself of the said judgment reads as under:

> "1. The core question that falls to be determined in this appeal by special leave is : does the arbitration agreement survive for the purpose of resolution of disputes arising under or in connection with the contract even if its performance has come to an end on account of termination due to breach?"

Learned counsel also specifically draws strength from the observations made in para 12, wherein the Supreme Court referred to its earlier decision in the case of **National Agriculcural Cooperative Marketing Federation India Ltd. Vs.Gains Trading Ltd.,** (2007) 5 SCC 692, wherein it was held that qua a contract which was abrogated by mutual agreement, that in such eventuality, the arbitration clause does not come to an end.

We are unable to agree with the submissions of learned counsel for the appellant, though there can be no dispute about the legal proposition propounded aforesaid and the law laid down by the Hon'ble Supreme Court. In fact, there is no quibble over the legal proposition that the arbitration clause would survive the termination/cessation of an agreement and the disputes pertaining to the same would still be resolved by arbitration. In the present case it is not a case of unilateral termination by one of the parties which has occurred. Mutually, a fresh document has been drawn

called the Exit Paper, an agreement containing comprehensive terms & conditions on which the parties continued with their association. Despite this Exit Paper setting out all the terms & conditions, the allegation of the respondent is that the appellant continued to infringe the trademark of the respondent by using the same, contrary to the said agreement. This Exit Paper undisputedly does not contain an arbitration clause.

The Supreme Court in **Magma Leasing & Finance Limited** (supra), which is a two-Judge bench decision, after referring to the judgment of the House of Lords in **Heymen v. Darwins Ltd.,** 1942 AC 356 : 1942 1 All ER 337 (HL), referred to the following observations of Subba Rao, J (as his Lordship then was) in **Union of India v. Kishorilal Gupta & Bros.,** AIR 1959 SC 1362:

> "8. Uninfluenced by authorities or case-law, the logical outcome of the earlier discussion would be that the arbitration clause perished with the original contract. Whether the said clause was a substantive term or a collateral one, it was nonetheless an integral part of the contract, which had no existence de hors the contract. It was intended to cover all the disputes arising under the conditions of, or in connection with, the contracts. **Though the phraseology was of the widest amplitude, it is inconceivable that the parties intended its survival even after the contract was mutually rescinded and substituted by a new agreement. The fact that the new contract not only did not provide for the survival of the arbitration clause but also the circumstance that it contained both substantive and procedural terms indicates that the parties gave up the terms of the old contracts, including the arbitration clause.** The case-law referred to by the learned counsel in this connection does not, in our view, lend support to his broad contention and indeed the principle on which the said decisions are based is a pointer to the contrary.
>
> 9...These observations throw considerable light on the question whether an arbitration clause can be invoked in the case of a dispute under a superseded contract. **The principle is obvious; if the contract is superseded by another, the arbitration clause, being a component part of the earlier contract, falls with it...** But where the dispute is whether the said contract is

> void ab initio, the arbitration clause cannot operate on those disputes, for its operative force depends upon the existence of the contract and its validity. **So too, if the dispute is whether the contract is wholly superseded or not by a new contract between the parties, such a dispute must fall outside the arbitration clause, for, if it is superseded, the arbitration clause falls with it."** (emphasis supplied)

We may note at this stage that the present is not a case involving the assertion by the respondent of accord and satisfaction in respect of the earlier contracts dated 01.04.2007 and 01.04.2010. In terms of the decision of the Supreme Court in **Kishorilal Gupta** (supra) (which is a three-Judge bench decision), if that had been the issue raised, the appellant may have been justified in claiming that the said dispute, i.e. whether there has been accord and satisfaction in respect of the two agreements should be referred to arbitration in terms of the arbitration agreement contained in the said two agreements.

Reliance placed on para 32 of the judgment in **Kishorilal Gupta** (supra) rendered by A.K. Sarkar, J in his concurring opinion appears to be misplaced. The Supreme Court in para 32 of the decision in **Kishorilal Gupta** (supra), after setting out section 62 of the Contract Act (which deals with the effect of novation, recession and alteration of contract) went on to observe that "*the settlement cannot be said to have altered the original contract or even to have rescinded it. It only settled the dispute as to the breach of the contract and its consequences.* For the same reason, it cannot be said to substitute a new contract for the old one". (emphasis supplied)

It is important to note that the Supreme Court made the aforesaid observation in respect of a "settlement" of disputes arising under the original contract, including the dispute as to the breach of the contract and its consequences. In the present case, the parties have clearly entered into a fresh contract contained in the exit agreement, which, as noticed above, is not even in dispute. The exit agreement does not even whisper about any dispute arising under the original agreements or about settlement thereof. It is pure and simple novation of the original contract by mutual agreement of parties.

The decision in **Magma Leasing & Finance Limited** (supra), did not concern the issue arising in the present case and therefore, in our

view, does not support the case of the appellant.

In our view, the decision in **National Agricultural Cooperative Marketing Federation India Limited** (supra) (an order passed on a petition under Section 11(5) of the Act by R.V. Raveendran, J) also does not advance the appellant's submission. That was a case where there had been alleged breach of the contract and the parties had agreed to cancel the contract. They had also agreed to enter into a fresh contract. In this background, the Supreme Court observed that even if performance of the contract comes to an end on account of repatriation, frustration or breach of the contract the arbitration agreement would survive for the purpose of resolution of disputes arising out of under or in connection with the contract. A reference was made, inter alia, to the decisions in **Heymen** (supra) and **Kishorilal Gupta** (supra). This decision, therefore, has no relevance in the present context.

We are, thus, of the view that the learned single Judge was right in coming to the conclusion that both the agreements dated 1.4.2007 and 1.4.2010 have been superseded/novated by the Exit Paper, and in view of Exit Paper being a fresh agreement with no arbitration clause for adjudication of disputes, the application of the appellant was rightly rejected.

We may add that, even otherwise, suppose there was no dispute about any item relating to the Exit Paper, then can it really be said thereafter a number of years if the trademark is infringed that the respondent will still have to resort to the contract where there was an agreement inter se the parties for mutual business containing the arbitration clause? The answer to this obviously would be in the negative.

We see no reason to interfere with the impugned order.

Dismissed with costs of Rs. 5,000.00.