NOMINAL-INDEX
VOLUME-3, PART-II
JUNE, 2011

Pages

SUBJECT-INDEX
VOLUME-3, PART-II
JUNE, 2011

CENTRAL RESERVE POLICE FORCE ACT, 1949—Section 11—Petition assailing the order dated 17.04.1990, whereby she was removed from service after departmental inquiry and the appellate order dated 03.08.1990, whereby her appeal against the removed order had been dismissed—Petitioner joined the Central Reserve Police Force as Mahila Sub-Inspector in 1986—In October 1987, petitioner sought permission from the department to appear in the Combined States Service Examination, 1987—Permission granted—Petitioner was granted one day casual leave for 08.02.1988 to appear in the aforesaid examination—On 08.02.1988, Kumari Mamta Sabharwal, reportedly a friend and neighbour of the petitioner was caught impersonating the petitioner and writing her answer sheet in the examination—Kumari Mamta Sabharwal gave a handwritten statement admitting that she was impersonating as the petitioner thereby defrauding the examination authorities on the request/advice of petitioner—Inquiry conducted—Petitioner held guilty and order passed—Petition—Held—Failure to maintain integrity and honesty in public examination would be covered within the meaning of expression "other misconduct" as defined under Section 11 (1) of the CRPF Act, 1949—The petitioner has not ceased to be a member of the force on 8th February, 1988 when she was appearing in the Combined State Service Examination, 1987—The petitioner though not on duty, did not cease to be a member of the force—The petitioner is a member of the disciplined force—It needs no elaboration that integrity and dignity of the service with which she is employed, is required to be observed at all times—The petitioner who was the sub-inspector, was taking the examination as an in service candidate—Causing any person to impersonate the service personnel in an examination with dishonest intention is reprehensible and certainly misconduct of the highest level—The challenge is solely premised on the plea that the acts attributed to the petitioner are not relatable to her service—

This submission is wholly misplaced. Held: No legally tenable grounds of judicial review.

Poonam Sharma v. *Union of India & Ors.* *739*

CODE OF CIVIL PROCEDURE, 1908—Suit—Order 26 Rule 9—Appointment of Local Commissioner—Delhi High Court Act, 1966—Section 10—Appeal—Maintainability of—Plaintiff filed an application for appointment for Local Commissioner for carrying out measurement of work done by plaintiff—Ld. Single Judge opined—Appropriate course would be to get measurements done on its own level from expert independent body—Local commissioner not required to be appointed—Dismissed the application—Preferred appeal against the order—Respondent contended—Real purpose behind the application to nullify the joint inspection carried out by parties—Court after going through the record, found substance in the arguments—Observed—Plaintiff's refusal to carry out inspection/measurement by its own engineer indicative of oblique and malafide purpose behind the application for appointment of local co`mmissioner—Carrying out measurements not only method by which plaintiff could prove the extent of work done by it—Must have possessed sufficient documents of its own showing—Deployment of man power, utilisation of material and resources at site, to be dealt with in detail in arbitration proceedings—Held—The appeal is maintainable against an interlocutory order having traits and traping of finality—Court possesses power for appointment of Local Commissioner but to exercise such power depend on the peculiarity of factual matrix—It can scarcely be claimed that local commissioner should be appointed to nullify the joint measurements in the face of offer of defendant to plaintiff to carry out measurements on its own—Appeal dismissed.

Prashant Projects (P) Ltd. v. *Indian Oil Corpn. Ltd.*.. *586*

— Order 9, Rule 13—Petitioner preferred writ petition challenging order of trial Court dismissing her application seeking condonation of delay in moving application under Order 9, Rule 13—As per petitioner, she came to know of ex-parte

(CIC)—CIC directed petitioner to supply the copies—Filed Writ Petition against the order of CIC—Contended fiduciary relationship between the petitioner and evaluator—Under Section 8 (1) (e) of RTI Act—The photocopy of ORS not to be disclosed—If the request for providing photocopies acceded to it Would open flood gate of such applications by other candidates—System would collapse—Further contended—Evaluation final and no request for evaluation can be entertained—Court observed: Admittedly evaluation carried out through computerised system not manually—The fiduciary relationship between IIT and Evaluator does not arise—No prejudice caused to IIT by providing a candidate a photocopy—Information not sought by third party—The apprehension of flood gate exaggerated—No difficulty if the IIT confident that system of evaluation foolproof—It is unlikely each and every candidate would want photocopy of ORS—Held—Present case was not about request of re-evaluation—The right of a candidate sitting for JEE or GATE to obtain information under RTI Act statutory—It cannot be waived by a candidate on the basis of a clause in the Information Brochure—The condition in the brochure that no photocopy of ORS shall be provided subject to RTI Act cannot override RTI Act. Writ Petition dismissed.

Indian Institute of Technology, Delhi v.
Navin Talwar *536*

— Article 226—Letter Patent Appeal—Appellant denied permission to appear in examination for shortage of attendance—Said denial challenged—Appellant also challenged appointment of Dean of University of Law and Legal Studies—Said challenge rejected—Appellant only attended 28.5% of classes against 75% requirement—Appellant permitted to appear in examination—Result kept in sealed cover—Appellants contended that attendance record of college forged and fabricated—Appellant claimed entitled for remission of recorded attendance for participation in Commonwealth Games. Hence instant appeal—Held; Need for attending

requisite lectures for LLB course repeatedly highlighted and emphasized—Student of law has to be dedicated person required to take study of law seriously—College records—No dispute that minimum requirement is 75% Difficult to accept that attendance records forged—Cannot be challenged on mere ipse dixit—Writ Courts not to get embroiled in such factual disputes—Credit for attending Commonwealth Games even if granted, Appellant to still have shortfall in attendance—Appellant allowed to sit for examination provided meeting of eligibility criteria—Allegations against Dean, School of Law and Legal Studies constitutes a distinct and separate cause of action—Cannot be ground for granting grace attendance to Appellant—Said question left open.

Vibhor Anand v. *Vice Chancellor, Guru Gobind*
Singh I.P. University & Ors. *654*

— Article 226 & 227—Personal with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995—Section 47—Petition challenging the order passed by the Central Administrative Tribunal, Principal Bench dated 18.05.2010 allowing the petition of the respondent quashing the order of pre-mature retirement—Directions given to reinstate the respondent in service on deemed basis with all consequential benefits—Respondent was employed as conductor with the petitioner—He met with an accident on 07.01.1991 and remained admitted in the hospital upto 07.06.1991—On 08.06.1991, respondent joined his duties after getting medical fitness certificate—Posted in Ticketing Section—Working upto 25.01.1992—Sent to DTC Medical Board for examination—Medical Board declared him medically unfit—On his application, he was again examined by another Board and was declared permanently unfit for the post of conductor—He preferred a petition seeking appropriate directions not to terminate his service—Court directed that he be examined again—Medical Board declared the respondent unfit for the post of conductor permanently—Directions issued to examine the respondent's case and provide such

employment to him protecting his salary—No alternative job was available—Competent Authority approved the compensation amount of Rs. 39,278,40/-—Not collected by the respondent—He moved contempt petition, which was dismissed—Respondent moved another writ petition challenging the order declaring him unfit for the post or any other lower post and his premature retirement—On account of jurisdiction, writ was transferred to Central Administrative Tribunal—Order passed—Petition—Held—Section 47 of the Act casts statutory obligation on the employer to protect employee acquiring disability during service—Petitioner ought to have considered the case of respondent under the aforesaid Act—The petitioner has not been able to show as to how Section 47 of the Act is not applicable to the facts and circumstances of the case either before the Tribunal or before this Court despite the fact that full liberty was given to the petitioner—Rather, considering the facts and circumstances of the case, a duty was cast upon the petitioner to consider on its own the case of the respondent under Section 47 of the Act—The Tribunal relying upon the provisions of Section 47 of the Act as well as judgments of the Supreme Court in Kunal Singh v. Union of India (supra) has allowed the petition of the respondent and has granted relief to him as has been stated above—In view of above discussion, no illegality or irrationally is seen in the order of the Tribunal which calls for interference of this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

Delhi Transport Coporation v. *Sh. Manmohan* *663*

— Article 226—Central Reserve Police Force Act, 1949—Section 11—Petition assailing the order dated 17.04.1990, whereby she was removed from service after departmental inquiry and the appellate order dated 03.08.1990, whereby her appeal against the removed order had been dismissed—Petitioner joined the Central Reserve Police Force as Mahila Sub-Inspector in 1986—In October 1987, petitioner sought permission from the department to appear in the Combined States Service Examination, 1987—Permission granted—

Petitioner was granted one day casual leave for 08.02.1988 to appear in the aforesaid examination—On 08.02.1988, Kumari Mamta Sabharwal, reportedly a friend and neighbour of the petitioner was caught impersonating the petitioner and writing her answer sheet in the examination—Kumari Mamta Sabharwal gave a handwritten statement admitting that she was impersonating as the petitioner thereby defrauding the examination authorities on the request/advice of petitioner—Inquiry conducted—Petitioner held guilty and order passed—Petition—Held—Failure to maintain integrity and honesty in public examination would be covered within the meaning of expression "other misconduct" as defined under Section 11 (1) of the CRPF Act, 1949—The petitioner has not ceased to be a member of the force on 8th February, 1988 when she was appearing in the Combined State Service Examination, 1987—The petitioner though not on duty, did not cease to be a member of the force—The petitioner is a member of the disciplined force—It needs no elaboration that integrity and dignity of the service with which she is employed, is required to be observed at all times—The petitioner who was the sub-inspector, was taking the examination as an in service candidate—Causing any person to impersonate the service personnel in an examination with dishonest intention is reprehensible and certainly misconduct of the highest level—The challenge is solely premised on the plea that the acts attributed to the petitioner are not relatable to her service—This submission is wholly misplaced. Held: No legally tenable grounds of judicial review.

Poonam Sharma v. *Union of India & Ors.* *739*

— Article 217(2)(b)—Appointment and conditions of office of Judge of High Court—Petition filed against recommendation of collegium recommending appointment of Respondent No.3 as Judge of High Court—Petitioner contended that Respondent No.3 not practicing advocate at time of recommendation—Petitioner appointed as member of Income Tax Appellate Tribunal—Non-fulfillment of qualification laid down in Article 217(2)(b) alleged—Hence present petition. Held- Article 217(2)

history of patient was that of suffering accidental burn—Because of discrepancies, testimonies of witnesses regarding recording of Dying Declarations cannot be believed—No Magistrate called to record Dying Declaration despite Rashida having died 15 days after incident—Dying Declaration not attested by anyone—Trial Court wrongly convicted accused solely on basis of fourth dying declaration which was the only evidence against him—Copy of judgment directed to be sent to the Commissioner of Police to take steps in accordance with law in respect of PW13 and to ensure that investigations are not conducted improperly as done in present case—Appellants acquitted—Appeal allowed.

Rashid & Ors. v. *State Govt. of NCT of Delhi* *571*

DELHI RENT CONTROL ACT, 1958—Section 4, 6 and 9—Petitioner demolished residential construction for reconstruction of a new building on plot of land—Assessing authority held rateable value of land which is not built upon but is capable of being built upon and/or is in process of erection, is to be fixed at 5% of estimated capital value of land—Statutory appeal against order of assessing authority dismissed by ADJ—Order challenged before High Court—Plea taken, principles of parity are applicable irrespective of whether rateable value is determined on basis of standard rent or actual rent—Section 63 (1) makes no distinction between self occupied and let out premises—Provisions of Section 63 (2) apply only to land which has not been built up earlier and would not apply to land which has already been built upon and building where upon is demolished for purpose of re-construction—Per contra plea taken, even before Sec. 4, 6 and 9 of DRC Act were declared invalid, assessment of rateable value of land on which building existed was different from assessment of rateable value of land alone, provisions of DRC Act were not applicable to open plot of land, principle of standard rent was not applicable to vacant land—Vacant land stands in its own class and is not to be governed by principles of parity—Once statute provided mode of assessment of rateable value of vacant land at 5% of capital

value thereof, other modes of assessment are excluded—Held—Literal reading of Section 63 (2) does not limit scope thereof to only virgin land—Expression used, is "the rateable value of any land" Which would also include land which was earlier built upon and building therefrom has been demolished—Only qualification for a land to fall under Section 63 (2) is that same is not built upon but is capable of being built upon—Only provision in statute for determination of rateable value of vacant land is Section 63 (2) and if same were to be held to not apply to land, though vacant but having been built upon earlier, it would create a void which is not desirable—There is no basis or rationale for discriminating between land which has earlier been built upon and building whereon has been demolished and land which has never been built upon—There can be no parity between built up property and vacant land—Municipal statute does not provide for parity—It provides for determination of rateable value as per rent at which property might reasonably be expected to be let—In supervisory jurisdiction, Court can refuse to interfere even where petitioner has made out a case.

Nakul Kapur v. *NDMC & Ors.* *510*

— Sections 4—Petitioners were tenant in shop measuring 15'x8' (120 sq. ft.) in property bearing no. E-3, Kalkaji, New Delhi at a monthly rent of Rs. 100/-—Respondent purchased some portion of the building including the premise in question from the previous owner—Petitioners attorned the respondent as landlord/owner and started paying rent to him—The respondent is a practicing Chartered Accountant—Respondent filed a petition for eviction u/s 14 (1) (e) and Section 25-B of the Act that premises are required for his bonafide requirement—Contented by the petitioner that landlord is not sure for what purpose the premises is required and alternative accommodation is available to him—Respondent submitted that he has no other suitable commercial accommodation; other property is a residential property and is fully occupied—No space is available for respondent there—Held—The respondent/landlord was in bonafide need of the rented premises because

(Appellate Tribunal) Rules, 1963—Rule 29—Code of Civil Procedure, 1908—Order 41 Rule 27 (1)—Assessing Officer (AO) rejected claim of assessee for management expenses—CIT(A) dismissed appeal of assessee—Assessee preferred appeal before ITAT—Alongwith appeal, application filed by assessee for further evidence which he did not produce before AO and CIT(A)—ITAT admitted that evidence and remitted case back to AO to decide issue after considering said additional evidence—Order challenged before High Court—Plea taken, under no circumstance, such additional evidence could be permitted—There was hardly any justifiable reason for permitting production of additional evidence—Rule 29 precludes producing additional evidence before Tribunal—Rule has limited scope and permits Tribunal production of any document or witness or affidavit to enable it to pass orders or for any other substantial cause—Assessee had no right to move application for additional evidence and Tribunal did not *suo moto* thought it proper to ask for production of these documents—Per contra plea taken, Rule 29 is to be given liberal interpretation as purpose behind Rule was to do substantial justice and to prevent failure of justice—Held—Discretion lies with Tribunal to admit additional evidence in interest of justice, once Tribunal forms opinion that doing so would be necessary for proper adjudication of matter—This can be done even when application is filed by one of parties to appeal and need not be *suo moto* action of Tribunal—Once it is found that party intending to lead evidence before Tribunal for first time was prevented by sufficient cause to lead such evidence and that this evidence would have material bearing on issue which needs to be decided by Tribunal and ends of justice demand admission of such evidence, Tribunal can pass order to that effect—True test in this behalf is whether Appellate Court is able to pronounce judgment on materials before it without taking into consideration additional evidence sought to be adduced—Legitimate occasion for exercise of discretion is not before Appellate Court hears and examines case before it, but arises when on examining evidence as it stands, some inherent lacuna or defect becomes apparent to

Appellate Court coming in its way to pronounce judgment—Reference is not to pronounce any judgment or judgment in a particular way, but is to pronounce its judgment satisfactory to mind of Court delivering it—Reason given by assessee for additional evidence was that these records could not be produced before lower authorities due to non retrievability of email because of technical difficulties—Ground pleaded by assessee was not confronted by Revenue—Tribunal found requirement of said evidence for proper adjudication of matter—Once Tribunal predicated its decision on that basis, no reason to interfere with the same—Appeal dismissed.

INCOME TAX (APPELLATE TRIBUNAL) RULES, 1963—Rule 29—Code of Civil Procedure, 1908—Order 41 Rule 27 (1)—Assessing Officer (AO) rejected claim of assessee for management expenses—CIT(A) dismissed appeal of assessee—Assessee preferred appeal before ITAT—Alongwith appeal, application filed by assessee for further evidence which he did not produce before AO and CIT(A)—ITAT admitted that evidence and remitted case back to AO to decide issue after considering said additional evidence—Order challenged before High Court—Plea taken, under no circumstance, such additional evidence could be permitted—There was hardly any justifiable reason for permitting production of additional evidence—Rule 29 precludes producing additional evidence before Tribunal—Rule has limited scope and permits Tribunal production of any document or witness or affidavit to enable it to pass orders or for any other substantial cause—Assessee had no right to move application for additional evidence and Tribunal did not *suo moto* thought it proper to ask for production of these documents—Per contra plea taken, Rule 29 is to be given liberal interpretation as purpose behind Rule was to do substantial justice and to prevent failure of justice—Held—Discretion lies with Tribunal to admit additional evidence in interest of justice, once Tribunal forms opinion that doing so

parties extended period of limitation by virtue of Section 18 of Limitation Act and Section 25 of Contract Act—As per Respondent suit barred by limitation as partial amount sent by Respondent with covering letter dated 21.05.1998 as well as communication dated 25.09.2004, did not extend period of limitation as alleged acknowledgment was beyond period of limitation since suit was filed on 08.04.2008—Held:- A plain reading of Clauses (3) of Section 25 of the Indian Contract Act makes it clear that a promise to pay a time barred debt is a condition precedent for application of the Section—Communication dated 25.09.2004 falls short of ingredients of Section 25(3) of the Act as Respondent clearly stated that he does not wish to make any meaningless commitments at that stage nor he stated that he would pay suit amount in future.

Promod Tandon v. *Anil Tandon* *762*

MOTOR VEHICLE ACT, 1988—Section 166—On 30.12.2006, Banwari Lal was hit by a truck from behind while going on motorcycle—He died in the accident—Claim petition preferred by the widow of deceased, four children and father—Tribunal awarded a sum of Rs. 26,56,000/- with 9% p.a., from the date of filing of the petition—Appeal filed against award—Further increase of 30% towards future prospects was not in accordance with Sarla Verma's case—Held—The Supreme Court while dealing with the aspect of future prospects in Sarla Verma's case (supra) has drawn no distinction between a private job, corporate job or Government job, though a distinction was made for obvious reasons between a temporary job and permanent employment—All that the Supreme Court emphasized in the aforesaid case was that while assessing the future prospects of the deceased, the permanency or otherwise of his job be taken into account and the future prospects of the deceased be adjudged accordingly—No hard and fast rule was laid down as is clear from the fact that the Court held that in special circumstances of the case a different approach may be warranted—The deceased was not self-employed but had a permanent job in a private limited company where every employee was getting yearly increments—There is also

evidence on record that at the time of his superannuation, the salary of the deceased would have most certainly doubled—In view of the aforesaid facts, the learned Tribunal cannot be faulted for adding 30% of the salary which the deceased was drawing at the time of his death to his last drawn salary towards "future prospects" for the purpose of calculation of "loss of dependency".

New India Assurance Co. Ltd. v. *Sushila & Ors.* *543*

NEW DELHI MUNICIPAL COUNCIL ACT, 1994—Section 63 (1) and (2), 72, 109, 115 (1)—Delhi Rent Control Act, 1958—Section 4, 6 and 9—Petitioner demolished residential construction for reconstruction of a new building on plot of land—Assessing authority held rateable value of land which is not built upon but is capable of being built upon and/or is in process of erection, is to be fixed at 5% of estimated capital value of land—Statutory appeal against order of assessing authority dismissed by ADJ—Order challenged before High Court—Plea taken, principles of parity are applicable irrespective of whether rateable value is determined on basis of standard rent or actual rent—Section 63 (1) makes no distinction between self occupied and let out premises—Provisions of Section 63 (2) apply only to land which has not been built up earlier and would not apply to land which has already been built upon and building where upon is demolished for purpose of re-construction—Per contra plea taken, even before Sec. 4, 6 and 9 of DRC Act were declared invalid, assessment of rateable value of land on which building existed was different from assessment of rateable value of land alone, provisions of DRC Act were not applicable to open plot of land, principle of standard rent was not applicable to vacant land—Vacant land stands in its own class and is not to be governed by principles of parity—Once statute provided mode of assessment of rateable value of vacant land at 5% of capital value thereof, other modes of assessment are excluded—Held—Literal reading of Section 63 (2) does not limit scope thereof to only virgin land—Expression used, is "the rateable

He met with an accident on 07.01.1991 and remained admitted in the hospital upto 07.06.1991—On 08.06.1991, respondent joined his duties after getting medical fitness certificate—Posted in Ticketing Section—Working upto 25.01.1992—Sent to DTC Medical Board for examination—Medical Board declared him medically unfit—On his application, he was again examined by another Board and was declared permanently unfit for the post of conductor—He preferred a petition seeking appropriate directions not to terminate his service—Court directed that he be examined again—Medical Board declared the respondent unfit for the post of conductor permanently—Directions issued to examine the respondent's case and provide such employment to him protecting his salary—No alternative job was available—Competent Authority approved the compensation amount of Rs. 39,278,40/-—Not collected by the respondent—He moved contempt petition, which was dismissed—Respondent moved another writ petition challenging the order declaring him unfit for the post or any other lower post and his premature retirement—On account of jurisdiction, writ was transferred to Central Administrative Tribunal—Order passed—Petition—Held—Section 47 of the Act casts statutory obligation on the employer to protect employee acquiring disability during service—Petitioner ought to have considered the case of respondent under the aforesaid Act—The petitioner has not been able to show as to how Section 47 of the Act is not applicable to the facts and circumstances of the case either before the Tribunal or before this Court despite the fact that full liberty was given to the petitioner—Rather, considering the facts and circumstances of the case, a duty was cast upon the petitioner to consider on its own the case of the respondent under Section 47 of the Act—The Tribunal relying upon the provisions of Section 47 of the Act as well as judgments of the Supreme Court in Kunal Singh v. Union of India (supra) has allowed the petition of the respondent and has granted relief to him as has been stated above—In view of above discussion, no illegality or irrationally is seen in the order of the Tribunal which calls for

interference of this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

Delhi Transport Coporation v. *Sh. Manmohan* *663*

REQUISITION AND ACQUISITION OF IMMOVABLE PROPERTY ACT, 1952—Section 8—Entitlement to rent on a residential premises used by Government for running offices—The Appellant contended that they were entitled to compensation/rent as was applicable to commercial property as it was used for running offices—Finding of the arbitrator that the property was a residential and not commercial premise-also contended that property was used for commercial purposes even if initially it was residential. Held—Under Section 8 the term “for the use and occupation of the property” does not mean the current use of the property but the initial purpose/ usage for which the property was constructed—The appellant therefore not entitled to enhanced rent.

Ballabh Das Aggarwal (Decd.) v. *Union of India & Ors.* *606*

RIGHT TO INFORMATION ACT, 2005—Respondent applied under RTI Act for copy of optical response sheet (ORS) of Joint Entrance Examination, 2010 (JEE 2010) and Graduate Aptitude Test 2010 (GAT 2010)—Denied—Challenged before Centre Information Commissioner (CIC)—CIC directed petitioner to supply the copies—Filed Writ Petition against the order of CIC—Contended fiduciary relationship between the petitioner and evaluator—Under Section 8 (1) (e) of RTI Act—The photocopy of ORS not to be disclosed—If the request for providing photocopies acceded to it Would open flood gate of such applications by other candidates—System would collapse—Further contended—Evaluation final and no request for evaluation can be entertained—Court observed: Admittedly evaluation carried out through computerised system not manually—The fiduciary relationship between IIT and Evaluator does not arise—No prejudice caused to IIT by providing a candidate a photocopy—Information not sought

ILR (2011) III DELHI 455
CRL. A.

MISRI DEVI & ORS. ....APPELLANTS

VERSUS

STATE ....RESPONDENT

(MUKTA GUPTA, J.)

CRL. A. NO. : 145/2001 DATE OF DECISION: 04.01.2011

Indian Penal Code, 1860—498A/304B—Dying Declaration (DD)—Victim/deceased set herself on fire—Removed to hospital in PCR—On way victim told PCR official that her parents-in-law and brother-in-law harassed her for dowry and so she put herself on fire—In MLC victim gave history of pouring oil on herself and setting herself on fire as she was being forced by her inlaws to commit suicide—Subsequently statement was recorded by SDM—Victim succumbed to injuries—Charge-sheet filed u/s 304B/498A—Trial Court acquitted husband of victim/deceased and convicted mother-in-law and two brothers-in-law (appellants) u/s 498A/304B and sentenced accordingly—During pendency of appeal, mother-in-law died—Held, there were contradictions in three DDs made to PCR official, SDM and in MLC—As per statement to PCR official and history recorded on MLC, deceased poured kerosene oil on herself and set herself on fire while as per DD before SDM, deceased told in-laws that she would commit suicide and asked them for kerosene which they gave and she poured it over her body and her father-in-law set her on fire—SDM did not take opinion of doctor as to fitness of deceased for making statement, nor satisfied himself about her fitness to make statement—Doctor who certified deceased as fit for statement not present when statement recorded

nor did doctor sign DD—Time when doctor certified deceased as fit for statement not proved by the prosecution—No evidence to show that DD recorded when deceased in fit state of mind thus DD cannot be relied upon—Where DD is suspicious, it cannot be acted upon without corroborative evidence and where DD suffers from infirmity, it cannot be the basis of conviction—Where more than one DD and there is inconsistency between them, conviction cannot be based solely on DD—Father of deceased admitted in cross-examination that in none of the letters of deceased, she had written regarding demand of money or any article—From perusal of letters evident that grievance of deceased was about impotency, drug-addiction and un-employment of husband—Neither in DD nor in letters there is demand in relation to dowry soon before the death of deceased—Appellants acquitted—Appeal allowed.

The law in relation to reliance on dying declarations is well settled in a catena of decisions of the Hon'ble Supreme Court. Since the dying declaration is a piece of untested evidence and must, like any other evidence, satisfy the court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it and if after careful scrutiny the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and is coherent and consistent, there is no legal impediment to make it the basis of conviction even if there is no corroboration. However, where the dying declaration is suspicious it cannot be acted without corroborative evidence and where the dying declaration suffers from infirmity the same cannot be the basis of conviction. When there are more than one dying declarations and there is inconsistency between them, then conviction cannot be based solely on the dying declaration. **(Para 8)**

Important Issue Involved: Where dying declaration is suspicious, it cannot be acted upon without corroborative evidence and where it suffers from infirmity, it cannot be the basis of conviction. Where there are more than one dying declarations and there is inconsistency between them, conviction cannot be based solely on dying declaration.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANTS : Mr. K.B. Andley, Sr. Advocate Mr. M. Shamikh, Advocate.

FOR THE RESPONDENT : Mr. Pawan Bahl, APP.

CASES REFERRED TO:

1. *Shivani and Anr* vs. *State* 2010 Crl.LJ 676.
2. *Mehiboobsab Abbasabi Nadaf* vs. *State of Karnataka* 2007 (13) SCC 112.
3. *Surender Kumar and others* vs. *State of Haryana*, 2004 (4) SCC 109.
4. *Dinesh Seth* vs. *State*, 2004 (1) JCC 143.
5. *Smt. Laxmi* vs. *Om Prakash and others*, 2001 Crl. L.J. 3302.

RESULT: Appeal allowed.

MUKTA GUPTA, J.

1. On 25th August, 1987, an information was received at P.S. Lahori Gate that a woman namely Nirmala Devi has set herself on fire by pouring kerosene oil at House No. 164, Chatta Bhawani Shankar. The woman was removed to JPN Hospital in PCR van and on the way Nirmala Devi told H.C. Dalley Ram that her father-in-law, mother-in-law and brother-in-law (Dewar) used to harass her for bringing television and fridge in dowry and so she put herself on fire. In the hospital as Smt. Nirmala Devi was conscious her MLC was prepared wherein she gave the history herself as "She poured kerosene oil over herself and she lit fire". She also stated that she was being forced upon by her in-laws to

commit suicide. On 26th August, 1987 at 4.00 P.M. the Executive Magistrate Shri U.C. Sarangi PW6 recorded the statement of Nirmala, Ex. PW6/A which reads:

> "That I was married to Satya Narain in the year 1983 (Oct./ Nov). That I do not have any issue. I live with my husband, in-laws (Hari Parshad Khandelwal & Smt. Misri Devi), brother-in-laws Raj Kumar & Rajesh Kumar. On 25.8.87 at 8.00 P.M. I was scolded by my in-laws. Since my marriage, I have been harassed by my in-laws, for want of bearing issue and in veiled manner about dowry. My husband used to make me write dirty letters. I was not allowed any freedom in the house and my every act was criticized. Even my expenditure led to criticism and scolding. In sheer disgust I told my in-laws that I will commit suicide-you give me kerosene. They gave me kerosene and I poured it over my body. My father-in-law set fire to me. I lost my consciousness and found myself in hospital. I hold my in-laws responsible for burning me. Even yesterday i.e. 25.8.87 in the morning I went to Police Station Lahori Gate and reported the fact about harassment being meted to me by my in-laws. The matter was patched up and I came back home. Once again I repeat that my in-laws were harassing and illtreating me."

2. On the statement of Smt. Nirmala Devi, PW6 directed the registration of the case under Section 307/498A IPC against father-in-law, mother-in-law, husband and both the brothers-in-law. On 29th August, 1987 Smt. Nirmala Devi died in the hospital. The postmortem Doctor opined the cause of death to be "Septicaemia consequent upon infected burn". After investigation a charge sheet was filed under Section 302/498A IPC against all the accused persons, that is, Hari Prasad (father-in-law), Misri Devi (Mother-in-law), Satya Narain (Husband), Raj Kumar and Rajesh Kumar (Brothers-in-law, Dewar). The learned ASJ framed charges under Section 498A/304BIPC against all the accused persons and also a separate charge under Section 302 IPC against Hari Prasad. During the pendency of the trial accused Hari Prasad died. After recording the prosecution evidence, the statements of the accused under Sec. 313 CrPC and the defence evidence, the trial court acquitted Satya Narain, husband of the deceased and convicted Misri Devi, the mother-in-law, Raj Kumar and Rajesh Kumar, the two brothers-in-law for offences

punishable under Section 498A/304B IPC.

3. The present appeal was filed by Misri Devi, Rajesh Kumar and Raj Kumar challenging their conviction under Section 498A/304B IPC and sentence of Rigorous Imprisonment for 7 years under Section 304B IPC and RI for 3 years and a fine of Rs.3,000/- each under Section 498A IPC. The sentence of the Appellants was suspended during the pendency of the present appeal. Before the appeal could be finally heard the Appellant No. 1 Smt. Misri Devi expired on 29th July, 2010. Thus, the two Appellants before this Court now are the two brothers-in-law of the deceased.

4. Learned counsel for the Appellants contends that the present case rests on the three dying declarations of the deceased which are inconsistent and unreliable and hence no conviction can be based on these dying declarations. Controverting the dying declaration made before the Executive Magistrate Ex. PW6/A, it is stated that this dying declaration has not been recorded in the language of the deceased. The alleged statement of the deceased has been translated by the SDM in English and is thus, not the original dying declaration. Neither was the doctor present during the recording of the dying declaration nor has any endorsement been taken that the deceased was fit for making the statement. In a case of 100% burns it was not possible that the deceased could have given such a long dying declaration after more than 20 hours of having received burn injuries. As per this dying declaration there is no demand of dowry soon before the death and the allegation, if at all, is against the father-in-law. As per this dying declaration the harassment, if any, was for want of bearing an issue. Since she was not allowed freedom, criticized and scolded for expenditure, she in sheer disgust told her in-laws that she will commit suicide and asked them to give kerosene. On their giving kerosene oil she poured it on her body and her father-in-law set fire on her. Moreover, as per this dying declaration the in-laws have been specified as the father-in-law and the mother-in-law and not the brothers-in-law. Thus, there is no allegation against the Appellants.

5. Challenging the oral dying declaration recorded before PW9 H.C. Dalley Ram it is stated that as per the testimony of PW9, he was sitting in front whereas another constable and the mother-in-law of the deceased were sitting by her side in the PCR van on the back side and it was not possible for him to have heard her statement in such a noisy and

overcrowded part of Delhi at that hour. Moreover, if PW9 had heard the version of the deceased the driver sitting next to him and surely the Constable sitting by the side of deceased would have also heard it. Neither the driver nor the constable sitting with the deceased, have been examined who would have been the best witnesses. Moreover, the deceased could not have made such a dying declaration when the mother-in-law was present and thus, this dying declaration has been falsely introduced by the prosecution.

6. It is further contended that once the father-in-law was charged for offence under Section 302 IPC, the others could not be convicted for offence punishable under Section 304B IPC. Reliance is placed on **Surender Kumar and others vs. State of Haryana,** 2004 (4) SCC 109 to contend that if the evidence shows some harassment about two and a half years prior to the death such an allegation being not proximate to the death of the deceased, the accused are entitled to be acquitted of the offences. Reliance is also placed on **Dinesh Seth vs. State,** 2004 (1) JCC 143 to contend that there should be convincing evidence of cruelty soon before the death and in connection with demand of dowry.

7. Learned APP for the State on the other hand contends that the dying declaration made to the SDM is fully reliable and prior to the dying declaration the Doctor had opined her to be fit for statement. Since the marriage took place in October/November, 1983 and the deceased died on 29th August, 1987 thus, the death occurred within seven years of marriage. There are clear allegations of demand of dowry soon before the death and the death being unnatural, all the ingredients of Section 304B IPC are made out. Reliance is also placed on letters written by the deceased to her father Exhibit PW13/B to G.

8. I have heard learned counsels for the parties and perused the record. The Appellants before this Court now are the two brothers-in-law of the deceased and the evidence qua them has to be analyzed; whether the same fulfils the requirement of offences punishable under Section 498A/304B IPC or not. The main incriminating evidence in the present case as per the prosecution is the three dying declarations of the deceased. As per the dying declaration recorded by the SDM Ex. PW6/A, it is apparent that the deceased has clarified that the term 'in laws' is being used for father in law and the mother-in-law. If that is the

purport of word 'in-laws', then in the entire dying declaration, there is no allegation against the Appellants. This view also finds support from the letters of the deceased Ex. PW13/B to G where the allegations are either against the husband or the mother-in-law. Learned APP fairly states that in these letters there is no allegation qua the two brothers-in-law. Moreover, the deceased has stated that the main reason for the harassment was want of bearing an issue and in a veiled manner about the dowry. Further grievance is lack of freedom, criticism even for expenditure and scolding. The grievance in the letters also appears to be paucity of funds and food with the deceased. In the dying declaration made before PW9 it is stated by the deceased that her mother in-law, father-in-law and brother-in-law (Dewar) used to harass her for bringing television and fridge in dowry so she had put herself on fire. In this dying declaration the deceased speaks of only one brother-in-law. The name of the brother-in-law is not mentioned. In the absence of the name of the brother it cannot be proved as to which of the two Appellants harassed the deceased for bringing television or fridge. Thus the Appellants are entitled to the benefit of doubt on this count as well. Moreover, the dying declaration before the SDM runs counter to the dying declaration before PW9 HC Dalley Ram and the one made in the MLC. As per the statement of PW9 and the history recorded in the MLC Ex. PW11/A, the deceased stated that she poured kerosene oil over herself and lit herself on fire whereas, as per the dying declaration before the SDM she told her in-laws that she will commit suicide and asked them for kerosene which they gave and she poured it upon her body and the father-in-law set fire to her. The law in relation to reliance on dying declarations is well settled in a catena of decisions of the Hon'ble Supreme Court. Since the dying declaration is a piece of untested evidence and must, like any other evidence, satisfy the court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it and if after careful scrutiny the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and is coherent and consistent, there is no legal impediment to make it the basis of conviction even if there is no corroboration. However, where the dying declaration is suspicious it cannot be acted without corroborative evidence and where the dying declaration suffers from infirmity the same cannot be the basis of conviction. When there are more than one dying declarations and there is inconsistency between them, then conviction cannot be based solely

on the dying declaration. The Hon'ble Supreme Court in **Mehiboobsab Abbasabi Nadaf v. State of Karnataka** 2007 (13) SCC 112 held:

> "Conviction can indisputably be based on a dying declaration. But, before it can be acted upon, the same must be held to have been rendered voluntarily and truthfully. Consistency in the dying declaration is the relevant factor for placing full reliance thereupon. In this case, the deceased herself had taken contradictory and inconsistent stand in different dying declarations. They, therefore, should not be accepted on their face value. Caution, in this behalf, is required to be applied."

This court in **Shivani and Anr v. State** 2010 Crl.LJ 676, held that the two mutually contradictory narratives i.e. irreconcilable versions narrated by the deceased compels it to hold that neither dying declaration inspires confidence and there are traces of deceased having a grudge against the Appellants and hence being motivated not to speak the truth. The grudge against the Appellants is evidenced by the fact that in the two completely different narratives of the same event, the only commonality is to implicate the Appellants. Thus, the Appellants were entitled to the benefit of doubt.

9. There is yet another infirmity in the dying declaration Ex. PW6/A that though PW6 UC Sarangi has stated that he recorded the statement at 19.20 hours at LNJP on the request of the Investigating Officer, in his examination-in-chief he has nowhere stated that he had taken the opinion of the Doctor as to whether she was fit for making statement at the time when he recorded the statement, nor has this witness satisfied himself about the fitness of the deceased to make the statement. The doctor who certified the deceased fit for statement was not present when the statement was recorded nor did the doctor sign the dying declaration. In his cross examination, PW6 states that when he reached first time at about 5.00 P.M. on 25th August, 1987 the patient was not fit for statement and hence he left for his home. Police informed him on telephone about patient being fit to make the statement but he could not give the name of the officer who rang him. He also did not remember if he met the I.O. when he again went to the hospital. The time when the doctor certified her to be fit for statements has not been proved by the prosecution. Since there are a number of endorsements on the Ex. PW11/A about the

condition of the deceased, but none mentioning the time, it has not been proved that at the time when PW6 recorded the dying declaration the deceased was fit for making the statement. The Hon'ble Supreme Court in **Smt. Laxmi vs. Om Prakash and others,** 2001 Crl. L.J. 3302 held:

> "….One of the important tests of the reliability of the dying declaration is a finding arrived at by the Court as to the satisfaction that the deceased was in a fit state of mind and capable of making a statement at the point of time when the dying declaration purports to have been made….

10. Since there is no evidence to show that the dying declaration was recorded when the deceased was in a fit state of mind, therefore, this dying declaration cannot be relied upon.

11. I have also analyzed the statement of PW13 Damodar Prasad Gupta father of the deceased who had stated that Hari Prasad, father-in-law, Misri Devi, mother-in-law, Satya Narain, husband, brothers-in-law Raj Kumar and Rajesh Kumar started harassing his daughter and used to ask her to bring Rs.50,000/-, TV, Fridge and a scooter. They used to beat her, lock her in a room and also not serve meals. This happened in March/April, 1985 whereafter Nirmala Devi and Satya Narain shifted to Jaipur and started residing separately in a house taken on rent by deceased Nirmala Devi. All these accused persons again started harassing Nirmala Devi and again demanded Rs.50,000/- and the articles as stated above. It may be noted that in his cross-examination he has admitted that in none of the letters Nirmala Devi had written regarding demand of money or any article. He also admits that he had visited the matrimonial home of the deceased twice in the year 1984 and once in the year 1985. In his further cross examination he has stated that while Nirmala used to do work of stitching at the house, her husband Satya Narain used to assist his son Krishan Kumar on his shop, however he was not paying any salary to Satya Narain. From the perusal of the letters it is evident that the grievance of the deceased was the impotency of accused Satya Narain and the fact that he was a drug addict and was under treatment and not employed resulting into frustration in day-to-day matrimonial life which resulted in the end of her life.

12. The appellants have been convicted for an offence punishable under Section 498A/304B. Neither in any of the dying declarations nor

in the letters, there is demand in relation to dowry soon before the death attributable to the Appellants. This essential ingredient of Section 304B is also missing in the present case.

13. In view of the fact that there is no clear and cogent evidence proved beyond reasonable doubt against the Appellant Nos. 2 and 3 for having demanded dowry soon before the death resulting in the unnatural death of the deceased the Appellants are entitled to the benefit of doubt. The Appellant Nos. 2 and 3 are acquitted of the charges under Section 304B/498A IPC framed against them.

14. The appeal is accordingly allowed. The bail bonds and the surety bonds are discharged.

ILR (2011) III DELHI 464
LPA

MANAGEMENT OF APPAREL EXPORT PROMOTION COUNCIL **....APPELLANT**

VERSUS

SURYA PRAKASH **....RESPONDENT**

(DIPAK MISRA, CJ. AND MANMOHAN, J.)

LPA NO. : 1114/2005 **DATE OF DECISION: 07.01.2011**

(A) Industrial Disputes Act, 1947—Sections 25-F, 2 (oo) (bb)—Respondent was working with appellant as peon w.e.f 12th September 1989 as daily wager—On 08th May, 1990, he was issued an appointment letter putting him on probation for a period of one year—On 18th June, 1990, the appellant terminated his service—Matter referred to Labour Court—The Court held that the termination of the workman was not retrenchment but was governed under the exception to the definition of

retrenchment under Section 2 (oo) (bb) of the Act—Writ Petition filed—Ld. Single Judge remanded the matter back—Letters Patent Appeal—Termination during probation period did not amount to retrenchment under Section 2 (oo) of the Act—Held—The appointment letter clearly sets out the terms of employment which make it clear that his services could be put to an end at any time by giving twenty four hours notice during the period of probation and his services would be regularized only after satisfactory completion of the probation period—These terms were accepted by the workman and were never challenged before the Tribunal or writ Court—In fact, the respondent-workman has not led any evidence in the Courts below that appointment letter was issued with malafide intent to terminate his services—Termination of services of workman in accordance with condition mentioned in the employment contract clearly fall within the domain of exception to definition of retrenchment as provided in clause (bb) of Section 2 (oo) of the Act.

The appointment letter clearly sets out the terms of employment which make it clear that his services could be put to an end at any time by giving twenty four hours notice during the period of probation and his services would be regularised only after satisfactory completion of the probation period. These terms were accepted by the workman and were never challenged before the Tribunal or writ court. In fact, the respondent-workman has not led any evidence in the Courts below that the appointment letter was issued with malafide intent to terminate his services. **(Para 9)**

In our considered opinion, the termination of the services of the workman in accordance with the condition mentioned in the employment contract clear fall within the domain of exception to definition of retrenchment as provided in clause (bb) of Section 2(oo) of the Act as reproduced above. We may refer with profit to a judgment in **Escorts Ltd. Vs.**

Presiding Officer and Anr., (1997) 11 SCC 521 wherein it has been held as under:

> "**4.** We do not consider it necessary to go into the question whether the workman had worked for 240 days in a year and whether Sundays and other holidays should be counted, as has been done by the Labour Court, because, in our opinion, Shri Shetye is entitled to succeed on the other ground urged by him that the termination of services of the workman does not constitute retrenchment in view of clause (bb) in Section 2(oo) of the Act. Clause (bb) excludes from the ambit of the expression "retrenchment" as defined in the main part of Section 2(oo) "termination of the services of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein". The said provision has been considered by this Court in M. Venugopal v. Divisional Manager, LIC. The appellant in that case had been appointed on probation for a period of one year from 23-5-1984 to 22-5-1985 and the said period of probation was extended for further period of one year from 23-5-1985 to 22-5-1986. Before the expiry of the said period of probation, his services were terminated on 9-5-1986. It was held that since the termination was in accordance with the terms of the contract though before the expiry of the period of probation it fell within the ambit of Section 2(oo)(bb) of the Act and did not constitute retrenchment. Here also the services of the workman were terminated on 13-2-1987, as per the terms of the contract of employment contained in the appointment letter dated 9-1-1987 which enabled the appellant to terminate the services of the workman at any stage without assigning any reason. Since the services of the workman were terminated as per the terms of the contract of employment, it does not amount to

retrenchment under Section 2(oo) of the Act and the Labour Court was in error in holding that it constituted retrenchment and was protected by Sections 25-F and 25-G of the Act." **(Para 10)**

(B) Industrial Disputes Act, 1947—Sections 25-F, 2 (oo) (bb)—Respondent was working with appellant as peon w.e.f 12th September 1989 as a daily wager—On 08th May, 1990, he was issued an appointment letter putting him on probation for a period of one year—On 18th June, 1990, the appellant terminated his service—Matter referred to Labour Court—The Court held that the termination of the workman was not retrenchment but was governed under the exception to the definition of retrenchment under Section 2 (oo) (bb) of the Industrial Disputes Act—Writ Petition filed—Ld. Single Judge remanded the matter back—Letters Patent Appeal—The workman did not work for requisite 240 days as daily wager which is mandatory to get the benefit under Section 25-F of the Act—Held—The provisions of Section 25-F of the Act are available to an employee who has put in continuous service for one year—Section 25-B contains a notional definition that once 240 days service has been put in by the workman in the preceding twelve months it will be deemed to be continuous service for a year—We are of the view that once the workman was appointed and was put on probation for a period of one year, this appointment amounts to a fresh appointment—The days put in by the workers on his probation cannot be considered for counting 240 days for the concept of continuous service.

Further, the provisions of Section 25-F of the Act are available to an employee who has put in continuous service for one year. Section 25-B contains a notional definition that once 240 days service has been put in by the workman in the preceding twelve months it will be deemed to be

continuous service for a year. We are of the view that once the workman was appointed and was put on probation for a period of one year, this appointment amounts to a fresh appointment. The days put in by the workers on his probation cannot be considered for counting 240 days for the concept of continuous service. The Supreme Court in **Sur Enamel and Stamping Works Ltd. v. Workmen,** (1964) 3 SCR 616 held that once an employee is reappointed, this reappointment amounts to fresh appointment and the period of employment prior to such reappointment cannot be considered in computing the days for the purposes of Section 25F the Act. The relevant portion of judgment in **Sur Enamel** (supra) reads as under :

"On the plain terms of the section only a workman who has been in continuous service for not less than one year under an employer is entitled to its benefit. "Continuous service" is defined in Section 2(eee) as meaning uninterrupted service, and includes service which may be interrupted merely on account of sickness or authorised leave or an accident or a strike which is not illegal or a lock-out or a cessation of work which is not due to any fault on the part of the workman. What is meant by "one year of continuous service" has been defined in Section 25-B. Under this section a workman who during a period of twelve calendar months has actually worked in an industry for not less than 240 days shall be deemed to have completed one year of continuous service in the industry. Nagen Bora and Monoharan were both reappointed on 10-3-1959. Their services were terminated on 15-1-1960. Thus their total period of employment was less than 11 months. It is not disputed that period of their former employment under the company prior to their reappointment on 10-3-1959 cannot be taken into consideration in computing the period of one year, because it is common ground that their reappointment on 10-3-1959 was a fresh

appointment. The position therefore is that during a period of employment for less than 11 calendar months these two persons worked for more than 240 days. In our opinion that would not satisfy the requirement of Section 25-B. Before a workman can be considered to have completed one year of continuous service in an industry it must be shown first that he was employed for a period of not less than 12 calendar months and, next that during those 12 calendar months had worked for not less then 240 days. Whereas in the present case, the workmen have not at all been employed for a period of 12 calendar months it becomes unnecessary to examine whether the actual days of work numbered 240 days or more. For, in any case, the requirements of Section 25-B would not be satisfied by the mere fact of the number of working days being not less than 240 days."

(emphasis supplied) **(Para 11)**

Important Issue Involved: On fresh appointment and putting the worker on probation, the days put in by the worker on his probation cannot be considered for counting 240 days for the concept of continuous service.

[Vi Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. A.P. Dhamija, Advocate with Mr. J.P. Singh, Advocate.

FOR THE RESPONDENT : Mr. Arun Kumar Srivastava, Advocate.

CASES REFERRED TO:

1. *Haryana State Cooperative Supply Marketing Federation Limited* vs. *Sanjay*, (2009) 14 SCC 43.

2. *Kalyani Sharp Indi Ltd.* vs. *Labour Court No. 1, Gwalior & Anr.*, (2002) 9 SCC 655.

3. *Escorts Ltd.* vs. *Presiding Officer and Anr.*, (1997) 11 SCC 521.

4. *Sur Enamel and Stamping Works Ltd.* vs. *Workmen*,(1964) 3 SCR 616.

RESULT: Appeal is allowed.

MANMOHAN, J.

1. Present Letters Patent Appeal has been filed challenging the judgment and order dated 24th April, 2005 passed in W.P.(C) 830/2003 whereby the learned Single Judge while allowing the writ petition has remanded the matter back to the Labour Court for readjudication.

2. The brief facts of the present case are that the respondent-workman was working with the appellant as a Peon w.e.f. 12th September 1989 and worked continuously without break till 18th June, 1990. The workman initially worked for the period from 12th September, 1989 to 07th May, 1999, as a daily wager and thereafter, on 08th May, 1990 he was issued an appointment letter. The Clause 2 of the appointment letter reads as under :

> "You will be on probation for a period of one year which may be extended at the absolute discretion of the Management. On satisfactory completion of the period of probation, your services will be confirmed in writing."

3. The appellant vide letter 18th June, 1990 terminated the services of respondent. The matter was referred to the Labour Court wherein it was held that the termination of the respondent workman was not retrenchment but was governed under the exception to the definition of retrenchment under Section 2(oo)(bb) of the Industrial Disputes Act, 1947 (hereinafter referred to as "Act"). The said section is reproduced hereinbelow:

> "2(oo) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include –
>
> (a) voluntary retirement of the workman; or

xxx xxx xxx

2(bb) termination of the service of the workman as a result of the non-removal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein."

(emphasis supplied)

4. The relevant portion of the award passed by the Labour Court is as under:"

9. The termination of services of the Claimant was w.e.f. 19.6.90 under Clause III made vide letter Ext. WW1/2. Since the Claimant himself has relied upon the letter of appointment Ex.t WW1/1, he cannot escape from the services conditions as were imposed against him vide Clause II as above. It is not a case of the Claimant that appointment letter Ext. WW1/1 was issued as a colour-ful exercise so as to terminate his service and to violate with impunity the mandate of Section 25-F of the I.D. Act. It being so, the termination of the services of the Claimant vide letter Ext.WW1/2 is not at all a case of retrenchment so as to call for compliance of section 25-F of the I.D. Act. The termination of the Claimant is government under exception to Section 2(oo) of the I.D. Act."

5. Being aggrieved, the respondent-workman filed a writ petition being W.P.(C) No.830/2003 whereby the learned Single Judge while allowing the writ petition remanded the matter back to the Labour Court. Hence this appeal.

6. Mr. A.P. Dhamija, learned counsel for the appellant submitted that the workman was appointed on probation of one year as per the appointment letter dated 08th May, 1990 and as his termination was during the probation period, it did not amount to retrenchment under Section 2(oo) of the Act. Mr. Dhamija further submitted that the workman did not work for requisite 240 days as daily wager which is mandatory to get the benefit under Section 25-F of the Act. To emphasis his submission, he placed reliance upon the judgments in **Sur Enamel & Stamping Works (P) Ltd. Vs. Their Workmen,** (1964) 3 SCR 616, **Escorts Ltd. Vs. Presiding Officer and Anr.,** (1997) 11 SCC 521 and **Kalyani Sharp Indi Ltd. Vs. Labour Court No. 1, Gwalior & Anr.,** (2002) 9 SCC 655.

7. Mr. Arun Kumar Srivastava, learned counsel for the respondent submitted that the appointment letter was a colourable exercise of power done with malafide intent to terminate the respondent's services.

8. Having heard the learned counsel for the parties and perused the record, we find that the respondent-workman worked in the capacity of a daily wager from the period starting 12 September, 1989 upto 07May, 1990 and thereafter, he worked as a probationer w.e.f. 08th May, 1990. To put the issue in right perspective, it is observed that from 8th May, 1990 onwards the terms and conditions of service of the respondent-workman were governed as per clauses contained in the letter of appointment dated 8th May, 1990. The respondent-workman's services were terminated vide letter dated 18th June, 1990 during the probation period w.e.f. 19th September 1990 under Clause 3 of the appointment letter which reads as under

"3. Your services can be terminated by giving 24 hours notice during the period of probation. After confirmation, your services may be terminated by giving one month's notice or one month's salary in lieu thereof or in case you desire to leave the services of the Council you shall have to give one month's notice in writing."

9. The appointment letter clearly sets out the terms of employment which make it clear that his services could be put to an end at any time by giving twenty four hours notice during the period of probation and his services would be regularised only after satisfactory completion of the probation period. These terms were accepted by the workman and were never challenged before the Tribunal or writ court. In fact, the respondent-workman has not led any evidence in the Courts below that the appointment letter was issued with malafide intent to terminate his services.

10. In our considered opinion, the termination of the services of the workman in accordance with the condition mentioned in the employment contract clear fall within the domain of exception to definition of retrenchment as provided in clause (bb) of Section 2(oo) of the Act as reproduced above. We may refer with profit to a judgment in **Escorts**

Ltd. Vs. Presiding Officer and Anr., (1997) 11 SCC 521 wherein it has been held as under:

> "**4.** We do not consider it necessary to go into the question whether the workman had worked for 240 days in a year and whether Sundays and other holidays should be counted, as has been done by the Labour Court, because, in our opinion, Shri Shetye is entitled to succeed on the other ground urged by him that the termination of services of the workman does not constitute retrenchment in view of clause (bb) in Section 2(oo) of the Act. Clause (bb) excludes from the ambit of the expression "retrenchment" as defined in the main part of Section 2(oo) "termination of the services of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein". The said provision has been considered by this Court in M. Venugopal v. Divisional Manager, LIC. The appellant in that case had been appointed on probation for a period of one year from 23-5-1984 to 22-5-1985 and the said period of probation was extended for further period of one year from 23-5-1985 to 22-5-1986. Before the expiry of the said period of probation, his services were terminated on 9-5-1986. It was held that since the termination was in accordance with the terms of the contract though before the expiry of the period of probation it fell within the ambit of Section 2(oo)(bb) of the Act and did not constitute retrenchment. Here also the services of the workman were terminated on 13-2-1987, as per the terms of the contract of employment contained in the appointment letter dated 9-1-1987 which enabled the appellant to terminate the services of the workman at any stage without assigning any reason. Since the services of the workman were terminated as per the terms of the contract of employment, it does not amount to retrenchment under Section 2(oo) of the Act and the Labour Court was in error in holding that it constituted retrenchment and was protected by Sections 25-F and 25-G of the Act."

11. Further, the provisions of Section 25-F of the Act are available to an employee who has put in continuous service for one year. Section 25-B contains a notional definition that once 240 days service has been

put in by the workman in the preceding twelve months it will be deemed to be continuous service for a year. We are of the view that once the workman was appointed and was put on probation for a period of one year, this appointment amounts to a fresh appointment. The days put in by the workers on his probation cannot be considered for counting 240 days for the concept of continuous service. The Supreme Court in **Sur Enamel and Stamping Works Ltd. v. Workmen,**(1964) 3 SCR 616 held that once an employee is reappointed, this reappointment amounts to fresh appointment and the period of employment prior to such reappointment cannot be considered in computing the days for the purposes of Section 25F the Act. The relevant portion of judgment in **Sur Enamel** (supra) reads as under :

> "On the plain terms of the section only a workman who has been in continuous service for not less than one year under an employer is entitled to its benefit. "Continuous service" is defined in Section 2(eee) as meaning uninterrupted service, and includes service which may be interrupted merely on account of sickness or authorised leave or an accident or a strike which is not illegal or a lock-out or a cessation of work which is not due to any fault on the part of the workman. What is meant by "one year of continuous service" has been defined in Section 25-B. Under this section a workman who during a period of twelve calendar months has actually worked in an industry for not less than 240 days shall be deemed to have completed one year of continuous service in the industry. Nagen Bora and Monoharan were both reappointed on 10-3-1959. Their services were terminated on 15-1-1960. Thus their total period of employment was less than 11 months. It is not disputed that period of their former employment under the company prior to their reappointment on 10-3-1959 cannot be taken into consideration in computing the period of one year, because it is common ground that their reappointment on 10-3-1959 was a fresh appointment. The position therefore is that during a period of employment for less than 11 calendar months these two persons worked for more than 240 days. In our opinion that would not satisfy the requirement of Section 25-B. Before a workman can be considered to have completed one year of continuous service in an industry it must be shown first that he was employed for a period of not less

than 12 calendar months and, next that during those 12 calendar months had worked for not less then 240 days. Whereas in the present case, the workmen have not at all been employed for a period of 12 calendar months it becomes unnecessary to examine whether the actual days of work numbered 240 days or more. For, in any case, the requirements of Section 25-B would not be satisfied by the mere fact of the number of working days being not less than 240 days."

(emphasis supplied)

12. In fact, the Supreme Court in **Haryana State Cooperative Supply Marketing Federation Limited Vs. Sanjay,** (2009) 14 SCC 43 has held that when a casual employee is employed in different establishments, may be under the same employer, the concept of continuous service cannot be applied.

13. Consequently, the provisions of Section 25-F of the Act are not available to the respondent-workman. Accordingly, the present appeal is allowed and the impugned order is set aside.

ILR (2011) III DELHI 475
ITA

THE COMMISSIONER OF INCOME-TAX-IV ....APPELLANT

VERSUS

TEXT HUNDRED INDIA PVT. LTD. ....RESPONDENT

(A.K. SIKRI AND SURESH KAIT, JJ.)

ITA NOS. 2077, 2061 AND 2065/2010 **DATE OF DECISION: 14.01.2011**

Income Tax Act, 1961—Section 52(2)—Income Tax (Appellate Tribunal) Rules, 1963—Rule 29—Code of Civil Procedure, 1908—Order 41 Rule 27 (1)—Assessing

Officer (AO) rejected claim of assessee for management expenses—CIT(A) dismissed appeal of assessee—Assessee preferred appeal before ITAT—Alongwith appeal, application filed by assessee for further evidence which he did not produce before AO and CIT(A)—ITAT admitted that evidence and remitted case back to AO to decide issue after considering said additional evidence—Order challenged before High Court—Plea taken, under no circumstance, such additional evidence could be permitted—There was hardly any justifiable reason for permitting production of additional evidence—Rule 29 precludes producing additional evidence before Tribunal—Rule has limited scope and permits Tribunal production of any document or witness or affidavit to enable it to pass orders or for any other substantial cause—Assessee had no right to move application for additional evidence and Tribunal did not *suo moto* thought it proper to ask for production of these documents—Per contra plea taken, Rule 29 is to be given liberal interpretation as purpose behind Rule was to do substantial justice and to prevent failure of justice—Held—Discretion lies with Tribunal to admit additional evidence in interest of justice, once Tribunal forms opinion that doing so would be necessary for proper adjudication of matter—This can be done even when application is filed by one of parties to appeal and need not be *suo moto* action of Tribunal—Once it is found that party intending to lead evidence before Tribunal for first time was prevented by sufficient cause to lead such evidence and that this evidence would have material bearing on issue which needs to be decided by Tribunal and ends of justice demand admission of such evidence, Tribunal can pass order to that effect—True test in this behalf is whether Appellate Court is able to pronounce judgment on materials before it without taking into consideration additional evidence sought to be adduced—Legitimate

occasion for exercise of discretion is not before Appellate Court hears and examines case before it, but arises when on examining evidence as it stands, some inherent lacuna or defect becomes apparent to Appellate Court coming in its way to pronounce judgment—Reference is not to pronounce any judgment or judgment in a particular way, but is to pronounce its judgment satisfactory to mind of Court delivering it—Reason given by assessee for additional evidence was that these records could not be produced before lower authorities due to non retrievability of email because of technical difficulties—Ground pleaded by assessee was not confronted by Revenue—Tribunal found requirement of said evidence for proper adjudication of matter—Once Tribunal predicated its decision on that basis, no reason to interfere with the same—Appeal dismissed.

The aforesaid case law clearly lays down a neat principle of law that discretion lies with the Tribunal to admit additional evidence in the interest of justice once the Tribunal affirms the opinion that doing so would be necessary for proper adjudication of the matter. This can be done even when application is filed by one of the parties to the appeal and it need not to be a suo motto action of the Tribunal. The aforesaid rule is made enabling the Tribunal to admit the additional evidence in its discretion if the Tribunal holds the view that such additional evidence would be necessary to do substantial justice in the matter. It is well settled that the procedure is handmade of justice and justice should not be allowed to be choked only because of some inadvertent error or omission on the part of one of the parties to lead evidence at the appropriate stage. Once it is found that the party intending to lead evidence before the Tribunal for the first time was prevented by sufficient cause to lead such an evidence and that this evidence would have material bearing on the issue which needs to be decided by the Tribunal and ends of justice demand admission of such an evidence, the Tribunal can pass an order to that effect. **(Para 13)**

The next question which arises for consideration is as to whether the exercise of discretion in the instant case permitting the additional evidence by the Tribunal, is apposite? It is undisputed that Rule 29 of the Rules is akin to Order 41 Rule 27(1) of the Code of Civil Procedure. The true test in this behalf, as laid down by the Courts, is whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. The legitimate occasion, therefore, for exercise of discretion under this rule is not before the Appellate Court hears and examines the case before it, but arises when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent to the Appellate Court coming in its way to pronounce judgment, the expression 'to enable it to pronounce judgment' can be invoked. Reference is not to pronounce any judgment or judgment in a particular way, but is to pronounce its judgment satisfactory to the mind of Court delivering it. The provision does not apply where with existing evidence on record the Appellate Court can pronounce a satisfactory judgment. It is also apparent that the requirement of the Court to enable it to pronounce judgment cannot refer to pronouncement of judgment in one way or the other but is only to the extent whether satisfactory pronouncement of judgment on the basis of material on record is possible. In **Arjan Singh v. Kartar Singh,** AIR 1951 SC 193, while interpreting the provisions of Order 41 Rule 27, the court remarked as follows:-

> "The legitimate occasion for the application of Order 41, rule 27 is when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the court of fresh evidence and the application is made to impart it. **The true test, therefore, is whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to**

be adduced."

[See also **Netha Singh Vs. Financial Commissioner,** AIR 1976 SC 1053] **(Para 14)**

Important Issue Involved: (A) The procedure is hand made of justice and justice should not be allowed to be choked only because of some inadvertent error or omission on the part of one of the parties to lead evidence at the appropriate stage.

(B) Discretion lies with the Income Tax Appellate Tribunal to admit additional evidence in the interest of justice once the Tribunal affirms the opinion that doing so would be necessary for proper adjudication of the matter. This can be done even when application is filed by one of the parties to the appeal and it need not to be a suo moto action of the Tribunal.

(C) The legitimate occasion for exercise of discretion by Appellate Court to take into account additional evidence is not before the Appellate Court hears and examines the case before it, but arises when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent to Appellate Court coming in its way to pronounce judgment, the expression 'to enable it to pronounce judgment' can be invoked.

(D) The requirement of the Court to enable it to pronounce judgment cannot refer to pronouncement of judgment in one way or the other but is only to the extent whether satisfactory pronouncement of Judgment on the basis of material on record is possible.

[Ar Bh]

APPEARANCES:

FOR THE APPELLANT : Ms. Rashmi Chopra for the Appellant in ITA No. 2077/2010, Ms. Suruchi Aggarwal for the Appellant in ITA Nos. 2061 & 2065/2010.

FOR THE RESPONDENT : Ms. Kavita Jha with Mr. Somnath Shukla.

CASES REFERRED TO:

1. *CIT* vs. *Kum Satya Setia* (1983) 143 ITR 486 (MP).
2. *Netha Singh* vs. *Financial Commissioner,* AIR 1976 SC 1053.
3. *R.S.S. Shanmugam Pillai and Sons* vs. *CIT* (1974) 95 ITR 109.
4. *Velji Deoraj and Co.* vs. *CIT* (1968) 68 ITR 708 (Bom.).
5. *K. Venkatramaiah* vs. *A. Seetharama Reddy,* AIR 1963 SC 1526.
6. *Arjan Singh* vs. *Kartar Singh,* AIR 1951 SC 193.
7. *Income-Tax Officer, Dist. III (I)* vs. *B.N. Bhattacharya,* 112 ITR 423 (Cal.).
8. *R.S.S. Shanmugam Pillai & Sons* vs. *CIT,* 95 ITR 109.
9. *R. Dalmia* vs. *CIT,* 113 IT 522 (Del.).
10. *Anaikar Trades and Estates Pvt. Ltd.* vs. *CIT,* 186 ITR 313 (Mad.).

RESULT: Dismissed.

A.K. SIKRI, J.

1. These three appeals concern the same assessee and the questions framed in these appeals are identical, though differently worded. It touches upon the question of allowability of management expenses allegedly incurred by the assessee in the form of those management expenses paid by it to its group companies. It arose for the first time in the assessment year 2004-05.

The Assessing Officer had rejected the claim on the ground that the

assesee was not able to prove that the group companies to whom the payment were made had rendered any services to the assessee. He, thus, opined that the entire management expenses given to the group companies of the assessee was only a device to divert its income. The CIT (A) also dismissed the appeal of the assessee forming the aforesaid decision. Before the CIT(A) the assessee had filed copies of certain agreements purportedly entered into between the assessee and its group companies to whom the management fee was given. The CIT(A) admitted this fresh evidence but still came to the conclusion that the assessee was unable to lead any credible evidence to prove that for carrying on the business it had received any inputs from the said group companies and the money to them became payable. The assessee preferred the appeal before the ITAT. Along with this appeal application for leading additional evidence under Rule 29 of the Income-Tax (Appellate Tribunal) Rules 1963 (hereinafter referred to as the 'Rules') was filed as the assessee wanted to produce some further evidence which he did not produce before the Assessing Officer and even the CIT(A). The ITAT had admitted that evidence allowing the application of the assessee under Rule 29 of the Rules and remitted the case back to the Assessing Officer to decide the issue afresh after considering the said additional evidence. The Revenue/ appellant feels aggrieved against this approach of the Tribunal. It is the case of the Revenue that under no circumstance, invoking the provisions of Rule 29 of the Rules, such additional evidence could be permitted. It is also the grievance of the Revenue that even if Rule 29 of the Rules could be invoked in a matter like this, there was hardly any justifiable reason for permitting the production of additional evidence. Keeping in view these twin contentions, the appeal was admitted on the following questions of law:-

(a) Whether the ITAT erred in law and on merits in admitting fresh evidence under Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 and restoring the matter on allowability of management expenses on group companies and consequential interest claimed for the first time during the year under consideration to the AO for fresh adjudication?

(b) Whether the reason of non-retrieving of e-mails due to technical difficulties for a period of almost 3 years before the lower authorities is a sufficient cause for the purpose

of admitting fresh evidence as per Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963?

Re. Question No.1

2. First question relates to the applicability of Rule 29 of the Rules. This Rule reads as under:-

> "The parties to the appeal shall not be entitled to produce additional evidence either oral or documentary before the Tribunal, but if the Tribunal requires any document to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause, or if the income-tax authorities have decided the case without giving sufficient opportunities to the assessee to adduce evidence either on points specified by them or not specified by them, the Tribunal, for reasons to be recorded, if any, allow such document to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced."

3. Next submission made by Ms. Rashmi Chopra, learned counsel for the Revenue, was that this Rule precludes a party from producing additional evidence, oral or documentary, before the Tribunal. The Rule has limited scope and permits the Tribunal only to seek the production of any document or witness or affidavit etc. to enable it to pass orders or for any other substantial cause. It was, thus, submitted that the assessee had no right to move any application for additional evidence and in so far as the Tribunal is concerned, it did not suo moto thought it proper to ask for the production of these documents. Ms. Kavita Jha, learned counsel appearing for the assessee, on the other hand argued that this Rule is to be given liberal interpretation inasmuch as purpose behind the Rule was to do substantial justice in the matter and/or to prevent failure of justice. She submitted that the Tribunal had categorically recorded the reasons, while allowing the production of additional documents, to the effect that these were necessary to impart substantial justice.

4. We have already re-produced the language of Rule 29 of the Rules. The Tribunal has given following justification while permitting additional evidence:-

> "It is clear that such is not the situation at hand. Rule 29, in

general, forbids the parties to the appeal from producing additional evidence either oral or documentary before the Tribunal. However, if the Tribunal requires any document to be produced to enable it to pass orders or for any substantial cause, it may allow such document to be produced for the reasons to be recorded and allow such evidence to be adduced. The facts of the case are that the assessee claimed deduction of a substantial amount of Rs.2.17 crores in computing the total income as expenditure incurred on availing of management services etc. from overseas group companies. There is no doubt about the payments. The expenditure was disallowed by the lower authorities on the ground that there was no evidence regarding the rendering of the services. In order to decide this substantial issue of fact on merits, it is necessary to take on record the evidence, which the assessee has now produced before us, failing which there will be substantial failure of justice. The reason for non-production of evidence before lower authorities was non-retrievable of e-mail on the date due to technological difficulties. Therefore, we are of the view that it is necessary to consider the evidence to come to appropriate conclusion in the matter. Accordingly, the evidence is admitted under Rule 29 of the Income-Tax (Appellate Tribunal) Rules, 1963."

5. No doubt, the Tribunal has stated that if the evidence produced before it is not allowed, there would be failure of justice. However, it has not at all addressed itself the question (and therefore, not answered) as to whether it is permissible for a party to file the application for adducing additional evidence having regard to the language of Rule 29. As per the language of this Rule, parties are not entitled to produce additional evidence. It is only when the Tribunal requires such additional evidence in the form of any document or affidavit or examination of a witness or through a witness it would call for the same or direct any affidavit to be filed, that too in the following circumstances:-

(a) when the Tribunal feels that it is necessary to enable it to pass orders; or

(b) for any substantial cause; or

(c) where the Income-Tax authorities did not provide sufficient

opportunity to the assessee to adduce evidence.

6. In the present case it is the assessee who moved application for production of additional evidence. He had the opportunity to file evidence before the Assessing Officer or even the CIT(A) but chose not to file this evidence (whether the assessee was precluded to produce the evidence is the aspect which would be examined while answering the second question).

7. Fact remains that it is not the Tribunal, while hearing the case, which asked for the production of these documents of its own. On the contrary, the Tribunal acted upon the application preferred by the assessee. That would clearly mean that it has allowed the assessee, i.e., the party to the appeal to produce the evidence. Whether this course of action would be permissible for the Tribunal under Rule 29 of the Rules? While arguing that the Tribunal is empowered to do so even in an application filed by one of the parties for production of additional evidence, Ms. Kavita Jha referred to certain judgments. Therefore, it would be of benefit to take stock of those judgments at this stage.

8. First case referred to by learned counsel for the assessee is the judgment of Madras High Court in **Anaikar Trades and Estates Pvt. Ltd. v. CIT,** 186 ITR 313 (Mad.). In that case the assessee sold several plots of land to various parties and the value of the properties shown in the documents of sale was Rs.2,58,338/-. The Valuation Officer of the Department estimated the market value of the properties sold at Rs.4,17,000/- and therefore, the Income-tax Officer determined the value of the properties sold at Rs.4,17,000/- under section 52(2) of the Income Tax Act, 1961. As the cost of acquisition of the properties was Rs.1,40,934/-, the difference of Rs. 2,76,066/- was brought to tax as capital gains. On appeal, the Appellate Assistant Commissioner held that it had not been established that anything more than the disclosed consideration had been received by the assessee and therefore, directed the Income-tax Officer to recompute the capital gain taking the sale consideration at Rs. 2,58,338/-. On appeal to the Tribunal by the Department, it was contended that the provisions of Section 52(2) were applicable. The revenue relied on certain affidavits given by five of the purchasers from the assessee to the effect that the sale of plots was effected by the assessee at Rs.22,000/- per ground though the price shown in the document was Rs.16,500/- per ground. This was objected

to by the assessee on the ground that though these affidavits were available at the time of the assessment proceedings and also at the time of the consideration of the appeal by the Appellate Assistant Commissioner, the Revenue did not make use of that material and therefore, the reliance on such affidavits should not be permitted. The Tribunal took the view that in order to decide the question of applicability of Section 52(2) of the Act, which was the subject matter of the appeal before it, it would be necessary, in the interest of justice, to consider these affidavits and, in that view, directed the restoration of the matter before the Appellate Assistant Commissioner.

9. It was in this backdrop, question arose as to whether the Tribunal could entertain the interest of the Revenue and allow production of those affidavits as additional evidence. The order of the Tribunal allowing additional evidence was challenged by the assessee in the High Court. The High Court took the view that the Tribunal could do so in exercise of its power under Rule 29 of the Rules. Having regard to the scope of the appeal involving the applicability of Section 52(2) of the Act to the assessee, in the opinion of the High Court, it was necessary for the Tribunal to ascertain the facts justifying such applications or otherwise and only in that view the Tribunal felt that in the interest of justice and in order to correctly adjust the liability of the assessee for payment of tax, it would be necessary to remit the matter to the Appellate Assistant Commissioner for fresh consideration on the basis of affidavits filed by the purchasers of the property. The High Court also noted that there was sufficient reason for the Revenue that the Revenue was prevented by sufficient cause for not perusing these affidavits earlier as these were available in different sections of the Department and were not made available to the Assessing Authority or even the First Appellate Authority and the assessee could not be permitted to take advantage of an inadvertent omission on the part of the Department to rely on these affidavits at the earlier stage or at the appellate stage. The ambit of rule 29 of the Rules, in the process, was discussed in the following manner:-

> "10. We may in this connection refer to the scope of the powers of the Tribunal under rule 29 of the Rules. In **R.S.S. Shanmugam Pillai and Sons Vs. CIT** (1974) 95 ITR 109, this court had occasion to go into the question of the powers of the Tribunal to entertain or reject evidence. While accepting that the Tribunal

> has got a wide discretion to admit or reject documents at the stage of appeal, it was pointed out that such a discretion cannot be exercised in an arbitrary manner and that if the Tribunal found that the documents filed are quite relevant for the purpose of deciding the issue arising before, it would be well within its powers to admit the evidence, consider the same or remit the matter to the lower authorities for such consideration. On the facts of this case, the Tribunal felt that in the interest of justice in order to decide the question of the applicability of section 52(2) of the Act to the assessee which was agitate before it, it would be necessary to investigate and ascertain the facts in that regard, especially when certain affidavits had been relied on, which, to some extent, prima facie made out that more than the stated consideration had passed under the sale deeds. These affidavits would be relevant and necessary for deciding the question of the application of section 52(2) of the Act and that was the reason why the Tribunal, in the exercise of its discretion, directed the Appellate Assistant Commissioner to consider the issue afresh after taking into account the evidence in the shape of affidavits. We are of the view that the Tribunal, on the facts of this case, properly exercised its discretion. We may also refer to **CIT Vs Kum Satya Setia** (1983) 143 ITR 486 (MP) where it has been laid down under rule 29 of the Rules, it was within the discretion of the Tribunal to allow the production of additional evidence and even if there was a failure to produce the documents before the Income-tax Officer and the Appellate Assistant Commissioner, the Tribunal had the jurisdiction in the interest of justice to allow the production of such vital documents. That leaves for consideration the decision in **Velji Deoraj and Co. Vs CIT** (1968) 68 ITR 708 (Bom.). In that case while exercising its discretion, the Tribunal found that the additional evidence was unnecessary and, therefore, the refusal by the Tribunal to allow additional evidence was held to be neither illegal nor improper."

10. Second case relied upon by the learned counsel for the assessee is the decision of this Court in **R. Dalmia v. CIT,** 113 IT 522 (Del.). In that case, with chequered history, the question was whether the source of cash credit in the account books of the assessee had been satisfactorily explained. The Assessing Officer had found certain cash

entries and was of the opinion that since the assessee could not explain the same, he made additions on the ground of these were unexplained cash entries. It so happened that the assessee had received a sum of Rs.13.65 lakhs from Bharat Union Agencies (P) Ltd. ("BUA") in cash on 3.8.1953 and paid a sum of Rs.13,64,250/- to Jaipur Traders Ltd. ("JT") on 7.8.1953 also in cash. It was in this backdrop the assessee was asked to disclose the source from which this money came. The assessee was in control of both JT and BUA. Avoiding the details with which we are not concerned and coming to the aspect which is relevant for us, when the matter reached the Tribunal, counsel for the Revenue sought permission of the Tribunal to place on record the balance-sheet and profit and loss account of JT for relevant period as additional evidence. This request of the Revenue was opposed by the assessee. However, the Tribunal was of the opinion that additional evidence sought to be addressed was relevant and the point in issue would be of assistance to it in deciding the appeal. It, thus, passed an order overruling the objection of the assessee and admitting the additional evidence. At the same time, the Tribunal thought it fair to given an opportunity to the assessee to explain the additional evidence and also certain other matters which it narrated in its order. Accordingly, direction was given to the Appellate Assistant Commissioner to record such further evidence as the Revenue may wish to produce and forward it to the Tribunal. After receiving the additional evidence and examining the same, the Tribunal heard the appeal of the assessee and by elaborate order partly allowed the same. Against this order, the assessee came in appeal and also challenged the order of the Tribunal permitting the additional evidence. The Court repelled this challenge holding that the Appellate Tribunal has a discretion to decide whether to admit the additional evidence or not and in the absence of any suggestion that it had acted on any wrong principle, no question of law can arise from the Tribunal's decision to admit the additional evidence and remand the case back to the Assistant Commissioner to give the Revenue an opportunity to produce the additional evidence as the Revenue might wish to produce and forward it to the Tribunal. The Court also observed that no prejudice whatsoever was caused to the assessee as he was given full chance to rebut the additional evidence produced by the Revenue and a chance was given to the assessee also to produce his own evidence.

11. Again in **R.S.S. Shanmugam Pillai & Sons v. CIT,** 95 ITR

109 (Mad.), the High Court dwelled on the powers of the Appellate Tribunal to admit additional evidence at the appellate stage in the following manner:-

> "It is no doubt true that the Tribunal has got a discretion either to admit the documents as additional evidence or to reject the same at the stage of the appeal. But the said discretion cannot be exercised in an arbitrary manner. If the Tribunal finds that the documents filed are quite relevant for the purpose of deciding the issue before it, it would be well within its powers to admit the evidence, consider the same or remit the matter to the lower authorities for the purpose of finding out the genuineness of the letters and considering the relevancy of the same. But if the Tribunal finds that the evidence adduced at the stage of the appeal is not quite relevant or that it is not necessary for the proper disposal of the appeal before it, in that case, the Tribunal could straigthtaway reject the evidence, which was sought to be produced for the first time at the stage of the appeal."

12. We may also quote the following observations of Calcutta High Court in **Income-Tax Officer, Dist. III (I) v. B.N. Bhattacharya,** 112 ITR 423 (Cal.). In that case the Court even permitted the additional evidence before it at appellate stage where the question was as to whether the notice was properly served upon the assessee or not. Record of the process server and the Income-Tax Officer were produced and objection of the assessee that such evidence could not be produced was turned down invoking the power to admit such evidence under Order 41 Rule 27(1) of the Code of Civil Procedure. Following pertinent observations were made in the process:-

> "But it was observed by the Supreme Court in the case of **K. Venkatramaiah v. A. Seetharama Reddy,** AIR 1963 SC 1526, that under rule 27(1) of Order 41 of the Code of Civil Procedure, the appellate court has the power to allow additional evidence not only if it requires such evidence "to enable it to pronounce judgment", but also for "any other substantial cause". There might well be cases where even though the court found that it was able to pronounce judgment on the state of record as it was, and so it could not strictly say that it required additional evidence

to enable it to pronounce judgment, it still considered that in the interest of justice something which remained obscure should be filled up so that it could pronounce its judgment in a more satisfactory manner. Such a case would be one for allowing additional evidence for any other substantial cause under rule 27(1)(b) of Order 41 of the Code. In the instant case, in the affidavit-in-opposition filed before the learned trial judge, it had been stated that the notice had been served by affixation at 8/1, Dacres Lane, Calcutta."

13. The aforesaid case law clearly lays down a neat principle of law that discretion lies with the Tribunal to admit additional evidence in the interest of justice once the Tribunal affirms the opinion that doing so would be necessary for proper adjudication of the matter. This can be done even when application is filed by one of the parties to the appeal and it need not to be a suo motto action of the Tribunal. The aforesaid rule is made enabling the Tribunal to admit the additional evidence in its discretion if the Tribunal holds the view that such additional evidence would be necessary to do substantial justice in the matter. It is well settled that the procedure is handmade of justice and justice should not be allowed to be choked only because of some inadvertent error or omission on the part of one of the parties to lead evidence at the appropriate stage. Once it is found that the party intending to lead evidence before the Tribunal for the first time was prevented by sufficient cause to lead such an evidence and that this evidence would have material bearing on the issue which needs to be decided by the Tribunal and ends of justice demand admission of such an evidence, the Tribunal can pass an order to that effect.

14. The next question which arises for consideration is as to whether the exercise of discretion in the instant case permitting the additional evidence by the Tribunal, is apposite? It is undisputed that Rule 29 of the Rules is akin to Order 41 Rule 27(1) of the Code of Civil Procedure. The true test in this behalf, as laid down by the Courts, is whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. The legitimate occasion, therefore, for exercise of discretion under this rule is not before the Appellate Court hears and examines the case before it, but arises when on examining the evidence as it stands,

some inherent lacuna or defect becomes apparent to the Appellate Court coming in its way to pronounce judgment, the expression 'to enable it to pronounce judgment' can be invoked. Reference is not to pronounce any judgment or judgment in a particular way, but is to pronounce its judgment satisfactory to the mind of Court delivering it. The provision does not apply where with existing evidence on record the Appellate Court can pronounce a satisfactory judgment. It is also apparent that the requirement of the Court to enable it to pronounce judgment cannot refer to pronouncement of judgment in one way or the other but is only to the extent whether satisfactory pronouncement of judgment on the basis of material on record is possible. In **Arjan Singh v. Kartar Singh,** AIR 1951 SC 193, while interpreting the provisions of Order 41 Rule 27, the court remarked as follows:-

"The legitimate occasion for the application of Order 41, rule 27 is when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the court of fresh evidence and the application is made to impart it. **The true test, therefore, is whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced."**

[See also **Netha Singh Vs. Financial Commissioner,** AIR 1976 SC 1053]

15. In the present case the reason which was given by the assessee in support of its plea for admission of additional evidence was that the assessee could not produce these records before the lower authorities due to non-retrievability of e-mail on the date because of technological difficulties. This reason was specifically mentioned in the application filed. No reply to this application was filed refuting this averment, though the departmental representative had opposed the admission of the additional evidence. The ground pleaded by the assessee was not confronted. In this backdrop, the Tribunal looked into the entire matter and arrived at a conclusion that the additional evidence was necessary for deciding the issue at hand. It is, thus, clear that the Tribunal found the requirement of the said evidence for proper adjudication of the matter and in the interest of substantial cause. Rule 29 of the Income Tax (Appellate Tribunal) Rules categorically permits the Tribunal to allow such documents

to be produced for any substantial cause. Once the Tribunal has predicated its decision on that basis, we do not find any reason to interfere with the same. As a result, the questions of law are answered in favour of the assessee and against the Revenue resulting into dismissal of these appeals. No costs.

ILR (2011) III DELHI 491
W.P.(C)

M.C. SHARMA **....PETITIONER**

VERSUS

UOI & ORS. **....RESPONDENTS**

(PRADEEP NANDRAJOG & SURESH KAIT, JJ.)

W.P.(C) NO. : 5607/2010 **DATE OF DECISION: 19.01.2011**

Constitution of India, 1950—Article 226—Petition seeking directions to respondents to grant full pension to the petitioner—Petitioner superannuated while holding the post of Commandant i.e. on attaining the age of 55 years—For purpose of full pension, qualifying service is 30 years and not 33 years—Respondent does not dispute that full pension has to be paid to all those who have rendered 33 years of qualifying service—Held—33 years qualifying service for pension is premised on the entitlement of civil servants to service till the age of 58 years and if the Government fixes a lower age when an employee would superannuate eg. 55 years for a Commandant, the span of qualifying service has to be lessened by such number of years as is the differential between 58 years and the lesser tenure—Accordingly, we allow the writ petition and issue a mandamus to the

respondents to pay full pension to the petitioner within 8 weeks from today together with interest @ 9% p.a.

In **D.D.Swami's** case (supra), a Commandant under BSF superannuated on attaining the age of 55 years i.e. the maximum age till which a person can hold the post of Commandant. He had rendered a little more than 30 years' service, but not 33 years. He was granted pension on pro rata basis. This Court directed that he would be entitled to full pension with interest on the arrears calculated @9% per annum effected from the date when the amount fell due and payable till payment was made. The basis of the view is that 33 years' qualifying service for pension is premised on the entitlement of civil servants to service till the age of 58 years and if the Government fixes a lower age when an employee would superannuate eg. 55 years for a Commandant, the span of qualifying service has to be lessened by such number of years as is the differential between 58 years and the lesser tenure. **(Para 6)**

Accordingly, we allow the writ petition and issue a mandamus to the respondents to pay full pension to the petitioner. Arrears would be paid within 8 weeks from today together with interest calculated @9% per annum from the date arrears have to be paid being the differential in the pension payable and pension paid each month. **(Para 7)**

Important Issue Involved: The Civil Servants, who are made to superannuate before attaining the age of 58 years would be entitled to proportionate reduction in the number of years for calculating service for pension.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Alok Bhachawat, Mr. Syed Hasan Isfahani and Mr. Sankalp Kashyap, Advocates.

FOR THE RESPONDENTS : Mr. Neeraj Choudhary and Mr. Mohit Auluck, Advocates.

CASES REFERRED TO:

1. *D.D.Swami* vs. *UOI* 2004 (2) AD (Delhi) 246.
2. *Raghunandan Lal Choudhary & Ors.* vs. *UOI* AIR 1998 SC 2125.

RESULT: Petition allowed.

PRADEEP NANDRAJOG, J. (Oral)

C.M.No.479/2011

Allowed.

W.P.(C) 5607/2010

1. Heard learned counsel for the parties.

2. After initially reckoning qualifying service, for purpose of pensionary benefits payable to the petitioner as 27 years, 1 month and 16 days, the respondents corrected themselves by treating qualifying service as 30 years, 5 months and 10 days.

3. It is not being disputed by the respondents that full pension has to be paid to all those who have rendered 33 years' qualifying service.

4. But the issue between the parties is that, as per the petitioner since he superannuated while holding the post of Commandant i.e. on attaining the age of 55 years for purposes of full pension the qualifying service has to be reckoned as 30 years and not 33 years for which stand the petitioner relies upon various decisions of this Court where view taken was that 33 years' qualifying service for full pension has been premised on the ground that civil servants superannuate on attaining the age of 58 years and thus those who are made to superannuate earlier would be entitled to proportionate reduction in the number of years for calculating qualifying service. The Department does not agree.

5. We find that the issue at hand is squarely covered in favour of the petitioner, commencing with the decision of the Supreme Court reported as AIR 1998 SC 2125 **Raghunandan Lal Choudhary & Ors. Vs. UOI**. It has been followed consistently by this Court in a number of

decisions, the latest reported decision being 2004 (2) AD (Delhi) 246 **D.D.Swami Vs. UOI**.

6. In **D.D.Swami's** case (supra), a Commandant under BSF superannuated on attaining the age of 55 years i.e. the maximum age till which a person can hold the post of Commandant. He had rendered a little more than 30 years' service, but not 33 years. He was granted pension on pro rata basis. This Court directed that he would be entitled to full pension with interest on the arrears calculated @9% per annum effected from the date when the amount fell due and payable till payment was made. The basis of the view is that 33 years' qualifying service for pension is premised on the entitlement of civil servants to service till the age of 58 years and if the Government fixes a lower age when an employee would superannuate eg. 55 years for a Commandant, the span of qualifying service has to be lessened by such number of years as is the differential between 58 years and the lesser tenure.

7. Accordingly, we allow the writ petition and issue a mandamus to the respondents to pay full pension to the petitioner. Arrears would be paid within 8 weeks from today together with interest calculated @9% per annum from the date arrears have to be paid being the differential in the pension payable and pension paid each month.

8. We note that in-spite of categorical pronouncement on this issue by this Court and reiterated in over 8 judicial decisions, the respondents are not taking any action to ensure that this issue is not recurring made the subject matter of litigation. Accordingly, we further direct the respondents and, in particular, respondent No.1 to issue an office memorandum within 6 weeks from today notifying all paramilitary forces under the jurisdiction of respondent No.1 that pension of paramilitary officers needs to be computed in view of the law laid down by the Supreme Court in **Raghunandan Choudhary's** case (supra) consistently followed by this Court, latest pronouncement on the issue being the present decision.

9. Petitioner is entitled to be paid costs in the sum of Rs.11,000/- by the respondents.

ILR (2011) III DELHI 495
LPA

ALL INDIA INSTITUTE OF MEDICAL SCIENCES ....APPELLANT

VERSUS

SANJAY KUMAR & ANR. ....RESPONDENTS

(DIPAK MISRA CJ. & SANJIV KHANNA, J.)

LPA NO. : 143/2010 DATE OF DECISION: 20.01.2011

Industrial Disputes Act, 1947—Section 10(1)—Petition challenging the reference made under Section 10 (1) of the Act, on 4th January 2007 by the Government of NCT of Delhi—The reference was unwarranted being hit by the doctrine of delay and laches—On the date of reference no industrial dispute as such was in existence—The respondent no. 1 was a daily wager in AIIMS—Terminated by the management on 1st March, 1996—Moved application for conciliation before the District Labour Officer on 26th May, 2005—No reconciliation took place—Failure report submitted—Respondent no. 2 made the reference to Labour Court for adjudication—Learned Single Judge dismissed the writ petition—Letters Patent Appeal—Held—The workman, the respondent no. 1 herein chose to maintain silence from 1996 till 2005 for a period of almost more than nine years and two months—Thereafter, he woke up from slumber and raised a dispute—In our considered opinion, the workman could not have risen like a phoenix or awake like Rip Van Winkle as if the time was arrested—As the workman had not taken any steps whatsoever for a span of nine years, that makes the dispute extinct by efflux of time—It tantamounts to acceptance of the order by the workman—Therefore, reference made by the respondent no. 2 is totally unsustainable and, accordingly, the same is quashed.

In the case at hand, the workman, the respondent No.1 herein, chose to maintain silence from 1996 till 2005 for a period of almost more than nine years and two months. Thereafter, he woke up from slumber and raised a dispute. In our considered opinion, the workman could not have risen like a phoenix or awake like Rip Van Winkle as if the time was arrested. We are disposed to think so as the workman had not taken any steps whatsoever for a span of nine years and that makes the dispute extinct by efflux of time. It tantamounts to acceptance of the order by the workman. Thus, he cannot be allowed to remain idle for a long span of time and thereafter file an application and revive a cause of action unless a cause of action has accrued at a belated stage or there is a continuous cause of action. Therefore, we are of the considered view that the reference made by the respondent No.2 is totally unsustainable and, accordingly, the same is quashed. **(Para 13)**

Important Issue Involved: A workman can not be allowed to remain idle for long span and then revive cause of action unless cause of action accrued at a belated stage or there is a continuous cause of action.

[Vi Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. Rajat Katyal and Mr. Anchit Sharma, Advocate.

FOR THE RESPONDENT : Mr. Amiet Andlay, Advocate for R-2.

CASES REFERRED TO:

1. *Dharappa* vs. *Bijapur Coop. Milk Produces Societies Union Ltd.,* (2007) 9 SCC 109.
2. *Sharad Kumar* vs. *Govt. of NCT of Delhi,* (2002) 4 SCC 490.

3. *National Engg. Industries Ltd.* vs. *State of Rajasthan,* (2001) SCC 371.

4. *Sapan Kumar Pandit* vs. *U.P. State Electricity Board & Ors.,* 2001 (4) SCALE 467.

5. *Nedungadi Bank Ltd.* vs. *K.P. Madhavankutty & others,* 2000 (2) SCC 455.

6. *Ajaib Singh* vs. *Sirhind Cooperative Marketing-cum-Processing Service Society Ltd.,* (1997) 6 SCC 82.

RESULT: Appeal is allowed.

DIPAK MISRA, CJ.

1. In this intra-court appeal, the pregnability of the order dated 9th December, 2009 passed by the learned Single Judge in WP(C) No.9640/2007 is called in question.

2. The facts which are requisite to be stated for adjudication of this appeal are that the reference made under Section 10(1) of the Industrial Disputes Act, 1947 (for brevity 'the Act') on 4th January, 2007 by the Government of NCT of Delhi, the respondent No.2 herein, was totally unwarranted being hit by the doctrine of delay and laches and further on the foundation that on the date of reference no industrial dispute as such was in existence. On a perusal of the order passed by the learned Single Judge, it transpires that the respondent No.1, who was a daily wager in AIIMS, claimed to have faced an order of termination by the management on 1st March, 1996. He filed an application for conciliation before the District Labour Officer on 26th May, 2005. As no re-conciliation took place, the failure report was submitted to the respondent No.2 and keeping the same in view, the respondent No.2 made the reference to the labour court for adjudication.

3. Be it noted, the terms of the reference made by the respondent No.2 reads as follows:

> "Whether Sh.Sanjay Kumar S/o Sh.Kalicharan has abandoned his job of his own or his services have been terminated by the management illegally and/or unjustifiably and if so, to what sum of money as monetary relief along with other consequential benefits in terms of existing Law/Govt. notifications and to what other relief is he entitled and what directions are necessary in this respect?"

Challenging the said reference, it was contended before the learned Single Judge that the claim put forth by the workman was absolutely stale and by no stretch of imagination it can be held that an industrial dispute did exist to make a reference for adjudication. The learned Single Judge expressed the view that the objection relating to delay and laches in raising the dispute by the workman can be taken up by the management in its written statement to be filed before the Labour Court and further as the management has already entered appearance before the Labour Court, the writ petition was sans substance. Being of this view, the learned Single Judge dismissed the writ petition.

4. Mr.Rajat Katyal, learned counsel appearing for the appellants, submitted that the learned Single Judge has fallen into error by expressing the view that the management could raise the issue of delay and laches before the Labour Court and was not entitled to challenge the reference. It is urged by him that if the factual matrix is appreciated with studied scrutiny, it would be quite vivid that the respondent No.2 has failed to appreciate that the industrial dispute as understood in law did not exist at the time of reference and the law does not countenance making stale claims alive unless there has been a continuous cause of action to keep the dispute alive. To buttress his submission, he has commended us to the decisions in **Nedungadi Bank Ltd. v. K.P. Madhavankutty & others,** 2000 (2) SCC 455 and **Dharappa v. Bijapur Coop. Milk Produces Societies Union Ltd.,** (2007) 9 SCC 109.

5. Despite service of the notice, the workman has remained absent.

6. Mr.Amiet Andlay, learned counsel appearing for the GNCTD, submitted that the State Government had correctly made the reference as it was obliged in law to do so. It is put forth by him that the State Government has no authority to adjudicate the issue of limitation as it is not within the domain of the executive but within the sphere of adjudication by the labour court/industrial adjudicator. The learned counsel has placed reliance on **Ajaib Singh v. Sirhind Cooperative Marketing-cum-Processing Service Society Ltd.,** (1997) 6 SCC 82, **Sapan Kumar Pandit v. U.P. State Electricity Board & Ors.,** 2001 (4) SCALE 467 and **Sharad Kumar v. Govt. of NCT of Delhi,** (2002) 4 SCC 490.

7. At the very outset, we may note with profit that there is no dispute with regard to the factual matrix of the case at hand. We are inclined to think so. On a perusal of the material brought on record, it is clear as day that the workman had alleged that he had been removed by the management w.e.f. 1st March, 1996. He raised the industrial dispute before the competent authority on 14th January, 2005. As the government file would show, the management did not appear and, accordingly, the district labour officer referred the matter to the State Government which, in turn, referred the matter for adjudication to the labour court by drawing a schedule and terms of reference which we have reproduced herein above. The question that emerges for consideration is whether in a case of this nature the State Government was obliged in law to make a reference.

8. In this context, we may profitably refer to the decision in **K.P. Madhavankutty and Others** (supra) wherein the Apex Court was dealing with a case whereby the Central Government had made a reference order under Section 10 of the Act in respect of a workman who was dismissed on 1st January, 1983 and a reference was made whether the dismissal of the employee w.e.f. 11th August, 1972 was justified. The employee had filed an application on 24th May, 1979. While dealing with the factum of delay and laches as well as the issue of stale claims, their Lordships have held as follows:-

> "6. Law does not prescribe any time-limit for the appropriate Government to exercise its powers under Section 10 of the Act. It is not that this power can be exercised at any point of time and to revive matters which had since been settled. Power is to be exercised reasonably and in a rational manner. There appears to us to be no rational basis on which the Central Government has exercised powers in this case after a lapse of about seven years of order dismissing the respondent from service. At the time reference was made no industrial dispute existed or could be even said to have been apprehended. A dispute which is stale could not be the subject-matter of reference under Section 10 of the Act. As to when a dispute can be said to be stale would depend on the facts and circumstances of each case. When the matter has become final, it appears to us to be rather incongruous that the reference be made under Section 10 of the Act in the

> circumstances like the present one. In fact it could be said that there was no dispute pending at the time when the reference in question was made. The only ground advanced by the respondent was that two other employees who were dismissed from service were reinstated. Under what circumstances they were dismissed and subsequently reinstated is nowhere mentioned. Demand raised by the respondent for raising industrial dispute was ex facie bad and incompetent."

9. After so stating, it has been further expressed as follows:-

> "7. In the present appeal, it is not the case of the respondent that the disciplinary proceedings, which resulted in his dismissal, were in any way illegal or there was even any irregularity. He availed his remedy of appeal under the rules governing his conditions of service. It could not be said that in the circumstances industrial dispute did arise or was even apprehended after lapse of about seven years of the dismissal of the respondent. Whenever a workman raises some dispute it does not become industrial dispute and appropriate Government cannot in a mechanical fashion make the reference of the alleged dispute terming as industrial dispute. The Central Government lacked power to make reference both on the ground of delay in invoking the power under Section 10 of the Act and there being no industrial dispute existing or even apprehended. The purpose of reference is to keep industrial peace in an establishment. The present reference is destructive to the industrial peace and defeats the very object and purposes of the Act. The Bank was justified in thus moving the High Court seeking an order to quash the reference in question."

10. Be it noted, their Lordships also made a reference to the decision in **National Engg. Industries Ltd. v. State of Rajasthan,** (2001) SCC 371 wherein it has been held thus:-

> "24. It will be thus seen that High Court has jurisdiction to entertain a writ petition when there is an allegation that there is no industrial dispute and none apprehended which could be the subject-matter of reference for adjudication to the Industrial Tribunal under Section 10 of the Act. Here it is a question of jurisdiction of the Industrial Tribunal, which could be examined

by the High Court in its writ jurisdiction. It is the existence of the Industrial Tribunal (sic dispute) which would clothe the appropriate Government with power to make the reference and the Industrial Tribunal to adjudicate it. If there is no industrial dispute in existence or apprehended the appropriate Government lacks power to make any reference."

11. In view of the aforesaid enunciation of law, it is the duty of the appropriate government to see whether the industrial dispute exists at the time of reference.

12. In **Dharappa** (supra), a two-Judge Bench of the Apex Court have opined that though the Act does not provide for limitation, yet if on account of delay, a dispute has become stale or ceases to exist, the reference should be rejected. The delay becomes fatal on such an occasion. Be it noted, a contention was canvassed that the court has to keep in view the provision of Section 10(1)(c) and (d) of the Act but the said submission was repelled by stating that the said provision does not revive stale claims.

13. In the case at hand, the workman, the respondent No.1 herein, chose to maintain silence from 1996 till 2005 for a period of almost more than nine years and two months. Thereafter, he woke up from slumber and raised a dispute. In our considered opinion, the workman could not have risen like a phoenix or awake like Rip Van Winkle as if the time was arrested. We are disposed to think so as the workman had not taken any steps whatsoever for a span of nine years and that makes the dispute extinct by efflux of time. It tantamounts to acceptance of the order by the workman. Thus, he cannot be allowed to remain idle for a long span of time and thereafter file an application and revive a cause of action unless a cause of action has accrued at a belated stage or there is a continuous cause of action. Therefore, we are of the considered view that the reference made by the respondent No.2 is totally unsustainable and, accordingly, the same is quashed.

14. Resultantly, the appeal is allowed and the order passed by the learned Single Judge is set aside and as we have quashed the reference, the proceedings before the labour court shall be deemed to have become extinct. There shall be no order as to costs.

ILR (2011) III DELHI 502
C.M. (M)

SMT. VIDYA DEVI ....PETITIONER

VERSUS

SMT. RAMWATI DEVI ....RESPONDENT

(KAILASH GAMBHIR, J.)

C.M. (M) NO. : 1735/2005 DATE OF DECISION: 21.01.2011

Limitation Act, 1963—Section 5—Article 123, Civil Procedure Code, 1908—Order 9, Rule 13—Petitioner preferred writ petition challenging order of trial Court dismissing her application seeking condonation of delay in moving application under Order 9, Rule 13—As per petitioner, she came to know of ex-parte judgment and decree dt. 08.01.1997 on 24.12.1999 when she received notice from Court in another case—She handed over notice to her Advocate who did not take steps and expired on 21.01.2000—Thereafter she managed to get back notice and engaged new counsel on 29.01.2000, who inspected records in first week of May, 2000 and she filed applications on 08.05.2000—Thus, she explained sufficient reasons for non filing condonation application within prescribed period which were ignored by trial Court—Respondent contended that besides preferring applications after a lapse of about three years, petitioner also failed to give any reasons for not filing applications between 29.01.2000 till 08.05.2000—There no ground to condone delay—Held:- The legal maxim vigilanibus, non dormentibus, jura subvenient which means that equity aids the vigilant and not the indolent is an undisputed axiom that eternal vigilance is the price of liberty and if one sleeps upon his right, his right will slip away from him—Petitioner failed to explain not taking timely steps

to file the applications.

To seek condonation of delay under Section 5 of the Limitation Act, the applicant should have explained each day's delay or at least sufficient reasons for not filing the application within the period of 30 days from the date of the knowledge as prescribed under Article 123 of the Limitation Act. Once having not given any sufficient or plausible explanation to explain the delay, can it be still said that the learned Trial Court should have exercised discretion in favour of the petitioner to condone the delay. The Hon'ble Apex Court in a catena of judgments has taken a view that when substantial justice and technical considerations are pitted against each other then cause of substantial justice deserves to be preferred. The Apex Court in **Special Tehsildar, Land Acquisition, Kerala Vs. K.V. Ayisumma,** (1996) SCC 634, also held that the approach of the Court should be pragmatic and not pedantic. There cannot be any dispute with the above said legal position as it stands that the technicalities cannot be given precedence over the substantial justice and substantive rights of the parties. In every case the endeavour of the court should be to decide the lis between the parties on its merits. The courts are also required to see whether any party to the suit has been adopting dilatory tactics to cause unnecessary and inordinate delay in final disposal of the case due to mala fide and oblique reasons. **(Para 10)**

Important Issue Involved: The legal maxim vigilanibus, non dormentibus, jura subvenient which means that equity aids the vigilant and not the indolent is an undisputed axiom that eternal vigilance is the price of liberty and if one sleeps upon his right, his right will slip away from him.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Dinesh Kumar Gupta, Advocate.

FOR THE RESPONDENT : Mr. O.P. Aggarwal, Advocate.

CASE REFERRED TO:

1. *Special Tehsildar, Land Acquisition, Kerala* vs. *K.V. Ayisumma,* (1996) SCC 634.

RESULT: Writ petition dismissed.

KAILASH GAMBHIR, J. Oral

1. By this petition filed under Article 227 of the Constitution of India, the petitioner seeks quashing of the order dated 4.9.2002, passed by the learned Additional District Judge whereby the application of the petitioner filed by her under Section 5 of the Limitation Act was dismissed.

2. Before I proceed to deal with the contentions raised by the counsel for the parties, it would be appropriate to state the brief background of facts of the case.

3. A suit for specific performance was filed by the respondent against the petitioner seeking specific performance of the agreement to sell dated 24.9.1987. The said suit was decreed ex-parte by the learned trial court on 13.5.1988, but subsequently on the application moved by the petitioner the said ex-parte decree was set aside by the learned trial court vide order dated 1.11.1988. After the said ex-parte decree was set aside, the petitioner had filed written statement and thereafter the issues were framed by the learned trial court. But when the case was fixed for evidence of the respondent, the same was dismissed in default by the learned trial court due to the non appearance of the respondent vide order dated 20.8.92. A restoration application was moved by the respondent to seek restoration of the said suit and in the said application the petitioner had appeared on 4.9.1995. Since nobody appeared from the side of the respondent, the same resulted in dismissal of her application. The respondent then moved application under Order 9 Rule 9 CPC. The said application moved by the respondent was restored by the learned trial court without directing notice of the same upon the petitioner. On 24.7.1996 the petitioner was proceeded ex-parte in the said application and the suit was restored by the learned trial court on the same day. Once again on 14.8.1996, the suit was dismissed in default and yet another application was moved by the respondent on 22.8.96 seeking restoration of the suit. The said suit was again restored by the learned

trial court on 4.12.96 and the matter was adjourned by the learned trial court for ex-parte evidence. On 20.12.96, the evidence was adduced by the respondent and the learned trial court heard final arguments on the same day and thereafter reserved the matter for orders. Vide order dated 8.1.97, an ex-parte decree for specific performance was passed by the learned trial court against the petitioner and in favour of the respondent. After passing of the said judgment and decree an execution application was moved by the respondent and without directing any notice upon the petitioner, the learned trial court directed appointment of Local Commissioner through whom the sale deed was executed and registered in favour of the respondent. When the petitioner learnt about the said ex-parte judgment and decree dated 8.1.97 on 24.12.1999, she filed an application under Order 9 Rule 13 CPC along with an application under Section 5 of the Limitation Act. The said application filed by the petitioner under Section 5 of the Limitation Act was dismissed by the learned trial court vide impugned order dated 4.9.2002 and as a result of the dismissal of the said application, the application moved by the petitioner under Order 9 Rule 13 CPC was also dismissed.

4. Assailing the said order dated 4.9.2002, Mr. D.K. Gupta, counsel for the petitioner contends that the respondent has played fraud not only upon the petitioner but upon the learned trial court as well, as the respondent failed to take steps to serve the petitioner after the dismissal of her case in default on various occasions. Counsel for the petitioner also submits that the learned trial court has adopted a hyper technical approach while dismissing the application filed by her under Section 5 of the Limitation Act instead of doing substantial justice between the parties. Counsel for the petitioner also submits that the petitioner explained sufficient reasons for not filing the condonation application within the prescribed period of limitation, but yet the learned trial court ignored the sufficient reasons given by the petitioner in her said application. Counsel further submits that reasonable opportunity was not granted by the learned trial court to the petitioner to substantiate the averments made by her in the said application by leading evidence and therefore abrupt dismissal of the said application is in gross violation of the principles of natural justice and ultimately the same has resulted into causing serious miscarriage of justice.

5. Opposing the present petition, Mr. Aggarwal counsel for the respondent submits that the petitioner has been most negligent in her

conduct throughout the proceedings i.e. before the learned trial court as well as in filing the present petition. The contention of the counsel for the respondent is that the petitioner failed to disclose any sufficient reason for not filing the application under Section 5 of the Limitation Act within the prescribed period of limitation from the date of her coming to know about the dismissal of the suit. Counsel further submits that not only there was a delay before the learned trial court but before this court as well the petitioner has preferred the present petition after a lapse of about three years period from the date of passing of the said order dated 4.9.2002.

6. Elaborating his arguments further, counsel for the respondent submits that the present petition was preferred by the petitioner after another suit was filed by the respondent claiming decree of possession and mesne profits against the petitioner was decreed by the learned trial court vide judgment and decree dated 15.4.2004, and even after the appeal against the said judgment and decree was preferred by the petitioner vide RFA No.617/2004. Counsel thus submits that even the present petition would not be maintainable on account of inordinate and unexplained delay and laches on the part of the petitioner.

7. I have heard learned counsel for the parties at considerable length and gone through the records.

8. In the application filed by the petitioner under Section 5 of the Limitation Act and also in the application under Order 9 Rule 13 CPC, the petitioner disclosed that she had received the notice dated 15.12.99 on 24.12.99, which was handed over by her to one Mr. R.S. Gulia, Advocate who did not take any steps in the matter and had expired on 21.1.2000. The petitioner thereafter managed to get back the notice and engaged a new counsel on 29.1.2000. In the application it was further stated that the petitioner had got the case file inspected in the first week of May 2000, and thereafter she got filed the said applications on 8.5.2000. Since the petitioner in her both the said applications failed to give any reasons for not filing the application between 29.1.2000 till 8.5.2000, therefore the learned trial court did not find any ground to condone the delay in filing the application by the petitioner under Order 9 Rule 13 CPC. The learned trial court also did not find any merit in the explanation given by the petitioner that since due to the dismissal of the said case on four occasions different goshwara numbers were given, therefore, the

same resulted in not locating the file for a long period of four months. The learned trial court further found that the petitioner did not disclose the fact that for how long the lawyers remained on strike during the said period of delay.

9. Under Article 123 of the Limitation Act, the limitation for filing an application to set aside an ex-parte decree is 30 days and the time begins to run from the date of the judgment and decree or where the summons or notice were not duly served from the date when the applicant has derived knowledge of the decree. In the facts of the present case, the learned trial court passed the ex-parte judgment and decree dated 8.1.1997 while the said application under Order 9 Rule 13 and application under Section 5 of the Limitation Act were filed by the petitioner on 8.5.2000. The petitioner has claimed knowledge of the said ex-parte judgment and decree dated 8.1.1997 on 24.12.99 when she had received the notice from the court in the other case. Prior to this date the petitioner has claimed total ignorance about passing of the said ex-parte judgment and decree against her. From the said date of notice dated 15.12.99, 30 days period came to expire on 14.01.2000. In both the applications the petitioner has failed to advance any explanation as to why the said applications could not be filed by the petitioner within the said period of 30 days from the date of the receipt of the notice. The only explanation given by the petitioner is that she had handed over the notice to Mr. R.S. Gulia, Advocate who had expired on 21.1.2000. Even if the said period is condoned, then also the petitioner should have explained the delay from 29.1.2000 when she had engaged a new advocate. Even from that date again no explanation has come forth from the petitioner to explain the delay. The petitioner has also not disclosed as to when the counsel for the petitioner had taken steps to inspect the file and how the counsel did not succeed in carrying out the inspection of the said four files and how come the counsel for the petitioner could only inspect the files in the first week of May, 2000.

10. To seek condonation of delay under Section 5 of the Limitation Act, the applicant should have explained each day's delay or at least sufficient reasons for not filing the application within the period of 30 days from the date of the knowledge as prescribed under Article 123 of the Limitation Act. Once having not given any sufficient or plausible explanation to explain the delay, can it be still said that the learned Trial

Court should have exercised discretion in favour of the petitioner to condone the delay. The Hon'ble Apex Court in a catena of judgments has taken a view that when substantial justice and technical considerations are pitted against each other then cause of substantial justice deserves to be preferred. The Apex Court in **Special Tehsildar, Land Acquisition, Kerala Vs. K.V. Ayisumma,** (1996) SCC 634, also held that the approach of the Court should be pragmatic and not pedantic. There cannot be any dispute with the above said legal position as it stands that the technicalities cannot be given precedence over the substantial justice and substantive rights of the parties. In every case the endeavour of the court should be to decide the lis between the parties on its merits. The courts are also required to see whether any party to the suit has been adopting dilatory tactics to cause unnecessary and inordinate delay in final disposal of the case due to mala fide and oblique reasons. The ex-parte judgment and decree in the present case was passed by the trial court on 08.01.1997 and the petitioner claimed knowledge of the said judgment and decree only on 24.12.99. It can be hardly believed that the petitioner would not have known the said judgment and decree dated 8.1.97, when the other case filed by the respondent i.e. suit for possession was being hotly contested by the petitioner. Nevertheless, even if the explanation given by the petitioner is accepted as correct, then she should have at least taken prompt steps in filing the said applications to seek setting aside of the ex-parte decree. It is one thing that one is not able to give plausible and sufficient reasons for delay while it is another thing if one does not offer any explanation as to how and for what reasons delay has taken place in filing the application. Here is a case where there is no explanation on the part of the petitioner in not taking timely steps to file the said applications. In the absence of any such explanation given by the petitioner, the court was not expected to assume on its own as what reasons could have prevented the petitioner to file the said applications. Although the petitioner was not seen crossing the bridge so far her feeble case before the learned trial court was concerned, yet another hurdle that came in the way of the petitioner was the failure of the petitioner to explain the reasons for not filing the present petition for a period of about three years. Nowhere in the present petition the petitioner has given any explanation for not challenging the said order dated 4.9.2002, of which certainly the petitioner cannot feign ignorance. The petitioner was fiercely contesting the other case filed by the respondent i.e. suit for possession

and it is only when the decree in the suit for possession was challenged by the petitioner in RFA No.617/2004, the petitioner woke up from her deep slumber to challenge the said order dated 4.9.2002 in the present petition. There is thus evidently gross unexplained delay and laches on the part of the petitioner in filing the present petition.

11. Taking in view the totality of the facts and circumstances of the case, this court is not inclined to exercise jurisdiction in favour of the petitioner who not only failed to act reasonably or to give any explanation for delay in filing the application under Order 9 Rule 13 and Section 5 of the Limitation Act before the learned trial court, but has further failed to challenge the said order expeditiously or at least within a reasonable period of time. The legal maxim Vigilanibus, non dormentibus, jura subvenient which means that equity aids the vigilant and not the indolent is an undisputed axiom that eternal vigilance is the price of liberty and if one sleeps upon his right, his right will slip away from him. The present case is an ideal example where the delay has proved to be catastrophic to the cause of equity and it is expected of people approaching the portals of law to be alert in espousing their cause.

12. In the light of the above, there is no merit in the present petition, hence the same is hereby dismissed.

ILR (2011) III DELHI 510

WP (C)

NAKUL KAPUR ....PETITIONER

VERSUS

NDMC & ORS. ....RESPONDENTS

(RAJIV SAHAI ENDLAW, J.)

W.P.(C) NO. : 4052/2010 DATE OF DECISION: 24.01.2011

New Delhi Municipal Council Act, 1994—Section 63 (1) and (2), 72, 109, 115 (1)—Delhi Rent Control Act, 1958—Section 4, 6 and 9—Petitioner demolished residential construction for reconstruction of a new building on plot of land—Assessing authority held rateable value of land which is not built upon but is capable of being built upon and/or is in process of erection, is to be fixed at 5% of estimated capital value of land—Statutory appeal against order of assessing authority dismissed by ADJ—Order challenged before High Court—Plea taken, principles of parity are applicable irrespective of whether rateable value is determined on basis of standard rent or actual rent—Section 63 (1) makes no distinction between self occupied and let out premises—Provisions of Section 63 (2) apply only to land which has not been built up earlier and would not apply to land which has already been built upon and building where upon is demolished for purpose of re-construction—Per contra plea taken, even before Sec. 4, 6 and 9 of DRC Act were declared invalid, assessment of rateable value of land on which building existed was different from assessment of rateable value of land alone, provisions of DRC Act were not applicable to open plot of land, principle of standard rent was not applicable to vacant land—Vacant land stands in its own class and is not to be governed by principles

of parity—Once statute provided mode of assessment of rateable value of vacant land at 5% of capital value thereof, other modes of assessment are excluded—Held—Literal reading of Section 63 (2) does not limit scope thereof to only virgin land—Expression used, is "the rateable value of any land" Which would also include land which was earlier built upon and building therefrom has been demolished—Only qualification for a land to fall under Section 63 (2) is that same is not built upon but is capable of being built upon—Only provision in statute for determination of rateable value of vacant land is Section 63 (2) and if same were to be held to not apply to land, though vacant but having been built upon earlier, it would create a void which is not desirable—There is no basis or rationale for discriminating between land which has earlier been built upon and building whereon has been demolished and land which has never been built upon—There can be no parity between built up property and vacant land—Municipal statute does not provide for parity—It provides for determination of rateable value as per rent at which property might reasonably be expected to be let—In supervisory jurisdiction, Court can refuse to interfere even where petitioner has made out a case.

Unless Section 63(2) is so read, it would create a situation where there is no provision for determination of rateable value of land earlier built upon and building whereon has been demolished. Though Section 63(1) provides for rateable value of any land "or" building but the same is found to be providing in fact for assessment of rateable value of only that land which has been built upon and not of vacant land. The expression "or" used in Section 63(1), in the context thereof is to be read as "and". Section 63(1) contemplates the land or building which might reasonably be expected to be let. A plot of land in municipal areas can be used either for residential or commercial/industrial or for institutional purposes only since, the Municipal Laws prohibit any

construction on the land without prior permission and also lay restrictions on the use of land and open land cannot reasonably be expected to be let. Also, proviso to Section 63(1) contemplates standard rent of land "or" building being fixed under the DRC Act. The provisions of DRC Act do not apply to vacant land. Thus there can be no eventuality of fixation of standard rent of vacant land. I am therefore of the opinion that Section 63(1) cannot be said to be providing for mechanism for assessment of rateable value of vacant land only and is concerned with rateable value of land with a building/ structure thereon. **(Para 14)**

Important Issue Involved: (A) Though Section 63(1) of NDMC Act, 1994 provides for rateable value of any land "or" building but the same is found to be providing in fact assessment of rateable value of only that land which has been built upon and not of vacant land. The expression "or" used in Section 63 (1), in the context thereof is to be read as "and".

(B) There is no basis or rationale for discriminating between the land which has earlier been build upon and the building whereon has been demolished and the land which has never been built upon.

(C) There can be no parity between built up property and vacant land for the purposes of rateable value.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER	**:**	Mr. Shanti Bhushan, Sr. Advocate with Mr. Sanjai K. Pathak, Advocate.
FOR THE RESPONDENTS	**:**	Ms. Madhu Tewatia with Ms. Sidhi Arora & Ms. Aeshna Singh, Advocates.

CASES REFERRED TO:

1. *Sant Ram Saigal vs. MCD* 105 (2005) DLT 746.
2. *Municipal Corporation of Greater Mumbai* vs. *Kamla Mills Ltd.* (2003) 6 SCC 315.
3. *The State Trading Corporation of India Ltd.* vs. *NDMC* 104 (2003) DLT 808.
4. *State Trade Corporation of India Ltd.* vs. *NDMC* 104 (2003) DLT 808.
5. *India Automobiles Ltd.* vs. *Calcutta Municipal Corporation* (2002) 3 SCC 388.
6. *Raghunandan Saran Ashok Saran (HUF)* vs. *Union of India* 95 (2002) DLT 508 (DB).
7. *Delhi Golf Club Ltd.* vs. *NDMC* (2001) 2 SCC 633.
8. *Lt. Col. P.R. Choudhary (Retd.)* vs. *MCD* (2000) 4 SCC 577.
9. *East India Commercial Co. Pvt. Ltd.* vs. *Corporation of Calcutta* (1998) 4 SCC 368.
10. *Asstt. General Manager, Central Bank of India* vs. *Commissioner, Municipal Corporation of the City of Ahmedabad* (1995) 4 SCC 696.
11. *Srikant Kashinath Jituri* vs. *Corporation of the City of Belgaum* (1994) 6 SCC 572.
12. *Dr. Balbir Singh* vs. *M.C.D.* AIR 1985 SC 339.
13. *Panchshila Co-Operative House Building Society Ltd.* vs. *MCD* 24 (1983) DLT 285.
14. *Dewan Daulat Rai Kapoor* vs. *New Delhi Municipal Committee* AIR 1980 SC 541.
15. *The Municipal Corporation of Greater Bombay* vs. *M/s Polychem Ltd.* (1974) 2 SCC 198.

RESULT: Dismissed.

RAJIV SAHAI ENDLAW, J.

1. The writ petition impugns the order dated 9th July, 2009 of the

Assessing Authority of the respondent NDMC revising the rateable value of Property No.B-36, Malcha Marg, New Delhi from the then existing value of Rs. 77,100/- to Rs. 8,00,000/- with effect from 1st April, 2004 and to Rs. 72,90,000/- with effect from 6th November, 2008 and the order dated 15th May, 2010 of the Additional District Judge dismissing the appeal of the petitioner against the order of the Assessing Authority.

2. Notice of the writ petition was issued and counter affidavit filed by the respondent NDMC. After some hearing on 3rd December, 2010, further particulars/documents were sought from both the parties and were filed. The counsels for the parties have been heard.

3. The factual matrix emerging from the documents filed and the pleading is as under:-

The property comprising of plot of land admeasuring 375 sq. yrds. and two and a half residential construction thereon, was acquired by purchase by the mother of the petitioner vide Sale Deed dated 16th November, 1995 for total sale consideration of Rs. 1,60,00,000/-. The mother of the petitioner applied to the respondent NDMC for demolition of the existing construction in the property and for permission for raising fresh construction and the same was sanctioned by the respondent NDMC vide order dated 22nd September, 2003. According to the petitioner, the demolition of the old structure and re-construction started in the year 2004-2005. The mother of the petitioner applied for sanctioning of revised construction plan and which was allowed on 8th June, 2004. The mother of the petitioner executed a registered Gift Deed dated 6th October, 2008 in favour of the petitioner. In the said Gift Deed, it is mentioned that the mother of the petitioner had "demolished the then existing structure of building on the plot of land underneath the said property and got ˇbuilding plan sanctioned for reconstruction of a new building on the said land". The mother of the petitioner at the time of the Gift Deed was described as the owner of the "plot of land" as distinct from property and it was further stated that in fact in anticipation of the Gift Deed, the possession of the "plot of land" had been handed over to the petitioner on 1st April, 2005. The gift for the purposes of stamp duty was valued at Rs. 1,34,82,500/-. The petitioner on 16th October, 2008 applied for Completion Certificate and which was issued with respect to the new construction on the plot of land on 12th November, 2008. The petitioner on 26th

November, 2008 let out the entire newly constructed property at a rent of Rs. 6,75,000/- per month.

4. It is not in dispute that the respondent NDMC on 24th January, 2005 had served a notice under Section 72 of the New Delhi Municipal Council Act, 1994 for assessment of the plot of land at the rateable value of Rs. 8,00,000/- with effect from 1st April, 2004. It is also not in dispute that another notice was served on 25th March, 2009 proposing the rateable value with effect from 6th November, 2008 at Rs. 72,90,000/-.

5. The petitioner objected to the aforesaid proposal of the respondent NDMC by contending that the increase in rateable value from the then existing of Rs. 77,100/- to Rs. 8,00,000/- with effect from 1st April, 2004 and to Rs. 72,90,000/- with effect from 6th November, 2008 was 100 fold and not permissible and the rateable value of similar properties in the neighbourhood was much less. It was contended that the proposal of the respondent NDMC was thus discriminatory and arbitrary. It was further contended that the house tax was in lieu of municipal services and cannot be disproportionate qua similarly situated properties. Reliance was placed on **Dewan Daulat Rai Kapoor Vs. New Delhi Municipal Committee** AIR 1980 SC 541 and **Dr. Balbir Singh Vs. M.C.D.** AIR 1985 SC 339.

6. The Assessing Authority of the respondent NDMC after hearing the petitioners held that as per Section 63(2) of the NDMC Act, 1994 the rateable value of land which is not built upon but is capable of being built upon and/or which is in the process of erection, is to be fixed at 5% of estimated capital value thereof and as such on the basis of the capital value of Rs. 1,60,00,000/- as disclosed in the Sale Deed of the year 1995 in favour of the mother of the petitioner, determined the rateable value of the land as on 1st April, 2004 at Rs. 8,00,000/-.

7. Aggrieved therefrom the petitioner preferred the statutory appeal under Section 115(1) of the Act. The challenge in the memorandum of appeal was on the ground of parity only. In addition to the judgments aforesaid referred to in reply before the Assessing Authority, reliance was also placed on **Lt. Col. P.R. Choudhary (Retd.) Vs. MCD** (2000) 4 SCC 577. It was also stated that the entire tax demanded on the basis of the order impugned, had been paid. It appears that the Additional

District Judge also summoned the assessment list of the locality and on the basis thereof it was submitted by the petitioner before the Additional District Judge that the rateable values as revised were not at par with the rateable values of the other properties in the locality.

8. The said appeal was dismissed vide order dated 15th May, 2010. It was held that the judgments relied upon by the counsel for the petitioner were in accordance with Sections 4, 6 & 9 of the Delhi Rent Control Act, 1958; that Sections 4, 6 & 9 of the Delhi Rent Control Act had in the judgment of this Court in **Raghunandan Saran Ashok Saran (HUF) Vs. Union of India** 95 (2002) DLT 508 (DB) been held to be ultra vires and void; that this Court in **The State Trading Corporation of India Ltd. Vs. NDMC** 104 (2003) DLT 808 has held that the principles of standard rent shall not be attracted where the premises are actually occupied by the tenant and the rate of rent is above Rs. 3,500/- per month as in the present case; that the principle of parity as laid down in the judgments in **Dr. Balbir Singh** (supra) and **Lt. Col. P.R. Chaudhary** (supra) was laid down while determining the rateable value on the basis of the standard rent in terms of provisions of Delhi Rent Control Act and the Apex Court was not concerned with cases of actual rent beyond the purview of the Delhi Rent Control Act as in the present case; that actual rent is the objective criteria and leaves no scope for any subjectivity and any attempt to reduce the rateable value to below the actual rent will create a lot of confusion and cause of action. It was further held that the unit area method had already been enforced with effect from 1st April, 2009 but the principles thereof could not be applied for period prior thereto.

9. The senior counsel for the petitioner has before this Court also argued:-

(a) that the principles of parity are applicable irrespective of whether the rateable value is determined on the basis of standard rent or actual rent.

(b) Section 63(1) does not make distinction between self occupied and let out properties.

(c) that the provisions of Section 63(2) apply only to land which has not been built up earlier and would not apply to land which

has already been built upon and the building where upon is demolished for the purposes of re-construction. Reliance in this regard is placed on Section 109 of the NDMC Act (to which attention was in fact invited by the counsel for the respondent NDMC) which is as under:-

> **"109. Demolition, etc., of buildings**—If any building is wholly or partly demolished or destroyed or otherwise deprived of value, the Chairperson may, on the application in writing of the owner or occupier, remit or refund such portion of any tax assessed on the rateable value thereof as he thinks fit."

It is contended that land which has already been built upon and building whereupon is demolished for the purposes of re-construction would be covered by Section 109 and the rateable value thereof is to remain as before and to be not fixed in accordance with Section 63(2) of the Act; rather rebate has to be granted with respect thereto; though it is admitted that the petitioner having not applied for rebate would not be entitle thereto but it is contended that the rateable value of such land would remain the same as before i.e. Rs.77,100/-. It is also contended that in such situation there may not be any vacant land at any point of time inasmuch as the work of demolition and re-construction may go on simultaneously.

(d) it is thus contended that the fixation of rateable value with effect from 1st April, 2004 at Rs. 8,00,000/- under Section 63(2) is erroneous.

(e) with respect to the revision of rateable value with effect from 1st December, 2008 to Rs. 72,90,000/- (inasmuch as with effect from 1st April, 2009 unit area method came into force), it is contended that the principles of parity would apply and it is further argued that rather than ordering reassessment by applying the principle of parity, the petitioner is willing to pay for the said period also as per the unit area method even though the tax so computed would be a little higher.

(f) it is contended that house tax cannot be discriminatory and the principle of parity flows from the Constitution of India itself.

(g) reliance is placed on paras 25 to 27 of **Sant Ram Saigal Vs.**

MCD 105 (2005) DLT 746 and to para 31 of the **State Trade Corporation of India Ltd. Vs. NDMC** 104 (2003) DLT 808 where the principles of parity were reiterated even in cases of actual letting.

10. Per contra the counsel for the respondent NDMC has contended:-

(i) that even before Sections 4, 6 & 9 of the Delhi Rent Control Act were declared to be invalid, the assessment of rateable value of land on which building existed was different from assessment of rateable value of land alone; that the provisions of the Delhi Rent Control Act were not applicable to open plot of land; the principle of standard rent was thus not applicable to vacant land;

(ii) vacant land stands in its own class and is thus not to be governed by the principle of parity. Reliance in this regard is placed on **The Municipal Corporation of Greater Bombay Vs. M/s Polychem Ltd.** (1974) 2 SCC 198 (paras 12, 22 & 27).

(iii) it is thus contended that vacant land is to be treated differently and the principle of parity with land which had already been built upon will not arise.

(iv) that once the statute i.e. Section 63(2) had provided the mode of assessment of rateable value of the vacant land as 5% of the capital value thereof, all other modes of assessment are excluded. Reliance is placed on The Commissioner Vs. Griha Yajamanula Samkhya 2003 MCC 403 in para 34 laying down that where the Act provides the formula for determination of tax, the same shall prevail.

(v) attention is invited to **Asstt. General Manager, Central Bank of India Vs. Commissioner, Municipal Corporation of the City of Ahmedabad** (1995) 4 SCC 696, with respect to the provisions of the Bombay Provincial Municipal Corporation Act, 1949 and to **East India Commercial Co. Pvt. Ltd. Vs. Corporation of Calcutta** (1998) 4 SCC 368 in relation to the Calcutta Municipal Act, 1951 but during the course of hearing it was found that the provisions of the said two Acts are materially different from that of the NDMC Act and as such the said judgments do not apply.

(vi) with respect to the argument on Section 109 of the NDMC Act, it is contended that the same applies for remission of tax on the building and not to remission of tax on land.

(vi) the judgment of the Division Bench in **State Trading Corporation of India Ltd.** reported in (2006) 1 AD Delhi 366 is relied upon to contend that after amendment of the Delhi Rent Control Act with effect from 1st December, 1988, the rateable value has to be determined on actual rent basis.

(vii) reliance is placed on **Panchshila Co-Operative House Building Society Ltd. Vs. MCD** 24 (1983) DLT 285 where a Division Bench of this Court laid down that property tax is a tax and not a fee.

(viii) attention is also invited to **Delhi Golf Club Ltd. Vs. NDMC** (2001) 2 SCC 633 where also the Apex Court held that the levy of property tax is not to be viewed as fee to avail municipal services.

11. The senior counsel for the petitioner in rejoinder has contended that for the period 1st April, 2004 to 30th November, 2008, Section 109 is a complete answer. He has also contended that the counsel for the respondent NDMC has not dealt with the judgment of the Apex Court in **Lt. Col. P.R. Chaudhary** where it has been observed that the property tax is in lieu of municipal services and therefore has to be co-related thereto. It is further argued that the Supreme Court sustained the provisions of property tax in the Municipal Act which otherwise would have been struck down as discriminatory, only for the reason of laying down that there has to be parity between property tax of all properties in the same locality. It is further argued that it is incongruous that the principle of parity would apply to built up property and not to land when the municipal services required for land are far less than that to a built up property.

12. The first question which arises for consideration is as to whether Section 63(2) laying down the mechanism for determination of rateable value of any land which is not built upon but is capable of being built upon and of any land on which the building is in the process of erection, applies only to land which has never been built upon and would not apply to land which has earlier been built upon and building whereon has been

demolished.

13. The literal reading of Section 63(2) does not limit the scope thereof to only virgin land. The expression used, is "the rateable value of any land" which would also include land which was earlier built upon and the building whereon has been demolished. The only qualification for a land to fall under Section 63(2) is that the same is not built upon but is capable of being built upon. As far as the said qualification is satisfied, it is immaterial whether it was earlier built upon and building earlier existing thereon has been demolished.

14. Unless Section 63(2) is so read, it would create a situation where there is no provision for determination of rateable value of land earlier built upon and building whereon has been demolished. Though Section 63(1) provides for rateable value of any land "or" building but the same is found to be providing in fact for assessment of rateable value of only that land which has been built upon and not of vacant land. The expression "or" used in Section 63(1), in the context thereof is to be read as "and". Section 63(1) contemplates the land or building which might reasonably be expected to be let. A plot of land in municipal areas can be used either for residential or commercial/industrial or for institutional purposes only since, the Municipal Laws prohibit any construction on the land without prior permission and also lay restrictions on the use of land and open land cannot reasonably be expected to be let. Also, proviso to Section 63(1) contemplates standard rent of land "or" building being fixed under the DRC Act. The provisions of DRC Act do not apply to vacant land. Thus there can be no eventuality of fixation of standard rent of vacant land. I am therefore of the opinion that Section 63(1) cannot be said to be providing for mechanism for assessment of rateable value of vacant land only and is concerned with rateable value of land with a building/ structure thereon.

15. Thus the only provision in the Statute for determination of rateable value of vacant land is Section 63(2) and if the same were to be held to not apply to land, though vacant but having been built upon earlier, it would create a void and which is not desirable.

16. I am also of the opinion that there is no basis or rationale for discriminating between the land which has earlier been built upon and the building whereon has been demolished and the land which has never been

built upon. If the two were to be so discriminated and the rateable value of land which was earlier built upon and building whereon has been demolished, were to be determined under Section 63(1) and the rateable value of the land which has never been built upon, were to be determined under Section 63(2), it will lead to a situation where the rateable value of land which has never been built upon but is capable of being built upon is far more than the rateable value of similarly situated land also capable of being built upon but on which building was earlier raised and demolished.

17. Had the intention of the Legislature been that Section 63(2) applies only to land which had never been built upon but is capable of being built upon, nothing prevented the Legislature from so providing. The Legislature however chose to use the words "which is not built upon" and not the words "which has never been built upon".

18. When Section 63(2) within its ambit has included even that land on which the building is in the process of erection and during which time the rateable value is to be fixed at 5% of the capital value of land, there is no reason to hold that the same would not cover land which was earlier built upon and building whereon has been demolished. This shows that the applicability of Section 63(2) is not confined to virgin land only.

19. As far as Section 109 is concerned, the same deals only with building and not with land. It provides for remission of tax assessed on the rateable value of a building which has been wholly or partly demolished or destroyed or otherwise deprived of value. The same will thus have no application whatsoever in determination of rateable value of land.

20. I find that in **Municipal Corporation of Greater Mumbai Vs. Kamla Mills Ltd.** (2003) 6 SCC 315 also, the issue culled out by the Supreme Court was, when a building constructed upon land previously assessed to municipal tax is demolished for construction of a new building, is it open to the Municipal Corporation to assess the rateable value of the land till construction of the building by taking the market value of the land? The contention of the assessee there also was that the rateable value could not be revised by taking market value and which was accepted by the High Court. The Supreme Court however allowed the appeals of the Municipal Corporation; of course since the Bombay Rent Act applied to vacant land also, it was held that the rateable value be determined as

per standard rent and not market value. However the NDMC Act as aforesaid provides for rateable value of vacant land @ 5% of estimated capital value of land. In my view, the matter is thus no longer res integra.

21. Thus no error can be found with the assessment or rateable value from 1st April, 2004 in accordance with Section 63(2) of the Act. There is no challenge by the petitioner to the assessment of capital value of land at Rs. 1,60,00,000/- on the purchase price of land and building close to 10 years ago in the year 1995.

22. The other argument raised by the senior counsel for the petitioner of there being no vacant land at any time owing to the work of demolition and re-construction going on simultaneously has no basis in the pleadings of the petitioner, neither before the Assessing Authority of the NDMC nor before the Appellate Authority nor before this Court. The petitioner has been challenging the rateable value only on the ground of parity. This argument was raised before this Court for the first time after being required to file additional documents vide order dated 3rd December, 2010. Even otherwise, the fact remains that the plans got sanctioned by the petitioner from the respondent NDMC, were not for addition, alteration but were for demolition and re-construction. The petitioner admits that the sanction for demolition and re-construction was received on 22nd September, 2003. It is thus in the normal course of events that by 1st April, 2004, the work of demolition had been completed and as on 1st April, 2004 there was only a vacant piece of land, may be under construction and covered by Section 63(2) of the Act. In the registered Gift Deed in favour of the petitioner, it is expressly recorded that the mother of the petitioner demolished the then existing structure of building on the said plot of land and thereafter got the building plans sanctioned for re-construction. The gift as on 6th October, 2008 also was of a vacant plot of land only and not of land with any old structure existing thereon. Thus the said contention of the petitioner cannot be accepted.

23. The next question which arises is whether the principle of parity would apply to rateable value of land assessed under Section 63(2) of the Act. I am in this regard, inclined to agree with the contention of the counsel for the respondent MCD that there can be no parity between built up property and vacant land. The judgment in **M/s Polychem Ltd** (supra) is apposite in this regard. Also, the judgment in **Griha Yajamanula**

Samkhya (supra) clearly lays down that where the Act lays down the formula for determining rateable value of vacant land, the same shall prevail. Even in **India Automobiles Ltd. Vs. Calcutta Municipal Corporation** (2002) 3 SCC 388 it was held that wherever the Municipal Law itself provides the mode and manner of determination of annual value irrespective of Rent Control Act, in such cases the determination of rateable value has to be accordingly. Thus the principles of parity would not apply to the rateable value of land and it cannot be said that the rateable value of vacant land has to be the same as the rateable value of other built up properties in the locality.

24. Thus no interference is called for in the determination of rateable value of the period 1st April, 2004 to 30th November, 2008.

25. As far as the determination of rateable value from 1st December, 2008 to 31st March, 2009 on the basis of actual rent is concerned, the question which arises is whether principles of parity would continue to apply even after the provisions of Rent Act and standard rent have ceased to apply to determination of rateable value.

26. The judgment in **Lt. Col. P.R. Chaudhary** though of after the amendment with effect from 1st December, 1988 to the Delhi Rent Control Act, in para 4 thereof expressly records that the Court was concerned with the law as it existed prior to the said amendment. The principle of parity emerged in the context of determination of rateable value in accordance with the principles of standard rent in the Rent Act. Though the Municipal Statutes provided for the determination of rateable value as per the letting value but the Courts held that since in law, notwithstanding the actual letting value being more, the owner was entitled to and the tenant liable to pay only standard rent as determined in the Rent Act, the municipality while determining the letting value was bound by law i.e. the Rent Act and to treat the letting value as only that which was permissible under the Rent Act notwithstanding the actual rent being more, for the reason of the same being contrary to law. The Delhi Rent Control Act, 1958 in Section 9(4) thereof, while providing for the determination of standard rent itself provided for the principle of parity by providing that after determining the standard rent in accordance with the principles enshrined therein, the Rent Controller shall have regard also to the standard rent payable in respect to other similar premises in the

neighbourhood.

27. Having found the genesis of the principle of parity in the determination of standard rent under the Rent Act, I am of the opinion that the same would not apply when the letting value has to be determined de-hors the provisions of the standard rent. The Municipal Statute does not provide for parity. It provides for determination of rateable value as per the rent at which the property might reasonably be expected to be let. There can be no better proof of the same than the actual rent fetched by the property. Moreover, even if the principle of parity were to apply, the parity will have to be with the other similar properties and parity cannot be with the properties constructed long back and without the modern amenities. It is not the case of the petitioner that the rent of Rs. 6,25,000/- per month fetched by the property is not the market rent or that any other similarly situated property is not fetching or would not have fetched the said rent. The reasoning given by the two Judge Bench in **Lt. Col. P.R. Choudhary** for application of parity for the reason of the two properties in the locality enjoying the same services is contrary to the three Judge Bench subsequent judgment in **Delhi Golf Club Ltd** (supra) of the levy of property tax being qua ownership of the property and being not in the nature of a fee.

28. Moreover, the challenge with respect to the same is for four months only and the computation of the tax under challenge for the said period would be small in comparison to the tax for the remaining period and for this reason also, it is not deemed appropriate to interfere with the same. It is significant that the Legislature has made the order of the Appellate Authority final and this Court is only exercising supervisory jurisdiction and it is a settled principle of law that in exercise of the said jurisdiction, this Court is entitled to refuse to interfere even where the petitioner has made out a case. The Supreme Court in **Srikant Kashinath Jituri Vs. Corporation of the City of Belgaum** (1994) 6 SCC 572 has already held that time has come for review of the soundness and continuing relevance of the view taken in earlier decisions of the property being determined on fair rent rather than actual rent.

The writ petition is therefore dismissed, however with no order as to costs.

ILR (2011) III DELHI 525
WP (C)

P.M. LALITHA LEKHA ....PETITIONER

VERSUS

LT. GOVERNOR & ORS. ....RESPONDENTS

(SUDERSHAN KUMAR MISRA, J.)

WP (C) NO. : 5435/2008 DATE OF DECISION: 02.02.2011

Constitution of India, 1950—Article 226—Delhi School Education Act, 1973—Section 10—Petition challenging the order of Deputy Director Education wherein date is fixed as 1st January 1981 for purpose of computing pension of petitioner—Petitioner claims date ought to have been 1st May, 1976—Petitioner was appointed as a TGT (Science) on 1st January, 1976 in DTEA Higher Secondary School, Janakpuri, New Delhi—The school was unrecognized at that time—The school was granted recognition on 1st May, 1976—The "grant-in-aid" was given to school from 1st May 1981—The Director of Education contends that benefit of pension is made available to an employee on the basis of certain contributions towards that benefit, both by the school as well as by the government—Those contributions towards pension by the government only commenced after grant-in-aid—School also started contribution only after grant-in-aid—Director of Education has no liability towards payment of pension for a period for which, no contribution has been received—Held—A bare reading of Section 10 (1) of the Act clearly, states inter alia, that the scale of pension of the employees of, "any recognized private school" shall not be less than those of the employees of corresponding status in schools run by the appropriate authority—Admittedly, in schools run by the Authority, there is no question

of any grant-in-aid being bestowed to them and employees of such schools are entitled to pension, regardless of any considertation of the nature of grant-in-aid to the school—Thus, if grant-in-aid cannot be a consideration for giving the benefit of pension to an employee of a school run by the Authority, and the employees of recognized private schools, such as the petitioner, have been accorded parity with them by the Statute, then the issue of grant-in-aid must also not be allowed to affect the pensionary benefits to be granted to the employees of recognized private schools—As discussed above, the date of grant-in-aid has nothing to do with calculating the pension of petitioner—Till the time no grant-in-aid was given to the school, the liability to pay the pension was of the school only—The Director of Education therefore directed to take into account the petitioner's service from the date on which the school was given recognition, i.e. From 1st May, 1986 and compute the pension accordingly, and to disburse the petitioner's pension every month on that basis henceforth.

A bare reading of Section 10 (1) of the Act clearly states, inter alia, that the scale of pension of the employees of, "any recognized private school" shall not be less than those of the employees of corresponding status in schools run by the appropriate authority. This means that parity has been accorded to the employees of private schools with the employees of corresponding status in schools run by the Authority. Admittedly, in schools run by the Authority, there is no question of any grant-in-aid being bestowed to them and employees of such schools are entitled to pension, regardless of any consideration of the nature of grant-in-aid to the school. Thus, if grant-in-aid cannot be a consideration for giving the benefit of pension to an employee of a school run by the authority, and the employees of recognized private schools, such as the petitioner, have been accorded parity with them by the Statute, then the issue of grant-in-

aid must also not be allowed to affect the pensionary benefits to be granted to the employees of recognized private schools. The petitioner is entitled to the same pension, on the same terms, as employees of corresponding status of the Authority's schools. That is the mandate of Section 10(1) of the Act. **(Para 9)**

As discussed above, the date of grant-in-aid has nothing to do with calculating the pension of the petitioner. Till the time no grant-in-aid was given to the school, the liability to pay the pension was of the school only. The Director of Education has the power to ensure that that this is paid and the petitioner does not suffer. The Director's offer to contribute its share for even the pre-grant in aid period has already been noted by this Court, consequently, the school is now required to contribute only its share in terms of the grant in aid scheme even for the period from the date of recognition of the school to the date grant in aid was given, i.e. from 1.5.1976 to 1.5.1981. **(Para 17)**

The Director of Education is therefore directed to take into account the petitioner's service from the date on which the school was given recognition, i.e. from 1st May, 1986 and compute her pension accordingly, and to disburse the petitioner's pension every month on that basis henceforth. The Director is further directed to disburse all arrears of unpaid pension as determined after the aforesaid computation, within one month from today. The corresponding effect of this on the petitioner's gratuity, and other relevant aspects, as a consequence of the relief granted in this petition shall naturally follow, and all arrears in this behalf shall be paid to the petitioner within two months from today by the concerned respondent. The Director is at liberty to seek any contribution, or to recover any portion of that pension and other dues, if any, which his office will be disbursing in terms of this judgment, from any other party, including the school itself, in the exercise of its powers under the First and the Second proviso to S. 10 (1) of the Act. **(Para 18)**

Important Issue Involved: Grant-in-aid has nothing to do with computation of pension, it is the date of recognition of school, which is material.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Ms. B.P. Singh, Anil Gaur & P.V. Mahavan, Advocates.

FOR THE RESPONDENTS : Ms. Jyoti Singh, Advocate.

RESULT: Petition disposed off.

SUDERSHAN KUMAR MISRA, J.

1. This petition impugns orders, dated 2nd August, 2007, 22nd April, 2008 and 24th April, 2008 of the Deputy Director of Education, District West-B, Vikaspuri, New Delhi. The only controversy in this matter is with regard to the date from which the service of the petitioner is to be taken into account for the purpose of computation of her pension. The respondents have fixed the relevant date as 1st January, 1981, whereas the petitioner claims that the date ought to have been 1st May, 1976 instead.

2. The petitioner was appointed as a TGT (Science) on 1st January, 1976 in DTEA Higher Secondary School, Janakpuri, New Delhi i.e. the fourth respondent. At that point of time the school was an unrecognized one. The school was granted recognition on 1st May, 1976. The Director of Education decided to give "grant-in-aid", to the School from 1st May, 1981. Thereafter in Writ Petition (C) No.2868/1991, the petitioner was held entitled to computation of the prescribed period of 12 years service with effect from the date the school was granted recognition, i.e. 1st May, 1976, for considering her entitlement to the senior scale of pay. The petitioner retired from service on 28th February, 2006. After her retirement, for quantifying the length of service rendered by her for determining her pension; the respondents decided that this must be reckoned from the date on which grant-in-aid was given, i.e. 1.5.1981, and not from the date on which the school was recognized, which was 1.5.1976.

3. Counsel for the petitioner has, inter alia, relied on the aforesaid

judgment passed by this Court on 26th July, 1996, in WP (C) No. 2868/1991 that had been moved by her, praying for directions to the school to pay her salary in terms of the senior scale of TGT from 1st May, 1988. In that petition, the court agreed with the petitioner's contention and held that the period in question must be computed from 1.5.1976 onwards, and the fact that the school was granted, "grant in aid", only from 1.5.1981 onwards, is irrelevant. The stand of the respondents that this period be reckoned only from 1st May, 1981, which happened to be the date the school was brought under the grant-in-aid scheme by the Director of Education, was rejected on the ground that the school was duly recognized w.e.f 1st May, 1976, and the petitioner continued to work with the respondent from that day onwards; therefore, the benefit of the period of 12 years for entitlement to the senior scale of pay would also commence from 1st May, 1976 and not from any later date. L.P.A No. 218/1996 impugning that decision was dismissed, and Special Leave Petition (C) CC No. 1963/1998 moved by the respondents before the Supreme Court of India was also dismissed.

4. While the school has not bothered to appear, counsel for the Director of Education contends that the benefit of pension is made available to an employee on the basis of certain contributions towards that benefit, both by the school as well as by the government. Those contributions towards pension by the government only commenced after the grant-in-aid was agreed to be given to the school and the school also started contributing its portion towards the pension of the petitioner thereafter. The responsibility for releasing monthly pension rests with the Director of Education and consequently, it would be unfair to expect it to meet the liability towards payment of pension for a period for which no contribution has been received from the respondent school on behalf of the petitioner. The counsel for the petitioner, however, states that the Director of Education would have no objection to include the period from 1st May, 1976 to 1st May, 1981, for the purpose of computing her pension provided the school were to contribute its share towards that period.

5. Admittedly, Section 10 of the Delhi School Education Act, 1973, (hereinafter referred as the Act), which was also examined in WP(C) 2868/1991 for the purpose of the petitioner's claim to the grant of senior scale of pay, as aforesaid, is again the relevant section since it also

envisages the grant of pension. That Section, inter alia, states that the scale of pension payable to the employees of any recognized private school shall not be less than that of employees of corresponding status in schools run by the appropriate authority. Section 10 of the Act reads as under:

> Section 10 – Salaries of employees
>
> (1) The scales of pay and allowances, medical facilities, pension, gratuity, provident fund and other prescribed benefits of the employees of a recognized private school shall not be less than those of the employees of the corresponding status in school run by the appropriate authority:
>
> Provided that where the scales of pay and allowances, medical facilities, pension, gratuity, provident fund and other prescribed benefits of the employees of any recognized private school are less than those of the employees of the corresponding status in the schools run by the appropriate authority, the appropriate authority shall direct, in writing, the managing committee of such bring the same up to the level of those of the employees of the corresponding status in schools run by the appropriate authority:
>
> Provided further that the failure to comply with such direction deemed to be non-compliance with the conditions for continuing recognition of an existing school and the provisions of section 4 shall apply accordingly.
>
> (2) The managing committee of every aided school shall deposit month, every month, its share towards pay and allowances, medical facilities, pension, gratuity, provident fund and other prescribed benefits with the Administrator and the Administrator shall disburse, or cause to be disbursed, within the first week of every month, the salaries and allowances to the employees of the aided schools.

6. Counsel for the respondent further contends that the difficulty arises from sub-section (2) of Section 10 of the Act as it requires the managing committee of every aided school to deposit its share towards pay and allowance, medical facilities, pension and other benefits every

Ahmad, J.)

month with the Administrator, who is then to disburse it. A reading of this sub-section shows that the word 'aided' has been used for the first time in this section. Counsel submits that this means no obligation can be imposed on the school to deposit moneys with the Administrator for a period before it acquired the status of an, "aided" school.

7. The impugned order of the Dy. Director of Education, dated 22nd April, 2008 stating that the period of service in respect of the petitioner for the period from 1st May, 1976 to 1st May, 1981 cannot be treated as qualifying service for pension does not appear to have any rational basis and, to my mind, cannot be sustained in law. I do not find any link between service rendered by an employee for computing his pension and the decision of the appropriate authority to give grant-in-aid to that school. The grant-in-aid in this matter, is merely a grant given to an educational institution as aid to help defray its expenses, and thus, it cannot be that the grant-in-aid, that is either given or refused, can restrict or enlarge the actual service rendered by an employee, especially in the absence of any special provision linking the period of service to be reckoned for the purpose of pension explicitly to the date on which the grant-in-aid was sanctioned. It cannot be that simply because the respondent school was not receiving grant-in-aid before 1st May, 1981, therefore, the petitioner was also not rendering any service before that date to the respondent school. The fact that the petitioner's service was continued after grant of recognition on 1st May, 1976, without any objection from the Director of Education, only shows that the petitioner was properly appointed and possessed all the necessary qualifications required for that post.

8. If the respondent's contention were to be accepted, it would lead to further complications. For instance, since admittedly, the grant-in-aid is always given by the authority on certain terms, it is quite possible that the grant-in-aid may be stopped at a later date, either forever or for a specific period, for non-compliance with such terms. In other words, if in the first ten years of service, the school was receiving grant-in-aid, that ten year period will be reckoned towards the computation of the petitioner's pension, and if for the next five years, grant-in-aid was stopped, then that period of five years will be removed from her tenure of service for computation, and thereafter, if grant-in-aid is again resumed, the later period will be again reckoned. There is no rationale nexus

between the length of service rendered by an employee to a school and the, "grant in aid", given by the authority to that school. Prima facie, no such nexus has also been demonstrated.

9. A bare reading of Section 10 (1) of the Act clearly states, inter alia, that the scale of pension of the employees of, "any recognized private school" shall not be less than those of the employees of corresponding status in schools run by the appropriate authority. This means that parity has been accorded to the employees of private schools with the employees of corresponding status in schools run by the Authority. Admittedly, in schools run by the Authority, there is no question of any grant-in-aid being bestowed to them and employees of such schools are entitled to pension, regardless of any consideration of the nature of grant-in-aid to the school. Thus, if grant-in-aid cannot be a consideration for giving the benefit of pension to an employee of a school run by the authority, and the employees of recognized private schools, such as the petitioner, have been accorded parity with them by the Statute, then the issue of grant-in-aid must also not be allowed to affect the pensionary benefits to be granted to the employees of recognized private schools. The petitioner is entitled to the same pension, on the same terms, as employees of corresponding status of the Authority's schools. That is the mandate of Section 10(1) of the Act.

10. Also, the right to senior scale and pension both emanate from the same Section 10 of the Act, and to my mind, it would be inequitable for this Court to hold that on one hand the petitioner had indeed rendered proper service right from 1st May, 1976 onwards, thus entitling her to the senior scale after completing 12 years, but part of the same period, i.e. from 1st May, 1976 to 1st May, 1981, is not be considered as, "service", for calculating the petitioner's pension.

11. The first proviso to Section 10 of the Delhi School Education Act, 1973 clearly obliges the Director of Education to direct the management of all recognized private schools to rectify any deficiency and to bring all benefits, including, inter alia, pensionary benefits up to the same level as those of employees of corresponding status of the schools run by the Director of Education. The second proviso further provides that in case the management of the school fails to comply with such directions, recognition of the school can be withdrawn under the powers given in S.4 of the Delhi School Education ˇAct, 1973. This

serves a salutary purpose and further empowers the Director of Education to issue appropriate directions aimed at fulfilling the object of Section 10 (1) of the Act.

12. The school has been given certain privileges, including recognition, on condition, inter alia, that it complies with Section 10 (1). Due to the non-compliance of the conditions by the respondent school the petitioner cannot be made to suffer. If the respondent school does not come forward to honor its employees. entitlement in this behalf, then, steps need to be taken by the appropriate authority to ensure compliance.

13. The payment of pension for the period before the grant-in-aid came into the picture has to be rendered by the school, but post such grant, the liability shifts to the respondent. This is because the mandate of Section 10 (1) is unambiguous. Regardless of whether it receives grant-in-aid or not. So long as it is a recognized private school, pension and other benefits of its employees must be the same as those admissible to employees of the Authority's schools. Under the first proviso, it is the respondent's duty to ensure that such payment is made. Under the Second proviso the respondent can take action if those directions are not followed. The respondents in no circumstance can be absolved from their duty.

14. Counsel for the respondent then refers to Rule 14 of the CCS (Pension) Rules, 1972, which, according to her, defines qualifying service for computing pension and is applicable to the petitioner as well. It reads as under:

> 14. Conditions subject to which service qualifies:
>
> (1) The service of a government servant shall not qualify unless his duties and pay are regulated by the Government, or under conditions determined by the Government.
>
> (2) For the purposes of sub-rule (1), the expression "Service" means service under the Government and paid by that Government from the Consolidated Fund of India or a Local Fund administered by that Government but does not include service in non-pensionable establishment unless such service is treated as qualifying service by that Government.
>
> (3) In the case of a Government servant belonging to a State Government, who is permanently transferred to a service or post

> to which these rules apply, the continuous service is rendered under the State Government in an officiating or temporary capacity, if any, followed without interruption by substantive appointment, or the continuous service rendered under that Government in an officiating or temporary capacity, as the case may be, shall qualify:
>
> Provided that nothing contained in this sub-rule shall apply to any such Government servant who is appointed otherwise than by deputation to a service or post to which these rules apply.

She contends that the service of a Government servant shall not qualify for pension unless his duties and pay are regulated by the government or under conditions determined by the Government as mentioned in sub-clause 1. Therefore, for service to be treated as, "qualifying service", for the computation of pension, it is necessary for the government to come into the picture, which it did, only after sanction of 'grant-in-aid' on 1st May, 1981. Whether this rule, which applies to government servants would apply to employees of aided private schools as well as is not free from doubt. It may be that the terms under which the "grant-in-aid" was granted to the school, have made this rule applicable for determining qualifying service. Even then, this can only regulate the obligation accepted by the Department from the date, "grant-in-aid" was sanctioned. It cannot extinguish, or even whittle down, either the right of the employees, or the obligation of the concerned school, specified under Section 10(1) of the Act for the period before sanction of 'grant-in-aid'.

15. In this context, it must be kept in mind that the Delhi School Education Act contemplates unaided private schools also. Even such schools are granted recognition. The mandate of Section 10(1) applies with full rigour to them also. There also, the duty to pay pension to its retiring employees at par with those similarly placed in the Authority's Schools remains sacrosanct, and the entire service of the retiring employee has to be reckoned for computing pension. If the School in this case had not sought, and been granted, 'grant-in-aid', the petitioner's service would have been counted right from the date of recognition i.e. 1st May, 1976. To think that merely because the school was given grant-in-aid sometime later, would go to reduce the reckonable service of its employees for

computing pension is, under the circumstances, illogical. Not only that, when the scale of pension is mandated by Section 10(1) of the Act to be the same as that of employees of the Authority's Schools, Rule 14 of the CCS Pension Rules cited by the respondent cannot be allowed to limit or reduce that parity granted by the Statute. To permit that would lead to an obvious disparity and operate to the detriment of employees, such as the petitioner, who were properly employed on, or soon after the grant of recognition but before sanction of, "grant-in-aid.".

16. The nature and extent of the obligations of the individual respondents to each other in this matter may be different. But so far as the petitioner is concerned, her right to be treated at par with employees of the Authority granted by Section 10(1) of the Act is untrammeled and admits to no exception. She is entitled to have her service reckoned from the date of recognition of the School which is 1st May, 1976. The obligation of the Director to pay the petitioner in terms of the 'grant-in-aid' formula, where both the School and the Director of Education contribute proportionately, applies after 1st May, 1981. Obviously, if any further amount is payable to the petitioner for her service from 1st May, 1976 to 1st May, 1981, that is the responsibility of the School, who was the petitioner's primary employer. Here, counsel for the Director has stated that her clients are willing to pay their share of her pension for the period from 1st May, 1976 to 1st May, 1981 also provided the School also contribute its share. This is a generous and eminently fair offer, and under the circumstances, both the respondents are directed to make good the arrears in pension and other dues accordingly.

17. As discussed above, the date of grant-in-aid has nothing to do with calculating the pension of the petitioner. Till the time no grant-in-aid was given to the school, the liability to pay the pension was of the school only. The Director of Education has the power to ensure that that this is paid and the petitioner does not suffer. The Director's offer to contribute its share for even the pre-grant in aid period has already been noted by this Court, consequently, the school is now required to contribute only its share in terms of the grant in aid scheme even for the period from the date of recognition of the school to the date grant in aid was given, i.e. from 1.5.1976 to 1.5.1981.

18. The Director of Education is therefore directed to take into account the petitioner's service from the date on which the school was

given recognition, i.e. from 1st May, 1986 and compute her pension accordingly, and to disburse the petitioner's pension every month on that basis henceforth. The Director is further directed to disburse all arrears of unpaid pension as determined after the aforesaid computation, within one month from today. The corresponding effect of this on the petitioner's gratuity, and other relevant aspects, as a consequence of the relief granted in this petition shall naturally follow, and all arrears in this behalf shall be paid to the petitioner within two months from today by the concerned respondent. The Director is at liberty to seek any contribution, or to recover any portion of that pension and other dues, if any, which his office will be disbursing in terms of this judgment, from any other party, including the school itself, in the exercise of its powers under the First and the Second proviso to S. 10 (1) of the Act.

19. The petition is disposed off accordingly.

ILR (2011) III DELHI 536
W.P. (C)

INDIAN INSTITUTE OF TECHNOLOGY, DELHI ....PETITIONER

VERSUS

NAVIN TALWAR ....RESPONDENT

(S. MURALIDHAR, J.)

W.P. (C) NO. : 747/2011 & CM APPL. NO. : 1568/2011
WP (C) NO. : 751/2011 & CM APPL. NO. : 1598/2011

DATE OF DECISION: 07.02.2011

Constitution of Indian, 1950—Writ Petition—Article 226—Right to Information Act, 2005—Respondent applied under RTI Act for copy of optical response sheet (ORS) of Joint Entrance Examination, 2010 (JEE 2010) and Graduate Aptitude Test 2010 (GAT 2010)—Denied—

Challenged before Centre Information Commissioner (CIC)—CIC directed petitioner to supply the copies—Filed Writ Petition against the order of CIC—Contended fiduciary relationship between the petitioner and evaluator—Under Section 8 (1) (e) of RTI Act—The photocopy of ORS not to be disclosed—If the request for providing photocopies acceded to it Would open flood gate of such applications by other candidates—System would collapse—Further contended—Evaluation final and no request for evaluation can be entertained—Court observed: Admittedly evaluation carried out through computerised system not manually—The fiduciary relationship between IIT and Evaluator does not arise—No prejudice caused to IIT by providing a candidate a photocopy—Information not sought by third party—The apprehension of flood gate exaggerated—No difficulty if the IIT confident that system of evaluation foolproof—It is unlikely each and every candidate would want photocopy of ORS—Held—Present case was not about request of re-evaluation—The right of a candidate sitting for JEE or GATE to obtain information under RTI Act statutory—It cannot be waived by a candidate on the basis of a clause in the Information Brochure—The condition in the brochure that no photocopy of ORS shall be provided subject to RTI Act cannot override RTI Act. Writ Petition dismissed.

In the first place given the fact that admittedly the evaluation of the ORS is carried out through a computerized process and not manually, the question of there being a fiduciary relationship between the IIT and the evaluators does not arise. Secondly, a perusal of the decision of the CIC in **Rakesh Kumar Singh v. Harish Chander** shows that a distinction was drawn by the CIC between the OMR sheets and conventional answer sheets. The evaluation of the ORS is done by a computerized process. The non-ORS answer sheets are evaluated by physical marking. It was observed

in para 41 that where OMR (or ORS) sheets are used, as in the present cases, the disclosure of evaluated answer sheets was "unlikely to render the system unworkable and as such the evaluated answer sheets in such cases will be disclosed and made available under the Right to Information Act unless the providing of such answer sheets would involve an infringement of copyright as provided for under Section 9 of the Right to Information Act. **(Para 11)**

The right of a candidate, sitting for JEE or GATE, to obtain information under the RTI Act is a statutory one. It cannot be said to have been waived by such candidate only because of a clause in the information brochure for the JEE or GATE. In other words, a candidate does not lose his or her right under the RTI Act only because he or she has agreed to sit for JEE or GATE. The condition in the brochure that no photocopy of the ORS sheet will be provided, is subject to the RTI Act. It cannot override the RTI Act. **(Para 15)**

Important Issue Involved: (i) A condition mentioned in brochure for a candidate cannot amount to waiver to his statutory right, (ii) merely because the acceptance of right would open the flood gate of applications cannot be a ground for denial of the right.

[Gu Si]

APPEARANCES:

FOR THE PETITIONER : Mr. Arjun Mitra, Advocate.

FOR THE RESPONDENT : None.

O R D E R

07.02.2011

1. The Petitioner Indian Institute of Technology ('IIT'), Delhi is aggrieved by orders dated 23rd November 2010 and 23rd December 2010 passed by the Central Information Commission ('CIC') in the

complaints of Mr. Navin Talwar [the Respondent in Writ Petition (Civil) No. 747 of 2011) and Mr. Sushil Kohli [the Respondent in Writ Petition (Civil) No. 751 of 2011), respectively.

2. The issue involved in both these petitions is more or less similar. Mr. Navin Talwar sat for the Joint Entrance Examination 2010 ('JEE 2010'). Mr. Sushil Kohli's daughter, Ms. Sakshi Kohli, sat for the Graduate Aptitude Test in Engineering 2010 ('GATE 2010'). The scheme of the examination is that the candidates are given two question papers, containing multiple choices for the correct answers, the correct answers are to be darkened by a pencil in the Optical Response Sheet ('ORS') which is supplied to the candidates. The candidate has to darken the bubbles corresponding to the correct answer in an ORS against the relevant question number.

3. The JEE 2010 was conducted on 11th April 2010 in 1026 centres across India and 4.72 lakh candidates appeared. The answer key was placed on the internet website of the IIT on 3rd June 2010 while the individual marks of the candidates were posted on 5th June 2010. Counseling of the successful candidates took place from 9th to 12th June 2010. The GATE 2010 was conducted on 14th February 2010 and the results were announced on 15th March 2010.

4. In the information brochure, for the JEE, one of the terms and conditions reads as under:

> **"X. Results of JEE-2010**
>
> **1. Performance in JEE-2010**
>
> The answer paper of JEE-2010 is a machine-gradable Optical Response Sheet (ORS). These sheets are scrutinized and graded with extreme care after the examination. There is no provision for re-grading and re-totalling. No photocopies of the machine-gradable sheets will be made available. No correspondence in this regard will be entertained.
>
> Candidates will get to know their All India Ranks ('AIR')/ Category ranks through our website/SMS/VRS on May 26, 2010.
>
> Candidates can view their performance in JEE-2010 from

> JEE websites from June 3, 2010."

A similar clause is contained in Clause 3.5.1 (d) of the brochure for GATE.

5. It is stated that despite the above condition, Mr. Navin Talwar [the Respondent in W.P. (Civil) No. 747 of 2011] and Mr. Sushil Kohli (father) [the Respondent in W.P. (Civil) No. 751 of 2011] filed applications under the Right to Information Act, 2005 ('RTI Act') with the Public Information Officer ('PIO'), IIT seeking the photocopies of the respective ORSs and for the subject-wise marks of each of the candidates.

6. The PIO of IIT responded by stating that the marks obtained by the candidates were available on the internet and there was no provision for providing a photocopy of the ORS. Thereafter, the Respondents filed appeals before the CIC. After perusing the response of the PIO, IIT, the CIC passed the following order in the appeal filed by Mr. Navin Talwar:

> "3. Upon perusal of the documents of the case, the Commission finds that the response of the Public Authority is not found acceptable by the Complainant. Hence, despite the information provided by the letter dated 15th June 2010, the Complainant approached this Commission. The Commission suggests the Complainant to seek inspection of the relevant records and directs Indian Institute of Technology, Delhi to cooperate with the Complainant in the inspection of the file/s. It is also directed that the Respondent shall submit a duly notarised affidavit on a Non-judicial stamp paper stating the inability to furnish the copy of ORS. The Complainant is at liberty to approach the appropriate Grievance Redressal Forum or seek legal remedy."

7. As regards the case of Mr. Sushil Kohli the Commission found that the defence of the IIT was that "the information sought is exempted under Section 8 (1) (e) since GATE Committee shares fiduciary relationship with its evaluators and maintains confidentiality of both the manner and method of evaluation." It was further contended before the CIC that "the evaluation of the ORS is carried out by a computerized process using scanning machines." The decision rendered on 23rd December 2010 in the appeal filed by Mr. Sushil Kohli reads as under:

> "2. During the hearing, the Respondent stated that they have to

inform the NCB, MHRD before handing over the marks to the Appellant and that the process would take more than a month. The Commission in consultation with the Appellant agreed to give additional time to the PIO for providing the information and accordingly directs the PIO to provide the marks sheet to the Appellant within 45 days from the date of hearing to the Appellant."

8. This Court has heard the submissions of Mr. Arjun Mitra, learned counsel appearing for the Petitioner IIT. It is first submitted that as regards Mr. Navin Talwar's case, severe prejudice has been caused to the Petitioner because the decision of the CIC has been rendered without affording the IIT an opportunity of being heard.

9. This Court is not impressed with the above submission. The defence the Petitioner may have had, if a notice had been issued to it by the CIC, has been considered by this Court in the present proceedings. This Court finds, for the reasons explained hereinafter, that there is no legal justification for the Petitioner's refusal to provide each of the Respondents a photocopy of the concerned ORS.

10. It is next submitted that under Section 8 (1) (e) of the RTI Act, there is a fiduciary relationship that the Petitioner shares with the evaluators and therefore a photocopy of the ORS cannot be disclosed. Reliance is placed on the decision by the Full Bench of the CIC rendered on 23rd April 2007 in **Rakesh Kumar Singh v. Harish Chander**.

11. In the first place given the fact that admittedly the evaluation of the ORS is carried out through a computerized process and not manually, the question of there being a fiduciary relationship between the IIT and the evaluators does not arise. Secondly, a perusal of the decision of the CIC in **Rakesh Kumar Singh v. Harish Chander** shows that a distinction was drawn by the CIC between the OMR sheets and conventional answer sheets. The evaluation of the ORS is done by a computerized process. The non-ORS answer sheets are evaluated by physical marking. It was observed in para 41 that where OMR (or ORS) sheets are used, as in the present cases, the disclosure of evaluated answer sheets was "unlikely to render the system unworkable and as such the evaluated answer sheets in such cases will be disclosed and made available under the Right to Information Act unless the providing of such answer sheets would involve an infringement of copyright as

provided for under Section 9 of the Right to Information Act."

12. Irrespective of the decision dated 23rd April 2007 of the CIC in **Rakesh Kumar Singh v. Harish Chander,** which in any event is not binding on this Court, it is obvious that the evaluation of the ORS/ORM sheets is through a computerized process and no prejudice can be caused to the IIT by providing a candidate a photocopy of the concerned ORS. This is not information being sought by a third party but by the candidate himself or herself. The disclosure of such photocopy of the ORS will not compromise the identity of the evaluator, since the evaluation is done through a computerized process. There is no question of defence under Section 8 (1) (e) of the RTI Act being invoked by the IIT to deny copy of such OMR sheets/ORS to the candidate.

13. It is then urged by Mr. Mitra that if the impugned orders of the CIC are sustained it would open a "floodgate" of such applications by other candidates as a result of which the entire JEE and GATE system would "collapse". The above apprehension is exaggerated. If IIT is confident that both the JEE and GATE are fool proof, it should have no difficulty providing a candidate a copy of his or her ORS. It enhances transparency. It appears unlikely that the each and every candidate would want photocopies of the ORS.

14. It is then submitted that evaluation done of the ORS by the Petitioner is final and no request can be entertained for re-evaluation of marks. Reliance is placed on the order dated 2nd July 2010 passed by the learned Single Judge of this Court in Writ Petition (Civil) No. 3807 of 2010 [**Adha Srujana v. Union of India**]. This Court finds that the question as far as the present case is concerned is not about the request of the Respondents for re-evaluation or re-totalling of the marks obtained by them in the JEE 2010 or GATE 2010. Notwithstanding the disclosure of the ORS to the Respondent, IIT would be within its rights to decline a request from either of them for re-evaluation or re-totalling in terms of the conditions already set out in the information brochure. The decision dated 2nd July 2010 by this Court in W.P. (C) No. 3807 of 2010 has no application to the present case.

15. The right of a candidate, sitting for JEE or GATE, to obtain information under the RTI Act is a statutory one. It cannot be said to have been waived by such candidate only because of a clause in the

information brochure for the JEE or GATE. In other words, a candidate does not lose his or her right under the RTI Act only because he or she has agreed to sit for JEE or GATE. The condition in the brochure that no photocopy of the ORS sheet will be provided, is subject to the RTI Act. It cannot override the RTI Act.

16. For the above reasons, this Court finds no reason to interfere with the impugned orders dated 23rd November 2010 and 23rd December 2010 passed by the CIC.

17. The writ petitions and the pending applications are dismissed.

ILR (2011) III DELHI 543
MAC. APP.

NEW INDIA ASSURANCE CO. LTD. ....APPELLANT

VERSUS

SUSHILA & ORS. ....RESPONDENTS

(REVA KHETRAPAL, J.)

MAC. APP. NO. : 6/2011 AND CM NO. : 95/2011 (STAY) DATE OF DECISION: 10.02.2011

Motor Vehicle Act, 1988—Section 166—On 30.12.2006, Banwari Lal was hit by a truck from behind while going on motorcycle—He died in the accident—Claim petition preferred by the widow of deceased, four children and father—Tribunal awarded a sum of Rs. 26,56,000/- with 9% p.a., from the date of filing of the petition—Appeal filed against award—Further increase of 30% towards future prospects was not in accordance with Sarla Verma's case—Held—The Supreme Court while dealing with the aspect of future prospects in Sarla Verma's case (supra) has drawn no distinction between

a private job, corporate job or Government job, though a distinction was made for obvious reasons between a temporary job and permanent employment—All that the Supreme Court emphasized in the aforesaid case was that while assessing the future prospects of the deceased, the permanency or otherwise of his job be taken into account and the future prospects of the deceased be adjudged accordingly—No hard and fast rule was laid down as is clear from the fact that the Court held that in special circumstances of the case a different approach may be warranted—The deceased was not self-employed but had a permanent job in a private limited company where every employee was getting yearly increments—There is also evidence on record that at the time of his superannuation, the salary of the deceased would have most certainly doubled—In view of the aforesaid facts, the learned Tribunal cannot be faulted for adding 30% of the salary which the deceased was drawing at the time of his death to his last drawn salary towards "future prospects" for the purpose of calculation of "loss of dependency".

It is clear from the decision in the case of **Sarla Verma** (supra) that a distinction was made between the case of a self-employed person and that of a person with a permanent job. The Supreme Court in its subsequent decision rendered in the case of **Shakti Devi** (supra) clarified that where the deceased is self-employed but has a reasonable expectation of a permanent job, this must be considered to be a special circumstance. In the said case, the deceased was running a general store from his house and earning about Rs. 1,000/- per month from the business, but since he had a reasonable expectation of Government employment in the near future according to a Government Policy, it was held that the actual income of the deceased at the time of his death was required to be revised by taking into consideration the aforesaid special circumstance, and the monthly income of the deceased was thus fixed at Rs. 2,000/- per month. The

present case, in my opinion, stands on a better footing. The deceased is not self-employed but had a permanent job in a private limited company where every employee was getting yearly increments. There is also evidence on record that at the time of his superannuation, the salary of the deceased would have most certainly doubled. In view of the aforesaid facts, in my view, the learned Tribunal cannot be faulted for adding 30% of the salary which the deceased was drawing at the time of his death to his last drawn salary towards "future prospects" for the purpose of calculation of "loss of dependency". **(Para 11)**

It also deserves to be highlighted that the Supreme Court while dealing with the aspect of future prospects in **Sarla Verma's** case (supra) has drawn no distinction between a private job, corporate job or Government job, though a distinction was made for obvious reasons between a temporary job and permanent employment. All that the Supreme Court emphasized in the aforesaid case was that while assessing the future prospects of the deceased, the permanency or otherwise of his job be taken into account and the future prospects of the deceased be adjudged accordingly. No hard and fast rule was laid down as is clear from the fact that the Court held that in special circumstances of the case a different approach may be warranted.**(Para 12)**

Important Issue Involved: Future prospects to be taken into consideration in case of permanent job irrespective of whether it is a private job, corporate job or Government job.

[Vi Ba]

APPEARANCES:

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

FOR THE RESPONDENTS : Mr. Bhupesh Narula and Mr. Yogesh Narula, Advocates for the respondents No. 1 to 6.

CASES REFERRED TO:

1. *Shakti Devi* vs. *New India Insurance Co. Ltd. & Anr.*, 2011 ACJ 15.
2. *Smt. Sarla Verma & Ors.* vs. *Delhi Transport Corporation & Anr.*, (2009) 6 SCC 121.
3. *Kailash Kaur & Anr.* vs. *New India Assurance Company*, MAC. APP. No.318/2008.
4. *Sushila and Ors.* vs. *Uttam Kumar & Ors.* M.A.C. Pet. No.164/2008.
5. *Abati Bezbaruah* vs. *Dy. Director General, Geological Survey of India* [2003] 1 SCR 1229.
6. *Sarla Dixit* vs. *Balwant Yadav* (1993) II LLJ 664 SC.

RESULT: Appeal is disposed off.

REVA KHETRAPAL, J.

1. This appeal filed by the appellant – Insurance Company seeks to assail the judgment dated 28th August, 2010 passed by the learned Motor Accident Claims Tribunal, Dwarka, New Delhi, in M.A.C. Pet. No.164/2008 titled as **"Sushila and Ors. vs. Uttam Kumar & Ors."**, whereby and whereunder an award in the sum of Rs. 26,56,000/- with interest @ 9 % per annum from the date of the filing of the petition till the date of its realization was passed against the appellant and in favour of the respondents No. 1 to 6.

2. In a nutshell, the facts leading to the filing of the present appeal are that on 30.12.2006, one Banwari Lal (hereinafter referred to as "the deceased") was hit by a truck No.RJ-06-GA-1820 from behind while he was going on motorcycle near the Petrol Pump, Nangli Dairy, Delhi. As a result of the accident, the deceased received fatal injuries. A claim petition was filed by the widow of the deceased, their four children and the father of the deceased, being respondents No.1 to 6 herein.

3. For the purpose of computation of the loss of dependency of the respondents No.1 to 6, the income of the deceased was assessed by the Tribunal on the basis of the salary certificate placed on record before it

by the respondent No.1/wife of the deceased, where his annual income is shown as Rs. 1,82,708/-. The Tribunal noted that after deduction of tax, i.e., Rs. 1,370/-, his net income came to Rs. 1,81,338/- per annum. The Tribunal made further increase of 30% towards future prospects as the deceased was a permanent employee of M/s Veenu Bhai Enterprises Private Ltd, in accordance with the law laid down by the Supreme Court in the case of **Smt. Sarla Verma & Ors. vs. Delhi Transport Corporation & Anr.,** (2009) 6 SCC 121. From this figure, 1/4th was deducted towards personal expenses as there are six dependants, and thereafter the multiplier of '14' was applied in order to ascertain the total loss of dependency of the claimants which came to Rs. 24,75,270/-, rounded off to Rs.24,76,000/-. The Tribunal relying upon the judgment of this court in **Kailash Kaur & Anr. vs. New India Assurance Company,** MAC. APP. No.318/2008 decided on 24.3.2009 awarded Rs. 25,000/- to each of the claimants towards loss of love and affection, i.e., in all Rs. 1,50,000/- (i.e., Rs. 25,000/- x 6), and further awarded a sum of Rs. 10,000/- each under the heads of loss of consortium, funeral expenses and loss of estate. In all a sum of Rs. 26,56,000/- was awarded as total compensation along with interest at the rate of 9 % per annum.

4. Mr. Nandwani, the learned counsel for the appellant challenged the award on three counts:

(i) The further increase of 30% on account of future prospects was not justified as per **Sarla Verma's** case (supra),

(ii) The amount of compensation awarded towards "loss of love and affection", i.e., Rs. 1,50,000/- was on the higher side, and

(iii) The rate of interest awarded should have been 7.5 % per annum instead of 9% per annum.

5. Regarding the first count, it is evident from the record that the deceased was a matriculate and aged 41 years at the time of the accident. He was working as a Supervisor with M/s Veenu Bhai Enterprises Private Ltd, his appointment letter and salary records are Ex.PW2/A to Ex.PW2/F. It is on record that he was initially appointed on a salary of Rs. 12,000/- per month, which, in due course of time, was increased to Rs. 15,000/- per month. As regards the TDS, which used to be deducted on his salary, Form No.16 had been issued from the Company for the

Assessment Year 2006-07, which was proved on record as Ex.PW1/3. The Manager (Administration), namely, Mr. Madan Mohan of the above said company was summoned as witness, who appeared as PW2 and deposed as under:

> "Deceased Banwari Lal was working with our company as Supervisor. Copy of his appointment letter is Ex.PW.2/A. His joining report is Ex.PW.2/B and his application for employment is Ex.PW.2/C. As per the pay drawn by Banwari Lal for April, 2005, a certificate dated 06.05.2005 was issued, which is Ex.PW.2/D. The last pay drawn by Banwari Lal is Ex.PW.2/E. His salary slip is Ex.PW.2/F as mentioned in the register of payment of wages. TDS used to be deducted on the salary paid to Banwari Lal and we had been issuing Form-16 on regular basis to Banwari Lal. Copy of Form-16 issued by our company to Banwari is already Ex.PW.1/3. Shri Banwari Lal was initially appointed at a salary of Rs. 12,000/- per month. He used to get yearly increment according to the performance ranging from Rs.1500/- to Rs. 2000/-. Retirement age of an employee of our company is 60 years. On the basis of the increments and experience in the service, salary of Banwari Lal would have been doubled had he reached the age of superannuation."

6. The aforesaid testimony of PW2 remained unshaken in cross examination and, as a matter of fact, the witness in cross-examination emphatically stated that the deceased had been working in their Company on a permanent basis.

7. The contention of Mr. Nandwani, the learned counsel for the appellant, placing his reliance upon **Salra Verma's** case (supra), is that the future prospects of the deceased could not have been considered as he was in a private job and the same does not fall in the category of "permanent job". The relevant part of the judgment in the case of **Sarla Verma** (supra) upon which reliance was placed by Mr. Nandwani is reproduced hereunder:

> "10. Generally the actual income of the deceased less income tax should be the starting point for calculating the compensation. The question is whether actual income at the time of death

should be taken as the income or whether any addition should be made by taking note of future prospects. In **Susamma Thomas,** this Court held that the future prospects of advancement in life and career should also be sounded in terms of money to augment the multiplicand (annual contribution to the dependants); and that where the deceased had a stable job, the court can take note of the prospects of the future and it will be unreasonable to estimate the loss of dependency on the actual income of the deceased at the time of death. In that case, the salary of the deceased, aged 39 years at the time of death, was Rs. 1032/- per month. Having regard to the evidence in regard to future prospects, this Court was of the view that the higher estimate of monthly income could be made at Rs. 2000/- as gross income before deducting the personal living expenses. The decision in **Susamma Thomas** was followed in **Sarla Dixit v. Balwant Yadav** (1993) II LLJ 664 SC, where the deceased was getting a gross salary of Rs. 1543/- per month. Having regard to the future prospects of promotions and increases, this Court assumed that by the time he retired, his earning would have nearly doubled, say Rs. 3000/-. This Court took the average of the actual income at the time of death and the projected income if he had lived a normal life period, and determined the monthly income as Rs. 2200/- per month. In **Abati Bezbaruah v. Dy. Director General, Geological Survey of India** [2003] 1 SCR 1229, as against the actual salary income of Rs. 42,000/- per annum, (Rs. 3500/- per month) at the time of accident, this Court assumed the income as Rs. 45,000/- per annum, having regard to the future prospects and career advancement of the deceased who was 40 years of age.

11. In **Susamma Thomas,** this Court increased the income by nearly 100%, in **Sarla Dixit,** the income was increased only by 50% and in **AbatiBezbaruah** the income was increased by a mere 7%. In view of imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years. [Where the annual income is in the taxable range, the words 'actual salary' should be read as `actual salary

less tax']. The addition should be only 30% if the age of the deceased was 40 to 50 years. There should be no addition, where the age of deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to standardize the addition to avoid different yardsticks being applied or different methods of calculations being adopted. **Where the deceased was self-employed or was on a fixed salary (without provision for annual increments etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances."**

8. Mr. Bhupesh Narula, the learned counsel for the respondents No.1 to 6, on the other hand, placed reliance upon the recent decision of the Supreme Court in **Shakti Devi vs. New India Insurance Co. Ltd. & Anr.,** 2011 ACJ 15. In the said case, after referring to the judgment rendered by it in the case of **Smt. Sarla Verma** (supra), the Supreme Court observed as follows:

> "In **Sarla Verma,** this Court stated that where the deceased was self-employed, the Court shall usually take only the actual income at the time of death; a departure from there should be made only in rare and exceptional cases involving special circumstances. Does the present case involve special circumstances? In our view, it does. The evidence has come that the deceased was to get employment in the forest department after the retirement of his father. Obviously the evidence is based on the government policy. The deceased, thus, had a reasonable expectation of the government employment in near future. In the circumstances, the actual income at the time of deceased's death needs to be revised and taking into consideration the special circumstances of the case, in our view, the monthly income of the deceased deserves to be fixed at Rs. 2,000/-……."

9. On the basis of the aforesaid, it was urged by Mr. Bhupesh Narula, the learned counsel for the respondents No.1 to 6, that in each case the question which the Tribunal or the Court concerned must pose to itself while computing the income of the deceased for the purpose of assessing the loss of dependency of his legal representatives is:

"Does the present case involve special circumstances?"

10. Mr. Narula contended that the evidence on record in the instant case clearly showed that the deceased was an employee of a private limited company. PW2 Mr. Madan Mohan, the Manager (Administration) of the said company had categorically testified that on the basis of the increments and experience in the service, the salary of the deceased would have doubled had he reached the age of superannuation, which in the case of their Company was 60 years. He also testified that every employee used to get yearly increments in their Company and that the deceased Banwari Lal had been working in their Company on a permanent basis. The aforesaid facts, Mr. Narula contended, must be regarded as special circumstances.

11. It is clear from the decision in the case of **Sarla Verma** (supra) that a distinction was made between the case of a self-employed person and that of a person with a permanent job. The Supreme Court in its subsequent decision rendered in the case of **Shakti Devi** (supra) clarified that where the deceased is self-employed but has a reasonable expectation of a permanent job, this must be considered to be a special circumstance. In the said case, the deceased was running a general store from his house and earning about Rs. 1,000/- per month from the business, but since he had a reasonable expectation of Government employment in the near future according to a Government Policy, it was held that the actual income of the deceased at the time of his death was required to be revised by taking into consideration the aforesaid special circumstance, and the monthly income of the deceased was thus fixed at Rs. 2,000/- per month. The present case, in my opinion, stands on a better footing. The deceased is not self-employed but had a permanent job in a private limited company where every employee was getting yearly increments. There is also evidence on record that at the time of his superannuation, the salary of the deceased would have most certainly doubled. In view of the aforesaid facts, in my view, the learned Tribunal cannot be faulted for adding 30% of the salary which the deceased was drawing at the time of his death to his last drawn salary towards "future prospects" for the purpose of calculation of "loss of dependency".

12. It also deserves to be highlighted that the Supreme Court while dealing with the aspect of future prospects in **Sarla Verma's** case

(supra) has drawn no distinction between a private job, corporate job or Government job, though a distinction was made for obvious reasons between a temporary job and permanent employment. All that the Supreme Court emphasized in the aforesaid case was that while assessing the future prospects of the deceased, the permanency or otherwise of his job be taken into account and the future prospects of the deceased be adjudged accordingly. No hard and fast rule was laid down as is clear from the fact that the Court held that in special circumstances of the case a different approach may be warranted.

13. As regards the grievance of the appellant that the amount of compensation awarded towards loss of love and affection is on the higher side, I am not inclined to agree with the contention of Mr. Nandwani that the same should be scaled down, keeping in view the fact that the respondents No.1 to 6 lost their bread earner at a comparatively young age.

14. On the aspect of interest awarded by the learned Tribunal however I find some substance in the contention of Mr. Nandwani that interest should have been awarded by the learned Tribunal at the rate of 7.5% per annum instead of 9% per annum, keeping in view the prevalent rate of interest on the date of the accident. The award is accordingly modified to the extent that the appellant is held liable to pay interest @ 7.5% per annum from the date of the institution of the petition till the date of realisation. The rest of the award is upheld.

MAC.APP. 6/2011 and CM No.95/2011 stand disposed of accordingly.

ILR (2011) III DELHI 553
RC. REV.

GIRDHARI LAL GOOMER ....PETITIONER

VERSUS

P.P. GAMBHIR ....RESPONDENT

(S.L. BHAYANA, J.)

RC REV. NO. : 06/2011 & 07/2011 **DATE OF DECISION: 15.02.2011**

Delhi Rent Control Act, 1958—Sections 4—Petitioners were tenant in shop measuring 15'x8' (120 sq. ft.) in property bearing no. E-3, Kalkaji, New Delhi at a monthly rent of Rs. 100/-—Respondent purchased some portion of the building including the premise in question from the previous owner—Petitioners attorned the respondent as landlord/owner and started paying rent to him—The respondent is a practicing Chartered Accountant—Respondent filed a petition for eviction u/s 14 (1) (e) and Section 25-B of the Act that premises are required for his bonafide requirement—Contented by the petitioner that landlord is not sure for what purpose the premises is required and alternative accommodation is available to him—Respondent submitted that he has no other suitable commercial accommodation; other property is a residential property and is fully occupied—No space is available for respondent there—Held—The respondent/landlord was in bonafide need of the rented premises because the need of the respondent was to use that rented premises for his personal commercial use and the other property available to the respondent in Greater Kailash was purely residential property which did not fulfill the requirement of respondent as he could not start his work from there—Petitioners failed to raise any triable issue, which if proved, might disentitle the respondent from getting an order of eviction in their favour—The trial court has given a detailed and reasoned order which does not call for any interference nor the same suffers from any infirmity or erroneous exercise of jurisdiction.

In **Sait Nagjee Purushotham and Co. Ltd. v. Vimalabai Prabhulal and Ors.** (2005) 8 SCC 252, it was observed:

> "It is always the prerogative of the landlord that if he requires the premises in question for his bona fide use for expansion of business this is no ground to say that the landlords are already having their business at Chennai and Hyderabad therefore, it is not genuine need. It is not the tenant who can dictate the terms to the landlord and advise him what he should do and what he should not. It is always the privilege of the landlord to choose the nature of the business and the place of business." **(Para 12)**

Therefore, I am of the opinion that the respondent/landlord is in bonafide need of the rented premises. Because the need of the respondent is to use that rented premises for his personal commercial use and the other property available to the respondent in Greater Kailash is purely residential property which does not fulfill the requirement of the respondent as he cannot start his work from there. **(Para 13)**

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Ajay Bhatnagar for petitioner.

FOR THE RESPONDENT : Mr. Sanjay Goswami for respondent.

CASES REFERRED TO:

1. *Umesh Challiyill* vs. *K.P.Rajendran,* (2008) 11 SCC 740.
2. *Sait Nagjee Purushotham and Co. Ltd.* vs. *Vimalabai*

Prabhulal and Ors. (2005) 8 SCC 252.

3. *Dwarka Nath Pandey* vs. *Income Tax Officer, Special Circle D ward and Anr.* AIR 1966 SC 81 (V 53 C 22).

RESULT: Petition dismissed.

S. L. BHAYANA, J.

1. The present revision petitions under section 25-B(8) of Delhi Rent Control Act, 1958 (for short as "the Act") have been filed by the petitioner against the order dated 13.10.2010 passed by Additional Rent Controller (for short as "the Controller") Delhi, whereby leave to defend/ contest the eviction petition has been dismissed and an eviction order is passed under section 14(1)(e) read with section 25(B) of Act against the petitioner in respect of suit premises.

2. The brief facts relevant for the purpose of deciding this petition are that the petitioners are tenant in a shop admeasuring 15'X8' (120 sq.ft.) in property bearing No.E-3, Kalkaji, New Delhi at a monthly rent of Rs. 100/-. The said shop was originally taken on rent on lease from Shri Om Dutt Malik in the year 1955-56 and for the last 55 years the petitioners are running the said shop as tenant. The petitioners are senior citizen aged above 70 years and carrying on business from the tenanted premises since 1955 onwards. The petitioners have no other sufficient means to earn their livelihood. The respondent purchased some portion of the building bearing No.E-3, Kalkaji, New Delhi from its previous owner Shri Om Dutt Malik S/o Late Shri Raghunath Rai Vide Agreement to Sell dated 26.11.1996 which included the tenanted shops on the Ground Floor admeasuring 300 sq.ft., i.e., about 120 sq.ft. under tenancy of the petitioners and other 180 sq.ft. under tenancy of the spouse of the petitioners. Shri Om Dutt Malik also executed a Will and Power of Attorney in favour of the respondent, however, the Agreement to Sell dated 26.11.1996, last Will dated 06.03.1989 were not registered. The respondent admitted that "Shri Om Dutt Malik from whom the respondent had purchased the said property has expired and his Will has come into operation in favour of the respondent".

3. Thereafter, the petitioners/tenants attorned the respondent as the landlord/owner in respect of the two tenanted premises and started paying rent of the tenanted premises to the respondent. The respondent is a

practicing Chartered Accountant. As per respondent's eviction petition he is having his office in the rented premises located in the same building No.E-3, Kalkaji, New Delhi and the land lady of the respondent is his own wife who is receiving a handsome rent of more than Rs.15,000/- per month from her husband without disclosing the portion of E-3 building in her legal possession.

4. Thereafter, the respondent filed a petition for eviction of the petitioners-tenants under section 14(1) (e) and section 25-B of the Act, 1958 in the year 2009 in the Court of Rent Controller wherein, he claimed to be requiring the tenanted premises for his bonafide requirement which was contested by the petitioners by filing a leave to contest the eviction petition. The Learned Controller by his order dated 13.10.2010 dismissed the application for leave to contest the eviction petition filed by the petitioners/tenants.

5. Learned counsel for the petitioners has argued that the respondent/ landlord was not at all sure that for what purpose the suit premises is required by the respondent/landlord.

6. Learned counsel for the petitioners has further vehemently argued that alternative accommodation is available with the respondent/landlord in the same city, therefore, respondent is not having a bonafide requirement.

7. Learned counsel for the petitioners has further submitted that the respondent/landlord has desperately wanted to evict the petitioners/tenants on one ground or the other. Further, he submitted that the respondent/ landlord was unable to satisfy the Learned ARC that he is having a bonafide requirement of the tenanted premises. The petitioners/tenants are senior citizen, who have no other means of livelihood and have been operating their office from the tenanted premises for the last 50 years and they will suffer hardship if eviction order is passed.

8. On the other hand, learned counsel for the respondent has submitted that respondent has no other suitable commercial accommodation. Property No. E-340, Greater Kailash Part-II is a residential property and is fully occupied for residential purposes and there is no other space available for the respondent/landlord.

9. Learned counsel for the respondent/landlord has submitted that

the tenanted premises was let out to the petitioners for commercial purpose and same is required bonafide by the respondent for his own occupation and respondent/landlord has no other reasonably suitable accommodation. The respondent/landlord requires the said tenanted premises for his own professional office as the same is a part of the property No. E-3, Kalkaji, New Delhi where respondent/landlord is running his office and the respondent need not change his postal address, telephone numbers etc. and would also be relieved of all types of hassles and harassment in shifting his office and also of losing his clients at any other new place.

10. Learned counsel for the respondent/landlord has contended that there is no leave to defend application filed by the petitioners. But there is one affidavit filed by Smt. Pushpa Rani Goomer which cannot be considered as affidavit filed by the petitioners/tenants.

11. I have heard the arguments advanced by the counsel for the parties. I have also gone through the documents on record and judgments relied upon by the counsel for the petitioner in cases **Umesh Challiyill vs. K.P.Rajendran,** (2008) 11 SCC 740, and **Dwarka Nath Pandey vs. Income Tax Officer, Special Circle D ward and Anr.** AIR 1966 SC 81 (V 53 C 22). The facts of both the cases are not applicable to the facts of the present case.

12. In **Sait Nagjee Purushotham and Co. Ltd. v. Vimalabai Prabhulal and Ors.** (2005) 8 SCC 252, it was observed:

> "It is always the prerogative of the landlord that if he requires the premises in question for his bona fide use for expansion of business this is no ground to say that the landlords are already having their business at Chennai and Hyderabad therefore, it is not genuine need. It is not the tenant who can dictate the terms to the landlord and advise him what he should do and what he should not. It is always the privilege of the landlord to choose the nature of the business and the place of business."

13. Therefore, I am of the opinion that the respondent/landlord is in bonafide need of the rented premises. Because the need of the respondent is to use that rented premises for his personal commercial use and the other property available to the respondent in Greater Kailash is purely

residential property which does not fulfill the requirement of the respondent as he cannot start his work from there.

14. Petitioners have failed to raise any triable issue in this case, which if proved, might disentitle the respondent from getting an order of eviction in their favour. The trial court has given a detailed and reasoned order which does not call for any interference nor the same suffers from any infirmity or erroneous exercise of jurisdiction.

15. Therefore, I find no infirmity in the order passed by the ARC.

16. These revision petitions are liable to be dismissed.

17. No Costs.

ILR (2011) III DELHI 558
W.P. (C)

GURDWARA SHRI GURU SINGH SABHA & ANR. **....PETITIONERS**

VERSUS

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

(S. RAVINDRA BHAT & G.P. MITTAL, JJ.)

W.P. (C) NO. : 2611/2001 & 3625/2002 **DATE OF DECISION: 17.02.2011**

Delhi School Education Rules-Rule 64(1)(b)—Aided Minority Institute—Powers of management and administration—Petitioners challenged the circular dated 07.12.2001 by GNCTD in furtherance of Rule 64(1)(b) being not binding on them and be declared void. Held—Rule 64(1)(b) and consequential circulars declared not binding in view of the judgment of the Supreme Court in *Sindhi Education Society & Anr. v.*

Chief Secretary, GNCTD & Ors. **(2010) 8 SCC 49.**

In the present cases, the petitioners have sought for declaration that Rule 64 (1) (b) and 1 (e) as well as Rule 47 and the consequential Circulars are not binding upon them and to that extent they seek a declaration that they are void. Having regard to the judgment of the Supreme Court, however, Mr. Siddiqui, Advocate who appears on behalf of the writ petitioners submits that the challenge would be confined to the extent it seeks relief of declaration vis-à-vis Rule 64 (1) (b) and other consequential Circulars including the one dated 7.12.2001. Learned counsel for the GNCTD agrees that the judgment of the Supreme Court covers the issue. **(Para 6)**

Important Issue Involved: Rule 64(1)(b) of the Delhi School Education Rules dilutes the right and protection available to minority schools under the constitution vis-a-vis their ability to recruit the teachers and personnel of their choice and therefore are not binding upon minority institutions even though recipients of aid.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONERS : Mr. M. Tarique Siddique with Ms. Rakhshan Ahmed, Advocates.

FOR THE RESPONDENT : Mr. Sushil D. Salwan with Mr. Aditya Garg, Advocates.

CASES REFERRED TO:

1. S*indhi Education Society & Anr.* vs. *Chief Secretary, GNCTD & Ors.* (2010) 8 SCC 49.
2. *M. Nagaraj* vs. *Union of India* (2006) 8 SCC 212
3. *Govt. of NCT of Delhi* vs. *Sindhi Education* L.P.A. No.33-36/2006.

RESULT: Writ Petition allowed.

S. RAVINDRA BHAT (OPEN COURT)

1. Heard the counsel.

2. On the previous date of hearing, counsel for the parties had submitted that the judgment of the Supreme; Court reported as **Sindhi Education Society & Anr. v. Chief Secretary, GNCTD & Ors.** (2010) 8 SCC 49 covers the dispute in these cases. The counsel had also stated that they would be furnishing brief written submissions in support of their contentions.

3. Briefly the petitioners in these proceedings question the Circulars including the one issued on 7.12.2001 by the Directorate of Education, GNCTD in furtherance of its powers under Rule 64 (1) (b) of the Delhi School Education Rules framed under the Delhi School Education Act, 1973. The petitioners claim to be aided Institutions. They assert that by virtue of Article-30 even though they are recipients of aid, the directions contained in the Circulars make inroads into the powers of management and administration vis-à-vis their ability to recruit the Teachers and personnel of their choice.

4. During the course of proceedings, it was noticed that nearly an identical challenge had been considered by the Division Bench of this Court which had upheld the Rules in its judgment in L.P.A. No.33-36/2006 i.e. **Govt. of NCT of Delhi v. Sindhi Education** society by its judgment dated 30.11.2006. However, the Division Bench was of the opinion that the question which had arisen before it was of public importance and, therefore, granted certificate to appeal to the appellants. In these circumstances, the appeal was preferred before the Supreme Court.

5. The Supreme Court by its judgment and order dated 8.7.2010 in Civil Appeal No.5489/2007 -**Sindhi Education Society & Anr. v. Chief Secretary, GNCTD & Ors.** (2010) 8 SCC 49 -allowed the appeal. It would be relevant to extract the material portions of the judgment which are as follows:

> "57. It is not necessary for us to examine the extent of power to make regulations, which can be enforced against linguistic minority institutions, as we have already discussed the same in the earlier part of the Judgment. No doubt, right conferred on

minorities under Article 30 is only to ensure equality with the majority but, at the same time, what protection is available to them and what right is granted to them under Article 30 of the Constitution cannot be diluted or impaired on the pretext of framing of regulations in exercise of its statutory powers by the State. The permissible regulations, as afore-indicated, can always be framed and where there is a mal-administration or even where a minority linguistic or religious school is being run against the public or national interest, appropriate steps can be taken by the authorities including closure but in accordance with law. The minimum qualifications, experience, other criteria for making appointments etc are the matters which will fall squarely within the power of the State to frame regulations but power to veto or command that a particular person or class of persons ought to be appointed to the school failing which the grant-in-aid will be withdrawn, will apparently be a subject which would be arbitrary and unenforceable. Even in **T.M.A. Pai's** case (supra), which view was reiterated by this Court in the case of Secy. Malankara Syrian Catholic College (supra), it was held that the conditions for proper utilisation of the aid by the educational institution was a matter within the empowerment of the State to frame regulations but without abridging or diluting the right to establish and administer educational institutions. In that case, while dealing with the appointment of a person as Principal, the Court clearly stated the dictum that the freedom to choose the person to be appointed as Principal has always been recognised as a vital facet to right to administer the educational institution. It being an important part of the administration and even if the institution is aided, there can be no interference with the said right. The power to frame regulations and control the management is subject to another restriction which was reiterated by the Court in **P.A. Inamdar's** case (supra) stating that it is necessary that the objective of establishing the institution was not defeated.

58. At last, what is the purpose of granting protection or privilege to the minorities in terms of Article 29, and at the same time, applying negative language in Article 30(2) in relation to State action for releasing grant-in-aid, as well as the provisions of DSE Act, 1973 and the rules framed thereunder? It is obvious

that the constitutional intent is to bring the minorities at parity or equality with the majority as well as give them right to establish, administer and run minority educational institutions. With the primary object of Article 21A of the Constitution in mind, the State was expected to expand its policy as well as methodology for imparting education. DSE Act, as we have already noticed was enacted primarily for the purpose of better organisation and development of school education in the Union Territory of Delhi and for matters connected therewith or incidental thereto. Thus, the very object and propose of this enactment was to improve the standard as well as management of school education. It will be too far fetched to read into this object that the law was intended to make inroads into character and privileges of the minority. Besides, in the given facts and circumstances of the case, the Court is also duty bound to advance the cause or the purpose for which the law is enacted. Different laws relating to these fields, thus, must be read harmoniously, construed purposively and implemented to further advancement of the objects, sought to be achieved by such collective implementation of law. While, you keep the rule of purposive interpretation in mind, you also further add such substantive or ancillary matters which would advance the purpose of the enactment still further. To sum up, we will term it as "doctrine of purposive advancement". The power to regulate, undisputedly, is not unlimited. It has more restriction than freedom particularly, in relation to the management of linguistic minority institutions. The rules, which were expected to be framed in terms of Section 28 of the DSE Act, were for the purpose of carrying out the provisions of the Act. Even, otherwise, it is a settled principle of law that Rules must fall within the ambit and scope of the principal legislation. Section 21 is sufficiently indicative of the inbuilt restrictions that the framers of the law intended to impose upon the State while exercising its power in relation to a linguistic minority school.

59. To appoint a teacher is part of the regular administration and management of the School. Of course, what should be the qualification or eligibility criteria for a teacher to be appointed can be defined and, in fact, has been defined by the Government

of NCT of Delhi and within that specified parameters, the right of the linguistic minority institution to appoint a teacher cannot be interfered with. The paramount feature of the above laws was to bring efficiency and excellence in the field of school education and, therefore, it is expected of the minority institutions to select the best teacher to the faculty. To provide and enforce the any regulation, which will practically defeat this purpose would have to be avoided. A linguistic minority is entitled to conserve its language and culture by a constitutional mandate. Thus, it must select people who satisfy the prescribed criteria, qualification and eligibility and at the same time ensure better cultural and linguistic compatibility to the minority institution. At this stage, at the cost of repetition, we may again refer to the Judgment of this Court in **T.M.A. Pai's** case (supra), where in para 123, the Court specifically noticed that while it was permissible for the State and its educational authorities to prescribe qualifications of a teacher, once the teachers possessing the requisite qualifications were selected by the minorities for their educational institutions, the State would have no right to veto the selection of the teachers. Further, the Court specifically noticed the view recorded by Khanna, J. in reference to Kerala Education Bill, 1957 case (supra), and to Clauses 11 and 12 of the Bill in particular, where the learned Judge had declared that, it is the law declared by the Supreme Court in subsequently contested cases as opposed to the Presidential reference, which would have a binding effect and said:

> 123. ...The words "as at present advised" as well as the preceding sentence indicate the view expressed by this Court in relation to Kerala Education Bill, 1957, in this respect was hesitant and tentative and not a final view in the matter.

What the Court had expressed in para 123 above, appears to have found favour with the Bench dealing with the case of **T.M.A. Pai** (supra). In any case, nothing to the contrary was observed or held in the subsequent Judgment by the larger Bench.

60. The concept of equality stated under Article 30(2) has to be read in conjunction with the protection under Article 29 and thus

it must then be given effect to achieve excellence in the field of education. Providing of grant-in-aid, which travels from Article 30(2) to the provisions of the DSE Act and Chapter VI of the Rules framed thereunder, is again to be used for the same purpose, subject to regulations which themselves must fall within the permissible legislative competence. The purpose of grant-in-aid cannot be construed so as to destroy, impair or even dilute the very character of the linguistic minority institutions. All these powers must ultimately, stand in comity to the provisions of the Constitution, which is the paramount law. The Court will have to strike the balance between different facets relating to grant-in-aid, right to education being the fundamental right, protection available to religious or linguistic minorities under the Constitution and the primary object to improve and provide efficiency and excellence in school education. In our considered view, it will not be permissible to infringe the constitutional protection in exercise of State policy or by a subordinate legislation to frame such rules which will impinge upon the character or in any way substantially dilute the right of the minority to administer and manage affairs of its school. Even though in the case of **Mohinder Kaur** (supra), the Bench of this Court held, that upon restoration of the minority character of the institution, the provisions of the Act and the rules framed thereunder would cease to apply to a minority institution. We still would not go that far and would preferably follow the view expressed by larger Bench of this Court in **T.M.A. Pai's** case (supra) and even rely upon other subsequent Judgments, which have taken the view that the State has the right to frame such regulations which will achieve the object of the Act. Even if it is assumed that there is no complete eclipse of the DSE Act in the Rules in the case of minority institutions, still Rule 64(1)(b), if enforced, would adversely effect and dilute the right and protection available to the minority school under the Constitution.

61. Now, we will revert back to the facts of the present case. There is no dispute to the fact that the Appellant-school is a linguistic minority institution and has been running as such for a considerable time. Admittedly, it was receiving grant-inaid for all this period. Its minority status was duly accepted and declared

by the Judgment of the Delhi High Court in the case of this very institution and which has attained finality. In this very Judgment, the Court also held, that certain provisions of DSE Rules, 1973 would not apply to this minority school. Thereafter, vide letter dated, 12th March, 1985, the Managing Committee was required to give an undertaking that it would make reservation in service for Scheduled Castes and Schedule Tribes, to which the school had replied relying upon the Judgment of the Delhi High Court in its own case. However, vide letter dated, 21st March, 1986, Secretary (Education), Government of NCT, Delhi had informed the Appellants that the circular requiring Government aided schools to comply with the provisions relating to reservation was not applicable to the minority institutions. In face of the Judgment of the Court, such a requirement was not carried out by the Appellant-school and the controversy was put at rest vide letter dated, 21st March, 1986 and the institution continued to receive the d grant-in-aid. However, in September, 1989, again, a letter was addressed to all the government aided schools including the Appellant stating that it was a precondition for all agencies receiving grant-in-aid, not only to enforce the requirement of providing reservation in the posts but even not to make any regular appointments in the general category till the vacancies in the e reserved category were filled up. This was challenged before the High Court. At the very outset, we may notice that we entirely do not approve the view expressed by the learned Single Judge of the Delhi High Court in the case of **Sumanjit Kaur** (supra) insofar as it held, that the regulation would be unconstitutional since they are likely to interfere with the choice of the medium of instruction as well as minority character of the institution by compelling the appointments to the teaching faculty of the persons, who may be inimical towards the minority community.

62. We are of the considered view that the learned Single Judge as well as the Division Bench erred in law in stating the above proposition as it is contra legam. The Preamble of our Constitution requires the people of India to constitute into a "Sovereign Socialist Secular Democratic Republic". 9 Secularism, therefore, is the essence of our democratic system. Secularism and

brotherhoodness is a golden thread that runs into the entire constitutional scheme formulated by the framers of the Constitution. The view of the learned Single Judge and the Division Bench in the case of **Sumanjit Kaur** (supra), runs contra to the enunciated law. We are afraid that while deciding a constitutional matter in accordance with law, the Court would not be h competent to raise a presumption of inimical attitude of and towards one community or the other. We do not approve the view of the High Court that a provision of an Act or a Circular issued thereunder could be declared as unconstitutional on such presumptuous ground. However, to the extent that it may interfere with the choice of medium of instructions as well as minority character of the institution to some extent is a finding recorded in accordance with law. The Division Bench while entertaining the appeal against the Judgment of the learned Single Judge, had primarily concentrated on the point that the selection of the teacher was valid and not violative of the Rules and accepted the findings recorded by the learned Single Judge, resulting in grant of relief to the Appellants. Further, in our considered view and for the reasons afore-recorded, the Judgment of the Division Bench in the present case while dismissing the Writ Petition filed by the Appellants before that Court cannot be sustained in law. Further, in the Judgment under appeal the Division Bench was right in not accepting the reason given by the learned Single Judge founded on other persons being inimical towards minority. It was expected of the Division Bench to critically analyse other reasons given by the learned Single Judge in the case of **Sumanjit Kaur** (supra), which had been followed in the present case. We could have had the benefit of the independent view of the Division Bench as well. Reasoning is considered as the soul of the Judgment. The Bench referred to the fact that the view in the Kerala Education Bill, 1957 case (supra) was tentative but still erred in ignoring paragraph 123 of the **T.M.A. Pat's** case (supra) as well as the other Judgments referred by us, presumably, as they might not have been brought to the notice of the Bench. The discussion does not analyse the various principles enunciated in regard to the protection available to the linguistic minorities under Article 29 of the Constitution and the result of principle of

equality introduced by Article 30(2) of the Constitution. For the detailed reasons recorded in this Judgment, we are unable to persuade ourselves to accept the view of the Division Bench in the Judgment under appeal.

63. A linguistic minority has constitution and character of its own. A provision of law or a Circular, which would be enforced against the general class, may not be enforceable with the same rigors against the minority institution, particularly where it relates to establishment and management of the school. It has been held, that founders of the minority institution have faith and confidence in their own committee or body consisting of the persons selected by them. Thus, they could choose their managing committee as well as they have a right to choose its teachers. Minority institutions have some kind of autonomy in their administration. This would entail the right to administer effectively and to manage and conduct the affairs of the institution. There is a fine distinction between a restriction on the right of administration and a regulation prescribing the manner of administration. What should be prevented is the mal-administration. Just as regulatory measures are necessary for maintaining the educational character and content of the minority institutions, similarly, regulatory measures are necessary for ensuring Orderly, efficient and sound administration. Every linguistic minority may have its own socio, economic and cultural limitations It has a constitutional right to conserve such culture and language. Thus, it would have a right to choose teachers, who possess the eligibility and qualifications, as provided, without really being impressed by the fact of their religion and community. Its own limitations may not permit, for cultural, economic or other good reasons, to induct teachers from a particular class or community. The direction, as contemplated under Rule 64(1) (b), could be enforced against the general or majority category of the Government aided school but, it may not be appropriate to enforce such condition against linguistic minority schools. This may amount to interference with their right of choice and, at the same time, may dilute their character of linguistic minority. It would be impermissible in law to bring such actions under the cover of equality which in fact, would diminish the very essence of their

character or status. Linguistic and cultural compatibility can be legitimately claimed as one of the desirable features of a linguistic minority in relation to selection of eligible and qualified teachers.

64. A linguistic minority institution is entitled to the protection and the right of equality enshrined in the provisions of the Constitution. The power is vested in the State to frame regulations, with an object to ensure better organisation and development of school education and matters incidental thereto. Such power must operate within its limitation while ensuring that it does not, in any way, dilute or impairs the basic character of linguistic minority. Its right to establish and administer has to be construed liberally to bring it in alignment with the constitutional protections available to such communities. The minority society can hardly be compelled to perform acts or deeds which per se would tantamount to infringement of its right to manage and control. In fact, it would tantamount to imposing impermissible restriction. A school which has been established and granted status of a linguistic minority for years, it will not be proper to stop its grant-in-aid for the reason that it has failed to comply with a condition or restriction which is impermissible in law, particularly, when the teacher appointed or proposed to be appointed by such institution satisfy the laid down criteria and/or eligibility conditions. The minority has an inbuilt right to appoint persons, which in its opinion are better culturally and linguistically compatible to the institution.

65. To frame policy is the domain of the Government. If, as a matter of policy, the Government has decided to implement the reservation policy for upliftment of the socially or otherwise backward classes, then essentially it must do so within the frame work of the Constitution and the laws. The concept of reservation has been provided, primarily, under Article 16 of the Constitution. Therefore, it would be the requirement of law that such policies are framed and enforced within the four corners of law and to achieve the laudable cause of upliftment of a particular Section of the society. In regard to the ambit and scope of reservation, this Court in the case of **M. Nagaraj v. Union of India**[2'] (2006) 8 SCC 212 held as under:

39. Reservation as a concept is very wide. Different people understand reservation to mean different things. One view of reservation as a generic concept is that reservation is an anti-poverty measure. There is a different view which says that reservation is merely providing a right of access and that it is not a right to redressal Similarly, affirmative action as a generic concept has a different connotation. Some say that reservation is not a part of affirmative action whereas others say that it is a part of affirmative action.

40. Our Constitution has, however, incorporated the word "reservation" in Article 16(4) which word is not there in Article 15(4). Therefore, the word "reservation" as a subject of Article 16(4) is different from the word "reservation" as a general concept.

41. Applying the above test, we have to consider the word "reservation" in the context of Article 16(4) and it is in that context that Article 335 of the Constitution which provides for relaxation of the standards of evaluation has to be seen. We have to go by what the Constitution-framers intended originally and not by general concepts or principles. Therefore, schematic interpretation of the Constitution has to be applied and this is the basis of the working test evolved by Chandrachud, J. in the Election case.

66. Thus, the framework of reservation policy should be such, as to fit in within the constitutional scheme of our democracy. As and when the Government changes its policy decision, it is expected to give valid reasons and act in the larger interest of the entire community rather than a Section thereof. In its wisdom and apparently in accordance with law Government had taken a policy decision and issued the circular dated, 218t March, 1986 exempting the minority institutions from complying with the requirements of the Rule 64(1)(b) of the DSE Rules. Despite this and Judgment of the High Court there was a change of mind by the State that resulted in issuance of the subsequent circular of September, 1989. From the record before us, no reasons have

been recorded in support of the decision superseding the circular dated, 218t March, 1986. It is a settled canon of administrative jurisprudence that state action, must be supported by some valid reasons and should be upon due application of mind. In the affidavits filed on behalf of the State, nothing in this regard could be pointed out and in fact, none was pointed out during the course of arguments. Absence of reasoning and apparent non-application of mind would give colour of arbitrariness to the State action. This aspect attains greater lucidity in light of the well accepted norm that minority institution cannot stand on the same footing as a non-minority institution.

67. Besides that, State actions should be actio quaelibet it sua via and every discharge of its duties, functions and governance should also be within the constitutional framework. This principle equally applies to the Government while acting in the field of reservation as well. It would not be possible for the Courts to permit the State to impinge upon or violate directly or indirectly the constitutional rights and protections granted to various classes including the minorities. Thus, the State may not be well within its constitutional duty to compel the linguistic minority institution to accept a policy decision, enforcement of which will infringe their fundamental right and/or protection. On the contrary, the minority can validly question such a decision of the State in law. The service in an aided linguistic minority school cannot be construed as "a service under the State" even with the aid of Article 12 of the Constitution. Resultantly, we have no hesitation in coming to the conclusion that Rule 64(1)(b) cannot be enforced against the linguistic minority school. Having answered this question in favour of the Appellant and against the State, we do not consider it necessary to go into the constitutional validity or otherwise of Rule 64(1)(b) of the Rules, which question we leave open.

68. For the reasons aforestated, we allow the appeal and hold that Rule 64(1)(b) and the circular of September, 1989 are not enforceable against the linguistic minority school in the NCT of Delhi. There shall be no Order as to costs."

6. In the present cases, the petitioners have sought for declaration that Rule 64 (1) (b) and 1 (e) as well as Rule 47 and the consequential Circulars are not binding upon them and to that extent they seek a declaration that they are void. Having regard to the judgment of the Supreme Court, however, Mr. Siddiqui, Advocate who appears on behalf of the writ petitioners submits that the challenge would be confined to the extent it seeks relief of declaration vis-à-vis Rule 64 (1) (b) and other consequential Circulars including the one dated 7.12.2001. Learned counsel for the GNCTD agrees that the judgment of the Supreme Court covers the issue.

7. In the light of the above submissions, the writ petitions are allowed in terms of the judgment of the Supreme Court; Rule 64 (1) (b) and the consequential Circulars impugned in these petitions are declared to be not binding upon the writ petitioners in these cases.

8. W.P. (C) 2611/2001 & W.P. (C) 3625/2002 are allowed in the above terms.

ILR (2011) III DELHI 571
CRL. A.

RASHID & ORS. ....APPELLANTS

VERSUS

STATE GOVT. OF NCT OF DELHI ....RESPONDENT

(BADAR DURREZ AHMED & MANMOHAN SINGH, JJ.)

CRL. A. NO. : 1374/2010 DATE OF DECISION: 17.02.2011

Indian Penal Code, 1860—Section 302, 316/34—Delhi High Court Rules—Chapter 13-A—Rule 2 & 7—Dying Declaration—As per prosecution case appellants sprinkled kerosene oil on Rashida (deceased) wife of appellant Rashid and ignited her with a matchstick as a result of which she died of burn injuries—This done because Rashid had illicit relations with appellant Mehtab—At the time of incident Rashida was 6 months pregnant—Four Dying Declarations recorded, three were the alleged histories recorded by the three separate doctors on MLC, fourth recorded by ASI PW13—Held, no motive made out—Language of fourth Dying Declaration was not of an ordinary person but of the police officer (PW13) himself—Noting of three doctors on MLC as history of patient was that of suffering accidental burn—Because of discrepancies, testimonies of witnesses regarding recording of Dying Declarations cannot be believed—No Magistrate called to record Dying Declaration despite Rashida having died 15 days after incident—Dying Declaration not attested by anyone—Trial Court wrongly convicted accused solely on basis of fourth dying declaration which was the only evidence against him—Copy of judgment directed to be sent to the Commissioner of Police to take steps in accordance with law in respect of PW13 and to ensure that investigations are not conducted improperly as done in present case—Appellants acquitted—Appeal allowed.

Important Issue Involved: Where there is more than one dying declaration and there are contradictions there in, it is unsafe to rely on them without proper corroboration.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANTS : Mr. Avadh Bihari Kaushik.

FOR THE RESPONDENT : Ms. Richa Kapoor, Addl. Standing Counsel.

CASE REFERRED TO:

1. *Geeta & Another* vs. *State:* 163 (2009) DLT 268.

RESULT: Appeal allowed.

BADAR DURREZ AHMED, J. (ORAL)

1. This appeal is directed against the judgment dated 16th November, 2010 in Sessions Case No. 08/2008 arising out of an FIR No. 615/2005 registered at Police Station Samaipur Badli under Section 302/316/34 IPC. Initially, the said FIR was registered U/s 307 and thereafter Section 316 was added on the death of quick unborn foetus (unborn child) which the deceased Smt. Rashida was carrying at the time of the incident. Subsequently, on the death of Smt. Rashida on 03.09.2005, Section 302 IPC replaced Section 307 IPC. This appeal is also directed against the order on the point of sentence which was passed on 26.11.2010. The learned Additional Sessions Judge after convicting all the three appellants, namely, Rashid, Mohd. Kamil and Smt. Mehtab sentenced them to imprisonment for life along with fine of Rs.1,000/- each, and in default whereof, 60 days simple imprisonment each, in respect of the offence under section 302/34 IPC. All the three convicts were also awarded sentences of imprisonment of five years with a fine of Rs.500/- each, and in default whereof, imprisonment of 30 days each for the offence under section 316/34 IPC. The sentences were to run concurrently and the benefit of Section 428 Cr.P.C. was also directed to be given to all the three convicts/appellants herein.

2. The prosecution case as noted in the judgment of the learned Additional Sessions Judge is that, on 18th August, 2005 at about 2.30 p.m. in a house in Gali No.3, Rajiv Nagar, Bhalaswa Dairy, Delhi which fell within the jurisdiction of Police Station Samaipur Badli, all the three appellants in furtherance of their common intention had sprinkled kerosene oil on Smt. Rashida, who was the wife of the appellant Rashid, and ignited her with a matchstick, as a result of which she received 80% grade 'I' and 'II' burn injuries to which she ultimately succumbed at LNJPN Hospital on 3rd September, 2005 at about 8:15 a.m. It is further the case of the prosecution that at the time of the incident, Smt. Rashida was about six months pregnant and was carrying a male foetus and that because of the said incident, death of the quick unborn child was caused and thus the appellants had not only committed an offence under section ˇ302/34 IPC in so far as the deceased Smt. Rashida was concerned, but also committed an offence U/s 316/34 IPC with regard to the death of

the quick unborn child.

3. In order to substantiate its case, the prosecution had examined as many as 18 witnesses. The defence also led its evidence and examined six witnesses. Even the accused/appellant Rashid came to the witness box as DW 6. Of all the prosecution witnesses, the most material witnesses in respect of the prosecution case were PW 3 Naushad Ahmad, who was the deceased Smt. Rashida's brother, PW 4 Syed Ahmad, who was the deceased Rashida's cousin, PW 7 Mohd. Kamil, who was a neighbour of PW 3 Naushad Ahmad and PW 13 ASI Hari Ram Sharma, who was the initial Investigating Officer and who allegedly recorded the purported dying declaration of the deceased Smt. Rashida which was exhibited as Ex. PW 7/A.

4. We may point out that the appellant Rashid, as stated above, was the husband of the deceased Smt. Rashida. The appellant Mohd. Kamil is Rashid's brother and the appellant Smt. Mehtab is Mohd. Kamil's wife. It was also the prosecution's case that Smt. Rashida was set ablaze by the three appellants because Rashid had alleged illicit relations with his sister-in-law Smt. Mehtab. This, according to the prosecution, was the motive behind the killing of Smt. Rashida at the hands of the three appellants.

5. The defence set up an alternative case of an accidental death. This is apparent from the suggestions which were given by the learned counsel for the accused at the time of cross-examination of some of the witnesses as also from the direct evidence which the defence sought to lead through DW 6 Rashid (who is the appellant herein).

6. The learned trial court disbelieved and brushed aside all the defence witnesses and found the prosecution witnesses, particularly, PWs 3,4,7 and 13 to be trustworthy, coherent and truthful, and on the basis of their testimonies as well as on the basis of the purported dying declaration Ex. PW 7/A, convicted the appellants for the offences they were charged with. The learned trial court was also of the view that the motive stood established as per the testimony of PW 3 Naushad Ahmad.

7. The learned counsel for the appellants submitted that the prosecution has not been able to prove its case beyond reasonable doubt. In fact, he submitted that the prosecution has not been able to establish any part of its case. On the other hand, he submitted, the defence has

been able to show that the burns caused to the deceased Smt. Rashida could have been accidental burns as suggested by the defence. It was also contended by the learned counsel for the appellants that the learned trial court had committed a grave error in concluding that the motive stood established when, according to the learned counsel, the motive as alleged by the prosecution was absurd. The learned counsel for the appellant further submitted that the entire case of the prosecution rests and hinges upon the dying declaration i.e., Ex. PW 7/A. He submitted that the said dying declaration, before it could be used against the accused for purposes of conviction, had to be established as authentic, correct and truthful. In so far as the authenticity of the dying declaration is concerned, the learned counsel for the appellants submitted that the three prosecution witnesses, namely, PW 3, PW 4 and PW 7 have stated that the said dying declaration Ex. PW 7/A was recorded in their presence at LNJP Hospital on 19th August, 2005 between 10-10:30 a.m. The learned counsel for the appellant immediately drew our attention to the MLC, Ex. PW 14/A, where the fitness certificate given by one Dr. Sumit, to the effect that the patient is "fit for statement", was given at 2:45 p.m. on 19th August, 2005. This, according to the learned counsel for the appellants, completely belied the statements of the said three PWs, namely, PW 3 Naushad Ahmad, PW 4 Syed Ahmad and PW 7 Mohd. Kamil. With regard to PW 13 ASI Hari Ram Sharma, who is said to have recorded the statement of the deceased Smt. Rashida, the learned counsel for the appellants submitted that his testimony cannot also be believed. He took us through the entire deposition of this witness made before the learned trial court in an attempt to point out the several instances where this witness has not spoken the truth. Thus, according to the learned counsel for the appellants, none of the four witnesses on the basis of whose testimony the authenticity of the dying declaration PW 7/A was sought to be established, cannot be relied upon. That being the case, the so-called dying declaration Ex. PW 7/A cannot be considered to be the correct and authentic statement of the deceased Smt. Rashida.

8. The learned counsel for the appellant also pointed out that the learned trial court failed to appreciate that Ex. PW 7/A was not the only purported dying declaration but there were four other alleged dying declarations which ought to have been taken note of by the learned Additional Sessions Judge. Three of those dying declarations were the alleged history recorded by three separate doctors on the MLC Ex. PW

14/A at Babu Jagjeevan Ram Memorial Hospital (BJRM Hospital) at Jahangir Puri. The fourth dying declaration, according to the learned counsel for the appellants, was actually destroyed by PW 13 ASI Hari Ram Sharma but the substance of that dying declaration was recorded in Ex. DW 1/A which is a copy of page No. 76 of book No. 3513 of Register No.2 i.e. the Station Daily Diary dated 18th August, 2005 of Police Station Samaipur Badli.

9. The learned counsel for the appellants submitted that all these four dying declarations indicate that the death of Smt. Rashida was accidental and the theory of homicidal death propagated by the prosecution is completely belied by these declarations which the learned trial court ought to have considered.

10. Coupled with these other dying declarations, the learned counsel for the appellants also submitted that the endorsement on the MLC Ex. PW 14/A to the effect that the patient was "fit for statement", which has been found on the said MLC, has not been proved by the prosecution.

11. Consequently, the learned counsel for the appellants submitted that the impugned order and order on sentence ought to be set aside in as much as the prosecution has failed to establish its case.

12. Ms. Richa Kapoor appearing on behalf of the State supported the decision of the learned trial court. Her main argument was that the death of Smt. Rashida was not accidental but homicidal. She submitted that the alleged history which has been recorded in the MLC Ex. PW 14/A and which the learned counsel for the appellants has styled as dying declarations was all at the instance of Smt. Rashida's husband, namely, the appellant Rashid. She submitted that this is so because Smt. Rashida was "unfit for statement" at that point of time. Secondly, she submits that in one of the alleged dying declarations recorded by Dr. Shilpi Shrivastava, it is mentioned that Smt. Rashid's saari got burnt, whereas she was not wearing a saari at the time of the incident but she was wearing a salwar kameez. It was also contended by Ms. Richa Kapoor that there was no evidence that food was being cooked as was sought to be suggested by the defence in support of its plea that the death was accidental. For all these reasons she contended that death of Smt. Rashida was clearly homicidal and not accidental.

13. She also contended that from the above submissions, it is clear that the appellant Rashid tried to mislead the investigation by suggesting that it was an accidental death when it was homicidal and this in itself is an incriminating circumstance which can certainly be looked into by the learned trial court. She also suggested that the appellant Rashid has not been able to explain why it took him one hour and forty five minutes from the time of the accident, which according to her took place at 2:30 p.m., to arrive at the BJRM Hospital at 4.15 p.m. along with the injured Smt. Rashida. She submitted that this is all the more startling because the distance between the residence of the deceased and the appellant Rashid and the said BJRM Hospital is only about 3-1/2 kilometres.

14. She also submitted that the learned trial court was correct in believing PW 3, PW 4, PW 7 and PW 13 and also in regarding Ex. PW 7/A as the authentic, correct and truthful dying declaration of Smt. Rashida. She also submitted that when the clothes of Smt. Rashida were examined by the Central Forensic Science Laboratory, they found that the same contained residue of kerosene, therefore, it was clearly a case, according to her, of Smt. Rashida being set ablaze after kerosene was sprinkled on her. Consequently, she submitted that the appeal ought to be dismissed and the order of conviction and sentence ought to be confirmed by this court.

15. Let us, first of all, consider the alleged motive that has been set up by the prosecution. According to the prosecution, the appellant Rashid had illicit relations with the co-appellant Smt. Mehtab, who was the wife of his elder brother (Mohd. Kamil), and it is because of this that the three of them got angered and killed Smt. Rashida. It has only to be stated, to realise how absurd this alleged motive is! The appellant Rashid was married to Smt. Rashida. It is the appellant Rashid who is alleged to have illicit relations with his sister-in-law Smt. Mehtab. Such a relationship could have infuriated either Smt. Rashida or Mohd. Kamil (Smt. Mehtab's husband), or both. In fact, while Smt. Rashida would be upset with her husband Rashid for having illicit relations with another lady, the appellant Mohd. Kamil would have a double grievance, that is against his wife Smt. Mehtab for having illicit relations with his brother and also against his brother Rashid for having an illicit relationship with his wife. It is unimaginable as to how these three, that is Rashid, Mohd. Kamil and Smt. Mehtab could join hands and direct their so-called ire against Smt.

Rashida who was not to blame for anything. Apart from the absurdity of the alleged motive, there is no evidence whatsoever which would even suggest that there were illicit relations between Rashid and Smt. Mehtab. The entire story of the motive has been concocted by the prosecution without any evidence to back it. It is unfortunate and strange that this, otherwise unbelievable, story of motive has been believed by the learned trial court.

16. We now come upon the so-called dying declaration, PW 7/A. The English translation of the same is as under:-

STATEMENT OF SMT. RASHIDA W/O RASHID R/O GALI NO.3, RAJIV NAGAR, BHALSWA DAIRY, DELHI AGED ABOUT 25 YEARS

I state that I reside at the above address along with my husband and children. My husband is having illicit relations with my sister-in-law mehtab and when I objected on the same he used to beat me. On 08.08.2005 my elder brother naushad Ahmed came to my house at Rajiv nagar in this connection and my brother conciliated the matter between me and my husband. My brother went to his village. After my brother had gone my husband threatened to kill me. On 18.08.2005 at about 2.30 in the day my husband came at home and asked me to warm the food. I lit the stove. In the meantime my brother-in-law kamil and sister-in-law mehtab also came there and my sister-in-law and my husband caught hold of me from both sides and my brother-in-law lifted the kerosene oil can and poured kerosene upon me and ignited a match stick and threw it upon me due to which my clothes caught fire and when I started burning, they all went out and closed the door from outside. After some time my husband came inside the house and poured a bucket of water upon me and took me to the hospital in a vehicle. My husband, my brother-in-law and my sister-in-law tried to kill me. The statement has been heard and found correct.

RTI (Rashida)

Attested Sd/- ASI Hari Ram

P.S. SP badli dt. 19.08.05

The transliterated version of the said statement is as under:-

"Byan ajaane shrimati Rashida w/o Rashida r/o Gali no.3, Rajiv nagar, bhalaswa dairy, Delhi ba umra 25 saal.

Byan kiya ki mein pata uprokt par apne pati va bachcho ke sath rehti hoon. Mera pati Rashid va meri jethani mehtab ke aapas mein nazayaj sambandh hai. Jo mein apne pati ko iss baat ke liye mana karti thi toh voh mujhe maarta peet-ta tha. Dinak 8.8.2005 ko mera bada bhai Naushad Ahmed bhi issi silsile mein mere ghar Rajiv nagar aaya tha aur mere bhai ne mere pati va mera faisla karva diya tha. Mera bhai apne gaon chala gaya. Bhai ke jane ke paschaat bhi mujhe mere pati ne mujhe dhamkaya va kaha jaan se maarunga jo dinank 18.8.05 ko samay karib 2.30 baje din, mera pati ghar par aaya va mujhe kaha khana garam kar lo. Maine stove ko jalaya aur issi asna mein mera jeth Kamil va jethani mehtab bhi wahan aa gaye aura ate hi meri jethani va mere aadmi ne mujhe dono taraf se pakad liya aur mere jeth ne mitti ke tel ki can utha mere upar daal di aur machis ki tilli jala kar mere upar daal di jis se mere kapdo me aag lag gayi. Jab main jalne lagi to voh teeno bahar nikal gaye aur bahar se darvaza band kar diya. Kuchh der ke baad mera pati dubara andar ghar mein aaya aur pani ki balti mere upar daal di aur mujhe mera pati gaadi mein daalkar hospital le gaye. Mere pati va mere jeth va jethani ne milkar mujhe maarne ki koshish ki hai. Byan sun liya theek hai."

17. We have purposely set out the transliterated version to show the clear falsity of the deposition of PW 13 ASI Hari Ram Sharma. According to this witness, the said statement was given by Smt. Rashida in her own words once and then again when he wrote the statement "line by line and word by word". A simple reading of the so-called dying declaration would indicate that it is not the language of an ordinary person but of the police officer himself. The expressions "pata uprokt" and "jo" and other similar expressions are commonly used by police officials in Delhi, particularly in recording Section 161 statements, as well as FIRs etc. We have serious doubts as to whether these were the words used by Smt. Rashida herself, if at all.

18. We have already pointed out that the learned counsel for the

appellants had submitted that there was one dying declaration which had been recorded by this very witness i.e., PW 13 Hari Ram Sharma at BJRM Hospital which has been suppressed by the prosecution. The learned counsel for the appellants, through the deposition of DW 1 ASI Ilam Singh has established that as per Ex. DW 1/A the statement was recorded by PW 13 Hari Ram Sharma at BJRM Hospital itself. The document Ex. DW 1/A translated into English reads as under:-

"DD No. 40B:

On receiving DD No. 40B I along with constable reached at BJRM Hospital where MLC No. 11105/05 in respect of Smt. Rashida w/o Mohd. Rashid r/o Gali No.3, Rajiv nagar, bhalaswa was received on which doctor mentioned as alleged history of accidental burn and patient fit for statement and thus, statement was recorded. Injured Smt. Rashida told that at about 2.45 p.m. I was warming food on stove. Stove was burning but fuel was not sufficient in it and hence, I started putting kerosene in the stove by uncapping it while it was burning and thus, flames erupted and caught my clothes due to which I received burn injuries on my body. There was never any quarrel at our home nor there was any tension. There is no fault of any body in it. I have three children. I got married in 1997. All circumstances have been explained to the SHO...".

19. From the above document, it is clear that the statement of Smt. Rashida was recorded at BJRM Hospital where she stated that at about 2:45 p.m. she was warming the food on the stove, and as it had insufficient fuel, she started pouring kerosene into the stove and while doing so, the stove caught fire as a result of which her clothes caught fire and she received burn injures all over her body. She also stated that there was no quarrel at home nor was there even any tension or fault on the part of anybody. This document Ex. DW 1/A has been proved to be in the writing of PW 13 Hari Ram Sharma by the defence witness DW 1 ASI Ilam Singh who has stated that "Ex. DW 1/A was recorded on 18.08.2005 itself".

20. This is a very strong circumstance for us to disbelieve PW 13. We may say that this witness has thoroughly discredited himself and his testimony does not inspire any confidence whatsoever. We are unable to comprehend as to how the learned Additional Sessions Judge considered

the testimony of this witness (PW 13) to be credible and trustworthy.

21. Ex. DW1/A brings out a case of accidental burns. This is also corroborated by the alleged history of occurrence recorded by three separate doctors on the MLC Ex. PW14/A. The first doctor - Dr. Gaurav Chaudhary - noted, inter alia, as under:-

> "Alleged H/o Accidental Burns".

This was followed by the noting of Dr. Ridip (S/R Surgery) to the following effect:-

> "Alleged H/o accidental flame burn Grade I and Grade II superficial burns 80% …… all over the body except lower abdomen and lower back."

The third doctor – Dr. Shilpi Srivastava (Gynae S/R) wrote:-

> "H/o accidental burn (her saree caught fire while cooking on stove)."

All these notings also suggest a case of accidental burns and cast serious doubts on the prosecution version.

22. We now turn to the other three witnesses, namely, PW 3 Naushad, PW 4 Syed Ahmad and PW 7 Mohd. Kamil who have been brought to the witness box by the prosecution in an attempt to establish the authenticity of the so-called dying declaration Ex. PW 7/A. According to PW 3 Naushad Ahmad, when he reached LNJPN Hospital on 19th August, 2005 the statement of Smt. Rashida was being recorded at about 10-10:15 a.m. PW 4 Syed Ahmad also stated that at about 10.00 a.m. on that date he found PW 13 Hari Ram Sharma recording the statement of Smt. Rashida at the said hospital. PW 7 Mohd. Kamil in his cross-examiantion stated that they had reached the hospital at 10-10.15 ˇa.m. and that the recording of the statement of Smt. Rashida in the hand of PW 13 Hari Ram Sharma started at about 10.30 a.m. and continued for 10-15 minutes. Thus, according to these three witnesses, the statement of Smt. Rashida which has been exhibited as Ex. PW 7/A was allegedly recorded between 10-10.30 a.m. on 19th August, 2005. But, from the fitness certificate at Mark-X of Ex. PW 14/A which is the MLC we find that the same was granted at 2.25 p.m. on 19th August, 2005. According to PW 13 ASI Hari Ram Sharma the statement of Smt. Rashida was

recorded after obtaining the fitness certificate. In other words, according to PW 13 the statement was recorded after 2:45 p.m., whereas according to these three witnesses, namely, PW 3 , PW 4 and PW 7 the statement was recorded at about 10-10:30 a.m. prior to the fitness certificate given by Dr. Sumit at 2.45 a.m. on 19th August, 2005. This clearly shows that the statement was not recorded at all in the presence of these three witnesses. Thus their testimonies as regards the recording of the so-called dying declaration Ex. PW 7/A cannot be believed at all.

23. Apart from this, PW 13 in his testimony has categorically stated again and again and particularly in his cross-examiantion that at the time when he was recording the statement of Smt. Rashida there was nobody else present whereas the PWs 3, 4 and 7 have all stated that they were present. Thus, as per the prosecution case itself, there are serious contradictions and the testimonies of PWs 3,4 & 7 as also PW 13 cannot at all be believed with regard to the recording of the statement of Smt. Rashida.

24. Although there is evidence of doctor DW 5 Dr. Arun Goel, that he had asked the duty constable at the hospital to call an SDM for recording of the dying declaration, no Magistrate was requested to record the dying declaration. In fact, in Chapter 13-A of the Delhi High Court Rules which pertains to dying declarations, it is specifically mentioned in Rule 2 thereof that wherever possible, a dying declaration should be recorded by a Judicial Magistrate. When PW 13 Hari Ram Sharma was questioned as to why the SDM was not called for recording Rashida's statement, he gave the following answer:-

> "Since Rashida was brunt more than 80% and that is why as per my observation, it was hard for her survival. I did not make any request to the SDM to get the statement recorded of Rashida."

This answer is preposterous inasmuch as Rashida died 15 days later on 03.09.2005. To be specific, Smt. Rashida was admitted to BJRM Hospital on 18th August, 2005 and subsequently shifted to LNJPN Hospital on the same day. As mentioned above, she remained in hospital till 3rd September, 2005 when she passed away. There was enough time for requesting a Judicial Magistrate to come and record her statement. The fact that this was not done also lends credence to the submission advanced by the learned counsel for the appellants that the prosecution did not want to do

so because that would harm their case.

25. Apart from this, Rule 7 of Chapter 13- A also prescribes that where a dying declaration is recorded by a police officer or a medical officer, the same should be attested by one or more of the persons who happen to be present at that time. Ex. PW 7/A is not attested by any witness. The Investigating Officer could have easily asked any doctor to have attested the dying declaration. In fact when this question was put to him in cross-examination he gave a most startling answer to the following effect:-

> "After recording the statement of Rashida, I shown (sic) it to the doctor on duty and requested him to give his signatures but he said that the person about to die shall not tell a lie and that is why my signatures are not required."

PW 13 has not disclosed the name of the doctor. And, in any event, it cannot, by any stretch of imagination, be believed that any doctor could make such an irresponsible statement. The manner in which and the preposterous answers given by PW 13 Hari Ram Sharma display his callous and insensitive attitude, in the least, and is even reflective of his complicity in a frame-up.

26. PW 13 Hari Ram Sharma has also not been able to state clearly as to whether Smt. Rashida's hand was burnt or not. He was not even able to tell as to whether he had taken her right thumb impression or as to whether it was burnt or not. In the backdrop of these statements and the absurd answers given by PW 13 Hari Ram Sharma, his testimony, as already mentioned above, does not deserve any credence. In view of the foregoing, the authenticity of Ex. PW 7/A is clearly not established by the prosecution.

27. We also note that PW 14 Dr. Neeraj Chaudhary in his cross-examination had categorically stated that the thumb impression of the patient Smt. Rashida is not available on the MLC (Ex. PW 14/A) because it was a case of 80% burn all over the body except the lower abdomen and lower back. An important aspect also is that this very witness stated that it is nowhere written in the MLC that any kind of smell was emanating from the body of the patient Smt. Rashida. It is also for this reason that the purported thumb impression appearing in Ex. PW 7/A cannot be

considered as the thumb impression of the deceased Smt. Rashida. The law with regard to dying declarations is well settled as observed in the case of **Geeta & Another Vs. State:** 163 (2009) DLT 268 D.B. Paragraph 24 of the said decision reads as under:-

> "24. The law with regard to dying declarations is quite well settled. It is an established principle that a conviction can be based solely upon a dying declaration. But, before this can be done, the dying declaration must be established to be authentic and correct as well as truthful. Insofar as the authenticity and correctness of the dying declaration is concerned, the prosecution has to establish that the dying declaration in question was, in fact, made by the person who lost his life. Even where it can be established that the statement, which purports to be the dying declaration of the deceased, was in fact made by the deceased, the prosecution has also to establish that the statement was truthful. Of course, it is normally presumed that a dying person in his last moments does not utter any falsehood. But that does not rule out the possibility that in some cases this may not be the position. There may be instances where out of hate or spite a person may falsely implicate his enemy, even in his dying moments. It is also quite possible that the person making the dying declaration is under the influence or control of someone else and out of fear or other reasons, he may make a false statement prior to his death. There is also a possibility that a person, in order to save his honour and the honour of his family, who would survive him, may make statements which are not entirely correct or truthful. There is also a possibility that the person making the dying declaration is under some medication or because of his precarious condition is suffering from hallucinations and, therefore, the statements he makes at that point of time may be far removed from the truth. It is only when all these circumstances are ruled out and the court is of the belief and opinion that what the dying declaration states is truthful, can a conviction be based upon it without seeking corroboration. A dying declaration must always pass the scrutiny by the Court because, after all, it is merely hearsay evidence and it is admissible and relevant only because the person who made the declaration is no longer alive and cannot be produced before Court for

testifying. At the same time, the courts need to exercise caution in relying upon dying declarations because the maker of the statement is not before it and nor does the defence have an opportunity to cross-examine him. Thus, while there is no rule of law which suggests that a conviction cannot be based solely upon a dying declaration, the courts, as a rule of prudence, look for other corroborative material. If the dying declaration is of such a stellar and unimpeachable quality that it fully inspires confidence of the Court, there is nothing to prevent the Court from relying solely on such a dying declaration and on basing a conviction thereupon. But, the emphasis must be on the quality of the dying declaration. If the dying declaration is suspicious or suffers from some infirmity, then it should not be acted upon without any corroborative evidence."

28. Keeping the position in law in mind, as also the facts surrounding the so-called dying declaration Ex. PW 7/A, we are clearly of the opinion that the same cannot be relied upon. It is doubtful to say the least and it is eons away from being of stellar or unimpeachable quality. Apart from the so-called dying declaration Ex. PW 7/A there is no other evidence. Consequently, we are of the clear view that the trial court was in error in convicting the appellants solely on the basis of the purported dying declaration Ex. PW 7/A and that too after brushing aside the defence evidence which had been led. The trial court had also erred in not laying any emphasis on the fact that PW 13 Hari Ram Sharma had actually recorded a dying declaration at BJRM Hospital itself which has not been produced but which, fortunately for the defence, found mention in Ex. DW 1/A. Apart from this, the trial court also brushed aside the alleged history as recorded by three separate doctors at BJRM Hospital itself which indicated that the death of Smt. Rashida was accidental and not homicidal.

29. This case has demonstrated as to how innocent people are made to suffer because of a faulty and tainted investigation. Here, the investigating officer PW 13 Hari Ram Sharma has thoroughly discredited himself and has played a vital and key role in setting up, what we feel, a fabricated case against the appellants. To compound the misery of the appellants, we are informed by their learned counsel that during this period two of the three minor children of the appellant Rashid passed

away due to want of care as their father, uncle and aunt were all locked up in jail! It is directed that a copy of this judgment be sent to the Commissioner of Police so that he may take further steps in accordance with law in respect of PW 13 ASI Hari Ram Sharma and also ensure that investigations are never conducted in this manner.

30. In view of the foregoing discussion, there is no doubt in our minds that the prosecution has not been able to establish its case. Consequently, the impugned judgment and the impugned sentences are set aside. The appellants are acquitted of the charges levelled against them. The appellants are in custody, therefore, they are directed to be released forthwith. The appeal stands allowed.

ILR (2011) III DELHI 586
FAO

PRASHANT PROJECTS (P) LTD. ....APPELLANT

VERSUS

INDIAN OIL CORPN. LTD. ....RESPONDENT

(VIKRAMAJIT SEN & SIDDHARTH MRIDUL, JJ.)

FAO (OS) NO. : 53-54 DATE OF DECISION: 22.02.2011

Code of Civil Procedure, 1908—Suit—Order 26 Rule 9—Appointment of Local Commissioner—Delhi High Court Act, 1966—Section 10—Appeal—Maintainability of—Plaintiff filed an application for appointment for Local Commissioner for carrying out measurement of work done by plaintiff—Ld. Single Judge opined—Appropriate course would be to get measurements done on its own level from expert independent body—Local commissioner not required to be appointed—Dismissed the application—Preferred appeal against the order—Respondent contended—Real purpose

behind the application to nullify the joint inspection carried out by parties—Court after going through the record, found substance in the arguments—Observed—Plaintiff's refusal to carry out inspection/ measurement by its own engineer indicative of oblique and malafide purpose behind the application for appointment of local co`mmissioner—Carrying out measurements not only method by which plaintiff could prove the extent of work done by it—Must have possessed sufficient documents of its own showing—Deployment of man power, utilisation of material and resources at site, to be dealt with in detail in arbitration proceedings—Held—The appeal is maintainable against an interlocutory order having traits and traping of finality—Court possesses power for appointment of Local Commissioner but to exercise such power depend on the peculiarity of factual matrix—It can scarcely be claimed that local commissioner should be appointed to nullify the joint measurements in the face of offer of defendant to plaintiff to carry out measurements on its own—Appeal dismissed.

Mr. Ramji Srinivasan has confined his arguments, so far as maintainability of the Appeal is concerned, within the four corners of **Khimji**. Their Lordships had, inter alia, concluded that the Judgment "must be a formal adjudication which conclusively determines the rights of parties with regard to all or any of the matters in controversy. …… The intention, therefore, of the givers of the Letters Patent was that the word 'judgment' should receive a much wider and more liberal interpretation than the word 'judgment' used in the Code of Civil Procedure". The Supreme Court also noted that "the interlocutory orders which contain the quality of finality are clearly specified in clauses (a) to (w) of Order 43 Rule 1 and have already been held by us to be judgments within the meaning of the Letters Patent and, therefore, appealable". Thereafter, it has been stated in paragraph 115 that "those orders would be judgments which decide matters of moment or affect vital and valuable rights of the

parties and which work serious injustice to the party concerned. Similarly, orders passed by the Trial Judge deciding question of admissibility or relevancy of a document also cannot be treated as judgments because the grievance on this score can be corrected by the appellate court in appeal against the final judgment." In paragraph 119, their Lordships have amplified this aspect of the law in these words:-

> 119. Apart from the tests laid down by Sir White, C.J., the following considerations must prevail with the court:
>
> (1) That the trial Judge being a senior court with vast experience of various branches of law occupying a very high status should be trusted to pass discretionary or interlocutory orders with due regard to the well settled principles of civil justice. Thus, any discretion exercised or routine orders passed by the trial Judge in the course of the suit which may cause some inconvenience or, to some extent, prejudice to one party or the other cannot be treated as a judgment otherwise the appellate court (Division Bench) will be flooded with appeals from all kinds of orders passed by the trial Judge. The courts must give sufficient allowance to the trial Judge and raise a presumption that any discretionary order which he passes must be presumed to be correct unless it is *ex facie* legally erroneous or causes grave and substantial injustice.
>
> (2) That the interlocutory order in order to be a judgment must contain the traits and trappings of finality either when the order decides the questions in ˇcontroversy in an ancillary proceeding or in the suit itself or in a part of the proceedings.
>
> (3) The tests laid down by Sir White, C.J. as also by Sir Couch, C.J. as modified by later decisions of the Calcutta High Court itself which have been dealt with

by us elaborately should be borne in mind. **(Para 7)**

Letters Patent was issued at a time when India was a colony of the British Empire and redressal against an order passed by a Single Judge/Trial Judge was available only before the Judicial Committee or the *Privy Council*. This entailed not only huge financial expense, but also required considerable discomfort of involving months of travel. If Parliament perceives it to be prudent to provide for an intra court appeal in independent India, so far as Delhi High Court is concerned, the needful can be achieved by an amendment in the DHC Act. Citizens should not be required to seek succor from archaic laws. **(Para 9)**

It seems to us that there is a force in the argument raised on behalf of the Respondent that the strategy behind the application is not the carrying out of measurement but rather diluting or defeating the veracity of the joint measurement. So far as we are concerned, the Plaintiff's refusal to carry out inspection/measurement by its own engineers is indicative that the purpose behind the application for appointment of a Local Commissioner is oblique and malafide. It is also relevant to reflect that the carrying out of measurement may not be the only method by which the Plaintiff could prove the extent of the work carried out by it. Surely, it must also possess sufficient documentation of its own, showing deployment of manpower and utilization of material and resources at the relevant site. All this will, no doubt, be dealt with in detail in the arbitration proceedings. Therefore, assuming that the present Appeal is maintainable, we find that it is devoid of merit. **(Para 11)**

Important Issue Involved: (i) The power of Court for appointment of local commissioner must be used depending on peculiarity of facts (ii) Local Commissioner cannot be appointed to nullify the evidence on record.

[Gu Si]

APPEARANCES:

FOR THE APPELLANT : Mr. Ramji Srinivasan, Sr. Advocate with Vikram Mehta, Mr. Kush Chaturvedi and Mr. Zeyaul Haque, Advocates.

FOR THE RESPONDENT : Mr. A.S. Chandhiok, Sr. Advocate with Ms. Mona Aneja, Mr. Bhagat Singh and Ms. Snigdha Sharma, Advocates.

CASES REFERRED TO:

1. *Wee Aar Constructive Builders* vs. *Simplex Concrete Piles (India) Ltd.,* 2010 II AD (Delhi) 382.
2. *Prima Developers* vs. *Lords Cooperative Group ˇHousing Society Ltd.,* 159(2009) DLT 586(DB).
3. *T.V. Balan* vs. *University of Calicut,* AIR 1996 Kerala 278.
4. *Chintapatla Arvind Babu* vs. *Smt. K. Balakristamma,* AIR 1992 AP 300.
5. *Jugal Kishore Paliwal* vs. *S. Sat Jit Singh,* (1984) 1 SCC 358.
6. *Shah Babulal Khimji* vs. *Jayaben D. Kania,* (1981) 4 SCC 8.
7. *University of Delhi* vs. *Hafiz Mohd. Said,* AIR 1972 102 : ILR (1972).

VIKRAMAJIT SEN, J.

CM No.2084/2011

1. Allowed, subject to all just exceptions.

FAO(OS) No.53-54/2011

2. This Appeal has been filed under Section 10 of the Delhi

High Court Act, 1966 (DHC Act for short) against the Order passed by the learned Single Judge on 21.1.2011 dismissing the Plaintiff's application under Order XXVI Rule 9 of the Code of Civil Procedure,

1908 (CPC for short) praying for the appointment of a Local Commissioner for carrying out measurement of the work done by the Plaintiff.

3. We have summoned and perused the original documents, especially because a copy of IA No.17646/2010 under Order XXVI Rule 9 of the CPC appears not to have been placed on record. In the said application, there is no mention of the fact that a joint inspection of the Project had been carried out and/or that the Defendant/Respondent had not conducted this exercise properly.

4. In the impugned Order, the learned Single Judge has dismissed the application opining that "the appropriate course for the Plaintiff would be to get the measurement done at its own level from an expert independent body and for this purpose, the Local Commissioner is not required to be appointed". It had been contended before the learned Single Judge, and reiterated before us by Mr. A.S. Chandhiok, learned Additional Solicitor General that the intent behind the application is the Plaintiff/Appellant's endeavour to wriggle out of joint measurement which has been carried out on 10.11.2010. In this regard, it has been emphasized that no objection in respect of the carrying out of the joint measurement has been articulated in the Plaintiff's letter/notice dated 12.11.2010.

5. At the very threshold, the learned ASG has raised an objection as to the maintainability of the present Appeal under Section 10 of the DHC Act. Nevertheless, he has again offered that the Respondent would have no objection to the Plaintiff/Appellant carrying out measurement of the work allegedly executed by it. The learned ASG has submitted that the Plaintiff only needs to indicate the date on which this exercise is to be embarked upon. Mr. Ramji Srinivasan, learned Senior Counsel for the Appellant, however, has roundly rejected the offer contending that a Local Commissioner ought to have been appointed for the purpose.

6. So far as the maintainability of the Appeal under Section 10 of the DHC Act is concerned, we must refer to **Shah Babulal Khimji –vs- Jayaben D. Kania,** (1981) 4 SCC 8. The High Court of Delhi was constituted under the DHC Act. While Letters Patent applied to the Punjab High Court, which earlier held territorial sway, technically it was not the precursor of the Delhi High Court. This aspect of curial annals has been fully unraveled by a decision of a Constitution Bench of five learned Judges of this Court in **University of Delhi –vs- Hafiz Mohd. Said,** AIR

1972 102 : ILR (1972) Delhi 1, which has been set aside by a brief Order of two paragraphs on the premise that it was irreconcilable with the enunciation of the law contained in Khimji. We may emphasise, at the risk of repetition, that Khimji deals with the maintainability of a Letters Patent Appeal. We, however, must assume, because of the pronouncement in **Jugal Kishore Paliwal –vs- S. Sat Jit Singh,** (1984) 1 SCC 358, which has overruled Hafiz Mohd. Said, that Section 10 of the DHC Act is in pari materia in content and effect with Letters Patent. We can only conjecturise that the disparate nature of the Delhi High Court when compared to chartered High Courts, such as in Punjab, Bombay etc., was not brought to the notice of their Lordships by the Advocates in Jugal Kishore Paliwal. We are sanguine that if this aspect is revisited by the Supreme Court, a different conclusion may be pronounced with regard to the High Courts which have not emerged from Chartered High Courts. To avoid prolixity, we shall merely refer to a Division Bench decision in **Wee Aar Constructive Builders –vs- Simplex Concrete Piles (India) Ltd.,** 2010 II AD (Delhi) 382 where a more detailed consideration of this conundrum was considered.

7. Mr. Ramji Srinivasan has confined his arguments, so far as maintainability of the Appeal is concerned, within the four corners of **Khimji**. Their Lordships had, inter alia, concluded that the Judgment "must be a formal adjudication which conclusively determines the rights of parties with regard to all or any of the matters in controversy. …… The intention, therefore, of the givers of the Letters Patent was that the word 'judgment' should receive a much wider and more liberal interpretation than the word 'judgment' used in the Code of Civil Procedure". The Supreme Court also noted that "the interlocutory orders which contain the quality of finality are clearly specified in clauses (a) to (w) of Order 43 Rule 1 and have already been held by us to be judgments within the meaning of the Letters Patent and, therefore, appealable". Thereafter, it has been stated in paragraph 115 that "those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned. Similarly, orders passed by the Trial Judge deciding question of admissibility or relevancy of a document also cannot be treated as judgments because the grievance on this score can be corrected by the appellate court in appeal against the final judgment." In paragraph 119, their Lordships have amplified this aspect of the law in

these words:-

> 119. Apart from the tests laid down by Sir White, C.J., the following considerations must prevail with the court:
>
> (1) That the trial Judge being a senior court with vast experience of various branches of law occupying a very high status should be trusted to pass discretionary or interlocutory orders with due regard to the well settled principles of civil justice. Thus, any discretion exercised or routine orders passed by the trial Judge in the course of the suit which may cause some inconvenience or, to some extent, prejudice to one party or the other cannot be treated as a judgment otherwise the appellate court (Division Bench) will be flooded with appeals from all kinds of orders passed by the trial Judge. The courts must give sufficient allowance to the trial Judge and raise a presumption that any discretionary order which he passes must be presumed to be correct unless it is *ex facie* legally erroneous or causes grave and substantial injustice.
>
> (2) That the interlocutory order in order to be a judgment must contain the traits and trappings of finality either when the order decides the questions in controversy in an ancillary proceeding or in the suit itself or in a part of the proceedings.
>
> (3) The tests laid down by Sir White, C.J. as also by Sir Couch, C.J. as modified by later decisions of the Calcutta High Court itself which have been dealt with by us elaborately should be borne in mind.

8. In paragraph 120 of **Khimji**, rejection of an application for appointment of a Local Commissioner does not find place in the itemization of order amenable to an appeal.

9. Letters Patent was issued at a time when India was a colony of the British Empire and redressal against an order passed by a Single Judge/Trial Judge was available only before the Judicial Committee or the *Privy Council*. This entailed not only huge financial expense, but also required considerable discomfort of involving months of travel. If Parliament perceives it to be prudent to provide for an intra court appeal in independent India, so far as Delhi High Court is concerned, the needful

can be achieved by an amendment in the DHC Act. Citizens should not be required to seek succor from archaic laws.

10. We shall now consider the contention of the Respondent that the real purpose behind the subject application is to nullify the joint inspection carried out by the parties. The sequence of events which we find relevant is that by letter dated 8.10.2010, stated by Mr. Ramji Srinivasan to actually have been issued the following month, it had informed the Defendants that they had "in terms of the termination order deputed our engineers to carry out the measurements. We request that the measurements for work carried out be taken physically. We also request you while taking the measurement, kindly jointly record the contractor supplied materials as well as the works done on this same". That this joint measurement had been carried out on 8.11.2010 has been admitted by the Appellant in paragraph 42 of the Plaint even though thereafter it has been pleaded that it was only in respect of a small part of the work done by the Plaintiff. The learned ASG, however, has emphasized that it was the first time that any grievance or umbrage had been recorded, so far as the exercise of joint measurement is concerned, was in the aforementioned pleadings. Our attention has also been drawn to the fact that the entire documentation has not been filed.

11. It seems to us that there is a force in the argument raised on behalf of the Respondent that the strategy behind the application is not the carrying out of measurement but rather diluting or defeating the veracity of the joint measurement. So far as we are concerned, the Plaintiff's refusal to carry out inspection/measurement by its own engineers is indicative that the purpose behind the application for appointment of a Local Commissioner is oblique and malafide. It is also relevant to reflect that the carrying out of measurement may not be the only method by which the Plaintiff could prove the extent of the work carried out by it. Surely, it must also possess sufficient documentation of its own, showing deployment of manpower and utilization of material and resources at the relevant site. All this will, no doubt, be dealt with in detail in the arbitration proceedings. Therefore, assuming that the present Appeal is maintainable, we find that it is devoid of merit.

12. In this view of the matter, no useful purpose will be served by a detailed consideration of the decisions of the learned Single Benches in **Chintapatla Arvind Babu –vs- Smt. K. Balakristamma,** AIR 1992 AP

300 and **T.V. Balan –vs- University of Calicut,** AIR 1996 Kerala 278, to which our attention has been drawn by Mr. Ramji Srinivasan. These are also our view with regard to the Division Bench Judgment of this Court in **Prima Developers –vs- Lords Cooperative Group Housing Society Ltd.,** 159(2009) DLT 586(DB). The Court indubitably possesses powers for appointment of a Local Commissioner, but whether those powers are to be exercised depends on the peculiarity of the factual matrix obtaining in the particular instance. It can scarcely be claimed that a Local Commissioner should be appointed to nullify joint measurement carried out by the parties, even in the face of the offer by the Defendant that the Plaintiff may carry out inspection on its own.

13. Since the matter has been argued at great length, the Appeal is dismissed with costs of Rs. 20,000/-.

14. Since the Appeal has been dismissed, CM Nos.2082-83/2011 are also dismissed.

ILR (2011) III DELHI 595
CRL. M.C.

G.E. CAPITAL TRANSPORTATION FINANCIAL SERVICES LTD. ....PETITIONER

VERSUS

LAKHMANBHAI GOVINDBHAI KARMUR CREATIVE CONSTRUCTION & ORS. ....RESPONDENT

(HIMA KOHLI, J.)

CRL. M.C. NO. : 2478/2009 & CRL. M.A. NO. : 8398/2009 & ORS. DATE OF DECISION: 28.02.2011

Negotiable Instruments Act, 1881—Section 138—Code of Criminal Procedure, 1973—Section 382—Complaint made by petitioner u/s 138 dismissed by trial Court on ground of lack of territorial jurisdiction—ASJ dismissed criminal revision—Held, the two acts of presentation of cheque and issuance of legal notice from Delhi, so also the fact that loan agreement executed at Delhi and loan disbursed to respondent from account of petitioner in New Delhi vests territorial jurisdiction in Delhi Courts—Magistrate only taking cognizance of an offence must prima facie have territorial jurisdiction to try a case—Respondent after being summoned has a right to take the plea with regard to lack of territorial jurisdiction—Petition allowed—Case remanded back to trial Court with direction to proceed further with complaint.

In the instant cases, when the learned counsel for the petitioner has filed additional affidavits along with the relevant documents and has taken a clear and categorical stand with regard to additional acts relevant for the purpose of deciding the issue of territorial jurisdiction, this Court is inclined to agree with him that the allegation made in the complaint, when read in conjunction with the additional affidavit, would *prima facie* show that there vests territorial jurisdiction in the court at New Delhi. It is further relevant to note that in case the respondent/accused enters appearance before the court below after being summoned, he shall still have a right to take a plea with regard to the aspect of territorial jurisdiction of the court by placing such material facts on record, as may be considered necessary at that stage. Learned Metropolitan Magistrate would then be in a position to ascertain the truth of the assertions made by the petitioner/complainant and could then arrive at a different conclusion. **(Para 13)**

Important Issue Involved: Presentation of cheque for encashment, issuance of legal notice, execution of loan agreement, disbursal of loan to respondent from account of complainant all having taken place from Delhi vests territorial jurisdiction in Delhi Courts for filing complaint u/s 138 NI Act.

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Mr. Vijay K. Shailendra with Ms. Worthing Kasar, Advocates.

FOR THE RESPONDENTS : None.

CASES REFERRED TO:

1. *Religare Finvest Limited* vs. *Sambath Kumar A* reported as (2010) JCC (NI) 266.
2. *Patiala Casting P. Ltd. & Ors.* vs. *Bhushan Steel Ltd.* reported as 2010 IV AD (CRL)(DHC) 266.
3. *Hartaj Singh* vs. *Godrej Agrovet Ltd. & Anr.*, Crl. M.C. 50 of 2010.
4. *M/s Religare Finvest Ltd.* vs. *State & Anr.* Crl.Rev.P.No.179/2009.
5. *ICICI Bank Ltd.* vs. *Subhash Chand Bansal*, reported as 160 (2009) DLT 379
6. *HDFC Bank* vs. *Salamuddin Ahmed*, Crl.Rev.P. No. 151 of 2009.
7. *Rajiv Modi* vs. *Sanjay Jain* reported as V (2009) SLT 725.
8. *ICICI Bank Ltd.* vs. *Subhas Chand Bansal* reported as 160 (2009) DLT 379.
9. *Achintya Mandal* vs. *Chaitanya Agro Products & Ors.* reported as 2009 (108) DRJ 471.
10. *M/s Harman Electronics (P) Ltd.* vs. *M/s National Panasonic India Ltd.*, 156 (2009) DLT 160 (SC).
11. *M/s Harman Electronics Pvt. Ltd.* vs. *M/s National Panasonic India Ltd.* reported as 2009 II AD SC 21.
12. *Smt. Shamshad Begum* vs. *B. Mohammed* reported as 2008 (13) SCALE 669.
13. *Mosaraf Hossain Khan* vs. *Bhagheeratha Engg. Ltd.* reported as (2006) 3 SCC 658.

14. *Lok Housing and Constructions Limited* vs. *Raghupati Leasing and Finance Limited and Anr.* reported as 100 (2002) DLT 38.
15. *Shri Ishar Alloy Steels Ltd.* vs. *Jayaswals NECO Ltd.* reported as 2001 (3) SCC 609.
16. *K. Bhaskaran* vs. *Sankaran Vaidhyan Balan & Anr.*, reported as (1999) 7 SCC 510.
17. *Trisuns Chemical Industry* vs. *Rajesh Agarwal and Ors.* reported as (1999) 8 SCC 686.

RESULT: Petition allowed.

HIMA KOHLI, J. (Oral)

1. The present petitions are disposed of by this common order and judgment as the impugned judgment is common in all these cases and the question involved is also common. For the sake of convenience, only the facts of CRL.M.C. No.2478/2009 are referred to.

2. The present petition is filed by the petitioner under Section 482 Cr.P.C. praying inter alia for quashing of order dated 10.7.2009 passed by the learned ASJ, dismissing the criminal revision petition preferred by the petitioner against the order dated 20.3.2009 passed by the learned Metropolitan Magistrate, whereunder the complaint preferred by the petitioner under Section 138 of the Negotiable Instruments Act, 1881 (in short **'the Act'**) was dismissed by the trial court on the ground of lack of territorial jurisdiction vested in Delhi courts to entertain and try the complaint.

3. Vide order dated 20.3.2009, the learned Metropolitan Magistrate returned the complaint of the petitioner for presentation of the same before the court having territorial jurisdiction within one month, on the ground that there was nothing in the complaint or the documents annexed, which showed that any of the acts constituting the offence under Section 138 of the Act had taken place in New Delhi, except for the presentation of cheque for encashment and issuance of legal notice. The learned Metropolitan Magistrate rejected the argument of the complainant that presentation of the cheque at a service branch of the Drawee Bank situated at Delhi would confer jurisdiction on the courts at Delhi. It was observed, in the said order, that in the present case, the cheque for

encashment was issued by a drawee bank located outside the territorial jurisdiction of Delhi and hence, the complaint was not maintainable in Delhi. It was also held that mere issuance of notice in Delhi would not vest jurisdiction on the courts at Delhi. In revision, the learned ASJ upheld the decision of the learned Metropolitan Magistrate and dismissed the revision petition preferred by the petitioner.

4. Learned counsel for the petitioner submits that the impugned order dated 10.7.2009, upholding the judgment of the learned Metropolitan Magistrate dated 20.3.2009 is erroneous inasmuch as the courts below failed to consider the fact that in the case of **K. Bhaskaran vs. Sankaran Vaidhyan Balan & Anr.,** reported as (1999) 7 SCC 510, it was held by the Supreme Court that the following acts were the necessary components for the offence under Section 138 of the Act to be constituted :

(i) drawing of the cheque,

(ii) presentation of the cheque to the bank,

(iii) returning the cheque unpaid by the drawee bank,

(iv) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount and,

(v) failure of the drawer to make payment within 15 days of the receipt of the notice.

It is urged that the aforesaid decision had made it clear that it was not necessary that all the above five acts ought to have been perpetrated at the same locality and it is possible that each of those five acts could have occurred at five different localities and that any one of the courts exercising jurisdiction in those five local areas could then have become the place of trial for the offence under Section 138 of the Act.

5. Learned counsel for the petitioner further submits that reliance placed by the courts below in the case of **M/s Harman Electronics (P) Ltd. vs. M/s National Panasonic India Ltd.,** 156 (2009) DLT 160 (SC) is misplaced, as in the aforesaid decision, it was particularly noticed that the complaint was completely silent on the fact whether the cheques were presented at Chandigarh or not. It is stated that in the aforesaid case, as the parties were carrying on business at Chandigarh, the transactions took place at Chandigarh, the cheques were issued at Chandigarh, the Supreme Court had observed that it had no option but

to presume that the cheques were also presented at Chandigarh and dishonour of the cheques took place at Chandigarh, hence mere sending of a demand notice from Delhi would not vest jurisdiction on Delhi courts to take cognizance under the Act. It is the contention of the counsel for the petitioner that unlike the facts in the case of **M/s Harman Electronics** (supra), in the present case, mere issuance of a legal notice by the petitioner/complainant from Delhi alone does not confer territorial jurisdiction on Delhi courts, rather the aforesaid act combined with the act of presentation of cheque for encashment would confer such jurisdiction. He submits that the petitioner has filed an additional affidavit, wherein it is stated that the loan agreement was executed at New Delhi and that the loan was disbursed to the respondent from the account of the petitioner from New Delhi.

6. Counsel for the petitioner further states that the cheques in question issued by the respondent were payable at par at all branches of the drawee bank because of the core banking system adopted by banks in the country, thus entitling an outstation cheque to be paid at par at all the branches of a drawee bank in any part of the country. He submits that the cheques in question were presented at the bank of the petitioner at New Delhi for encashment, through the clearance house of the Reserve Bank of India, and were dishonoured by the bank of the respondent at New Delhi and returned unpaid to the petitioner through its bank at New Delhi with the remarks "insufficient funds". Hence, it is canvassed that contrary to the findings of both the courts below, territorial jurisdiction would vest in the courts at Delhi.

7. The question of territorial jurisdiction vesting in the Courts in Delhi, in the context of complaints filed under Section 138 of the Act came up for consideration before this Court in a batch of matters, lead matter being **M/s Religare Finvest Ltd. vs. State & Anr.** Crl.Rev.P.No.179/2009, reported as 173(2010) DLT 185. In the aforesaid case, after examining a number of judgments cited by both sides on the issue of territorial jurisdiction including **K. Bhaskaran vs. Sankaran Vaidhyan Balan and Anr.** reported as (1999) 7 SCC 510; **Trisuns Chemical Industry vs. Rajesh Agarwal and Ors.** reported as (1999) 8 SCC 686; **Shri Ishar Alloy Steels Ltd. vs. Jayaswals NECO Ltd.** reported as 2001 (3) SCC 609; **Lok Housing and Constructions Limited vs. Raghupati Leasing and Finance Limited and Anr.** reported as 100

(2002) DLT 38; **Mosaraf Hossain Khan vs. Bhagheeratha Engg. Ltd.** reported as (2006) 3 SCC 658; **Smt. Shamshad Begum vs. B. Mohammed** reported as 2008 (13) SCALE 669; **Rajiv Modi vs. Sanjay Jain** reported as V (2009) SLT 725; **ICICI Bank Ltd. vs. Subhas Chand Bansal** reported as 160 (2009) DLT 379; **Achintya Mandal vs. Chaitanya Agro Products & Ors.** reported as 2009 (108) DRJ 471; **M/s Harman Electronics Pvt. Ltd. vs. M/s National Panasonic India Ltd.** reported as 2009 II AD SC 21; **Religare Finvest Limited vs. Sambath Kumar A** reported as (2010) JCC (NI) 266 and **Patiala Casting P. Ltd. & Ors. vs. Bhushan Steel Ltd.** reported as 2010 IV AD (CRL)(DHC) 266, this Court had held as below:-

> "15. As regards the submission of the counsel for the respondent that territorial jurisdiction vests in a Court in whose jurisdiction, the major portion of the cause of action arises, i.e., the locality where the bank of the accused which has dishonoured the cheque is situated, the Supreme Court has clarified in the case of **K. Bhaskaran** (supra), that the locality where the bank of the accused, which has dishonoured the cheque, is situated cannot be regarded as the sole criteria to determine the place of offence and that a place, for the purpose of invoking the provisions of Section 138 of the Act, would depend on a variety of facts. Pertinently, the term used by the Supreme Court in the aforesaid case for completing the offence under Section 138 of the Act is "acts" and not "cause of action". The said position emerges clearly from a bare reading of paras 11, 14 and 16 of the aforesaid judgment reproduced hereinabove. Therefore, this Court is not inclined to agree with the submission of the counsel for the respondent that the major portion of the cause of action in the present case arose only after the cheque issued by the respondent/ accused was forwarded by the banker of the petitioner/ complainant to the banker of the accused, and where, on presentation, the cheque was dishonoured, which in the present case, is situated not in Delhi, but in Pune.
>
> 16. It is clear from the provision itself that an offence under Section 138 would not be completed with the dishonour of the cheque. Rather, it attains completion only with the failure of the drawer to pay the cheque amount within the expiry of the fifteen

> days after the legal notice is served upon the drawer of the cheque/s whose cheque/s have been dishonoured. As noted above, the offence under Section 138 of the Act can be completed only with the concatenation of a number of acts, the acts being, drawing of the cheque, presentation of the cheque with the bank, returning of the cheque unpaid by the drawee bank, giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, and failure of the drawer to make payment within 15 days of the receipt of the notice. It is not essential that all the acts should be committed at the same locality. It is quite possible that all the five acts are perpetrated in five different localities. In such a situation, any one of the courts exercising jurisdiction in one of the five localities can become the place of trial for the offence under Section 138 of the Act. At the stage of entertaining a complaint under Section 138 of the Act, the Court is only required to arrive at a prima facie opinion as to the territorial jurisdiction, on the basis of the averments made therein, without launching into a fact finding mission as to their correctness or otherwise.
>
> XXXX
>
> XXXX
>
> 25. From the aforesaid facts and circumstances, there appears no ambiguity on the aspect of the right of the petitioner/ complainant to file a complaint in a Court having jurisdiction in the context of the five acts mentioned in the case of **K. Bhaskaran** (supra). In the present case, as noted above, a substantial part of the cause of action for filing of the complaint by the petitioner/ company against the respondent/accused under Section 138 of the Act, prima facie appears to have arisen within the jurisdiction of the courts in Delhi. However, it is clarified that if after taking cognizance, the respondent/accused is able to place such material facts on the record which demonstrate that 0020 the Courts in Delhi do not have the territorial jurisdiction to entertain the complaint, the learned Metropolitan Magistrate shall still have a free hand to ascertain the truth of the allegations made by the petitioner/complainant and arrive at a different conclusion."

8. On a plain reading of the principles laid down in the aforesaid case, it is clear that the two acts of presentation of the cheque and issuance of legal notice from Delhi, constitute two of the five acts contemplated by **K. Bhaskaran vs. Sankaran Vaidhyan Balan & Anr.** (supra). Further, the petitioner/complainant claims that the loan agreement was executed at Delhi and the loan was disbursed to the respondent, from the account of the petitioner, from New Delhi. Hence this court is inclined to agree with the petitioner that territorial jurisdiction would vest in Delhi.

9. Admittedly, the cases were at the pre-summoning stage and evidence had yet not been recorded by the learned Metropolitan Magistrate. On this point, this Court has already held in the case of **M/s Religare Finvest Ltd. vs. State & Anr.** (supra) that the Magistrate taking cognizance of an offence must not necessarily have the territorial jurisdiction to try the case. The observations made in this context in the aforesaid judgment are reproduced hereinbelow:

> **"24. As discussed above, the Magistrate taking cognizance of an offence must not necessarily have the territorial jurisdiction to try the case as well. Only when an enquiry or trial begins, does the jurisdictional aspect become relevant.** In fact, after taking cognizance of the offence, the Magistrate may have to decide as to which court would have the jurisdiction to enquire into the case and such a situation can arise only during the post-cognizance stage. **At the pre-cognizance stage, the Magistrate has only to examine the averments, as set out in the complaint and not more, for *prima facie* arriving at a decision as to whether some of the acts essential for completing an offence under Section 138 of the Act were done in the territorial jurisdiction of that Court.** In the present case, having perused the complaint filed by the petitioner/ complainant without ascertaining the correctness of the allegations made therein, prima facie it has to be held that a part of the cause of action has arisen in Delhi and the same is not based solely on the issuance of a legal notice by the petitioner/ complainant to the respondent/accused from Delhi, but some other acts done prior thereto, as set out in para (3) hereinabove."
>
> (emphasis added)

10. Insofar as the judgment in the case of **Shri Ishar Alloy Steels Ltd. vs. Jayaswals Neco Ltd.,** reported as (2001) 3 SCC 609 and referred to by both the courts below is concerned, it was held by this Court in the case of **M/s Religare Finvest Ltd.** (supra) that the aforesaid judgment did not deal with the question of territorial jurisdiction at all. Rather, the point of discussion was on the meaning of the term, "the bank", as mentioned in clause (a) of the proviso to Section 138 of the Act and whether such a bank would take within its fold any bank, including the collecting bank of the payee of the cheque, for the purposes of examining the validity of the cheque under the Act. The question of territorial jurisdiction to entertain a complaint by a particular court was not under consideration of the Supreme Court in the aforesaid case. Hence, reliance placed on the aforesaid judgment by the courts below, is misconceived.

11. Further, the judgments in the cases of **ICICI Bank Ltd. vs. Subhash Chand Bansal,** reported as 160 (2009) DLT 379 and in Crl.Rev.P. No. 151 of 2009 entitled **HDFC Bank vs. Salamuddin Ahmed,** decided on 15.05.2009 by coordinate benches of this Court and relied upon by the learned ASJ, appear to be based on facts similar to those in the case of **M/s Harman Electronics (P) Ltd.**(supra). As in both the aforesaid cases, the facts have not been dealt with in detail, they cannot be made applicable to the present cases in hand where the fact position appears to be quite different.

12. Furthermore, in light of the averments contained in the additional affidavit filed by the petitioner, the petitioner is justified in stating that since the matter was still at the pre-summoning stage, the petitioner-company was not heard by the learned MM and had it been afforded an opportunity to be heard, it could have filed such an additional affidavit along with the supporting documents in the trial court, so as to satisfy the court that it had the territorial jurisdiction to proceed with the complaint filed by the petitioner. Reliance can be placed on Crl. M.C. 50 of 2010 entitled **Hartaj Singh v. Godrej Agrovet Ltd. & Anr.,** decided by a coordinate bench of this court on 31.05.2010, wherein at the pre-summoning stage, the complainant (respondent in that case) could not file an additional affidavit and supporting documents to make out a case of territorial jurisdiction. The Single Judge in that case held that if objections as to lack of territorial jurisdiction were raised at the pre-summoning

stage, the complainant could have filed an additional affidavit by way of evidence along with supporting documents to take a categorical stand and justify its stand that the criminal courts in Delhi were vested with territorial jurisdiction to entertain the complaint.

13. In the instant cases, when the learned counsel for the petitioner has filed additional affidavits along with the relevant documents and has taken a clear and categorical stand with regard to additional acts relevant for the purpose of deciding the issue of territorial jurisdiction, this Court is inclined to agree with him that the allegation made in the complaint, when read in conjunction with the additional affidavit, would *prima facie* show that there vests territorial jurisdiction in the court at New Delhi. It is further relevant to note that in case the respondent/accused enters appearance before the court below after being summoned, he shall still have a right to take a plea with regard to the aspect of territorial jurisdiction of the court by placing such material facts on record, as may be considered necessary at that stage. Learned Metropolitan Magistrate would then be in a position to ascertain the truth of the assertions made by the petitioner/ complainant and could then arrive at a different conclusion.

14. In view of the above, the present petitions are allowed and the impugned orders are set aside. The cases are remanded back to the trial court with directions to proceed further and deal with the complaint of the petitioner filed under Section 138 of the Act in accordance with law. The petitioner shall appear before the learned Metropolitan Magistrate on 04.04.2011 at 2.00 PM for further proceedings.

15. It is however made clear that while passing the present order, this Court has refrained from dealing with the arguments urged by the learned counsel for the petitioner on the issue of the core banking system adopted by banks in the country, which requires outstation cheques to be paid at par at all the branches of a drawee bank in any part of the country, which as per the petitioner, is an additional ground for conferring territorial jurisdiction on courts at Delhi, for the reason that, without going into the merits of the aforesaid argument, this Court finds that there exist other grounds which are considered sufficient to hold that, on a prima facie view, courts at Delhi would be vested with territorial jurisdiction to entertain the complaint filed by the petitioner under Section 138 of the Act.

A copy of this order be forwarded by the Registry forthwith to the trial court for information.

ILR (2011) III DELHI 606
FAO

BALLABH DAS AGGARWAL (DECD.) ....APPELLANT

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(MOOL CHAND GARG, J.)

FAO NO. : 383/1980 DATE OF DECISION: 28.02.2011
FAO NO. : 423/2000

Requisition and Acquisition of Immovable Property Act, 1952—Section 8—Entitlement to rent on a residential premises used by Government for running offices—The Appellant contended that they were entitled to compensation/rent as was applicable to commercial property as it was used for running offices—Finding of the arbitrator that the property was a residential and not commercial premise-also contended that property was used for commercial purposes even if initially it was residential. Held—Under Section 8 the term "for the use and occupation of the property" does not mean the current use of the property but the initial purpose/usage for which the property was constructed—The appellant therefore not entitled to enhanced rent.

I would like to observe here that the term "for the use and occupation of the property" does not mean the current use of the property i.e the commercial purpose for which the

respondents were using the property. The meaning that the language conveys is the initial purpose/usage for which the property was constructed and that is residential. Hence in my view, the appellants have totally misinterpreted the language of Section 8 of Act and therefore, cannot take the benefit of it. **(Para 27)**

Important Issue Involved: Under Section 8 of the Requisition and Acquisition of Immovable Property Act, 1952, the term "for the use and occupation of the property" does not mean the current use of the property but the initial purpose/usage for which the property was constructed.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. Sandeep Sethi, Sr. Advocate with Mr. Pawanjit S. Bindra, Mr. Rohit Kumar, Mr. Sindhu Sinha, Advocates.

FOR THE RESPONDENTS : Mr. Jaswinder Singh, Advocate.

CASES REFERRED TO:

1. *Rao Narain Singh (Dead) by L.R.s* vs. *UOI*, AIR 1993 SC 1557.
2. *Naresh Chandra Jain & Ors* vs. *UOI*, decided on February 9,2000 in suit No 580/77.

RESULT: Writ Petition allowed.

MOOL CHAND GARG, J.

1. Both these appeals seek enhancement of claim towards rent/ compensation of the property bearing No.4, Tolstoy Marg, New Delhi (hereinafter referred to the 'said property') requisitioned by the Government for running its offices for different periods in accordance with the provisions contained under the Requisition and Acquisition of Immovable Property Act, 1952 (hereinafter referred to as "the Act").

2. Briefly stating the facts of this case are that the said property measuring about 13485 sq. ft. was first requisitioned by the Delhi Administration on 07.08.1968 for housing offices of CPWD. On 15.06.1974, the said property was de-requisitioned and to determine ˇthe compensation to be paid to the appellants for the aforesaid period, Shri P.L.Singla, ADJ was appointed as Sole Arbitrator. By his award dated 30.04.1973, Shri P.L.Singla held that the appellants were entitled to monthly compensation of Rs.20,000/- along with Rs. 10,000/- as charges for repairs etc. for restoring the said property to its original shape, approximately as awarded at that time were at Rs. 1.50/- per square ft. per month. The period of requisition was 07.08.1968 to 15.06.1974.

3. The appeals now concern to the period 15.03.1977 to 31.12.1996 though the appellants do make reference to the award of Sh. P.L. Singhla for the purpose of contending that the rate of rent as fixed by Sh. P.L. Singhla could be taken as a basis for fixing reasonable compensation of the rent/compensation amount which has not been done by the Arbitrators in their case. Hence they seek enhancement of compensation in these two appeals. According to the appellants they were entitled to rent/ compensation for various periods as under:

Period	Rate
15.03.1977 to 14.03.1982	Rs. 7 per sq. ft. plus service charges of Rs. 2696/-
15.03.1982 to 14.03.1987	Rs. 25 per sq. ft. interest @ 18% p.a.
15.03.1987 to 14.03.1992	Rs. 40 per sq. ft. per month
15.03.1992 to 14.03.1994	Rs. 80 per sq. ft. + 76 lacs for damages
15.03.1994 to 31.12.1996	Rs. 400 per sq. ft. as damages and same amount for remedying the damages.

4. The rent/compensation has been fixed by the arbitrators who were appointed in accordance with Section 8 of the Act for the use and occupation of the aforesaid property in the relevant period. The arbitrators have granted the rent/compensation as under:

Period	Rate
15.03.1977 to 14.03.1982	Rs. 2.50 per sq. ft. plus restoration charges of `20,000/-
15.03.1982 to 14.03.1987	Rs. 4.50 per sq. ft.
15.03.1987 to 14.03.1992	Rs. 8 per sq. ft.
15.03.1992 to 14.03.1994	Rs. 14 per sq. ft.
15.03.1994 to 31.12.1996	Rs. 20 per sq. ft.

5. It is the stand of the appellants that since user of the property was commercial inasmuch as it was used for commercial purpose by the Government for running its offices and the property is situated near the commercial areas, they were entitled to compensation/rent as was applicable to commercial property. It is submitted that they have also led evidence in this regard.

6. Insofar as the first arbitrator, namely, Justice (Retd.) Sh.M.K. Chawla (as His Lordship then was) is concerned, he granted compensation of Rs. 2.50 per sq. ft. and Rs.20,000 towards restoration. It has been observed:

> "16. It is not disputed that Shri P.L. Singla, Addl. District Judge awarded the compensation for this very property at `20,000/- per month from the date of the requisition till the time the property remained under requisition with the Collector. From the perusal of the certified copy of his award Ex.PW.10.10/D,. I find that the petitioners have led evidence to show that the market rate of rent of similarly situated properties in the area at that time was Rs. 2.50 per sq. ft. per month, besides 10ps. per sq. ft. as service charges. The learned Arbitrator after discussing the relevant evidence on the subject fixed the rents stated above and also awarded and amount of Rs. 10,000/- for restoring the property to its original condition. In the present proceedings unfortunately neither of the party have produced any evidence in respect of the rent of the properties, the lend use of which is residential. **Almost all the witnesses appearing on behalf of the petitioner talk about the rate of rent for the building being used for commercial purpose which to my mind cannot**

> **be made the basis for fixing the fair compensation in respect of the property in dispute.** It is not disputed that since the award of Shri. P.L. Singla dated 30.04.1973 the rate of rents or almost all types of buildings have increased, those buildings may be situated in any part of Delhi. It is respondent's own case that the Ministry of Information and Broadcasting was not able to get any other accommodation in the vicinity of Connaught Place area at any cost. That being the situation, the respondent should also be prepared to pay the reasonable increase in the rent. After careful consideration of the entire material on record, in any opinion, the ends or justice will be fully met if the petitioner is awarded compensation at the rate of Rs. 2.50 per sq. ft. per month for the covered area w.e.f. 15.3.1977 till the time the property remains under requisition with the collector. I do not propose to allow him any compensation on account of service charges as there is no evidence worth reliance that the open space was being used by the office for a regular parking place. No witness has come forward to depose that the office which is being run in the building as in public dealings which required a number of visits frequently visit the property in question. The small portion of the open area, under these circumstances, can be said to form part of the area which was requisitioned for the purpose of locating the office."

7. The second arbitrator Justice (Retd.) P.K. Bahri (as His Lordship then was) framed the following issues:

(1) Whether the award given by Justice(Retd.) M.K.Chawla fixing the rent at the rate of Rs. 2.50 per sq.ft per month is applicable to the period beyond five years?

(2) What should be the rate of charges in respect of the property in question for the period 15th April, 1982 to 14th March 1987 and for the period 15th March 1987 to 14th March 1992, and for the period 18th March 1992 to 14th March 1994?

(3) Are the claimants and respondents 3 to 5 entitled to the whole of the enhanced charges for the period 15th March 1994 to 31st December 1996? If so, at what rate?

(4) Whether the respondents 3 to 5 are entitled to the whole of the enhanced charges for the period prior to 7th September, 1992?

(5) What are the shares of the claimant and the respondent 3 to 5 in respect of the aforesaid periods?

(6) Whether the present proceedings are not maintainable in view of the pendency of the appeal in Delhi High Court against the award given by Justice (Retd.) M.K.Chawla?

(7) Whether the claimants and respondent 3 to 5 are entitled to recover any other charges? If so, what are those charges?

(8) Relief?

8. We are concerned with issue No.2 in this appeal. The evidence led before the sole Arbitrator comprises of statement made by ten witnesses examined on behalf of the appellant. However, none appeared for the respondent.

9. The evidence comprises of rent agreements/ lease etc. showing the rate of rent for various periods. However, the documents which have been relied upon by the appellant pertain to the properties which were of lesser sizes and were commercial.

10. Referring to the evidence which came on record, it has been observed:-

(i) PW1 has relied upon a letter dated 04.02.1977 showing the rate of rent @ Rs.5.50 per sq.ft. in the year 1977. He has also deposed that rent in the year 1979 was Rs. 8.50 to 9 while car parking was @ Rs. 150 to 200 per month.

(ii) PW2 stated to have let-out out a property bearing No. 3/ 90 Connaught Circus @ Rs. 7 per foot in 1977. According to this witness the letting rate was Rs. 8 for his house i.e. 20 Fire Brigade Lane.

(iii) PW4 was examined by the appellant to prove that the premises in question was taken in possession by the respondent/ Government for the purpose of housing the offices of the employees of the Ministry of Information & Broadcasting.

(iv) PW5 has produced a lease deed in respect of flat No.B on 14th floor of Atma Ram house, measuring 941.52 sq.ft. The lease for the said flat was Rs. 3 per sq. ft. for office and Rs. 1.50 for storage space.

(v) According to PW6 who is an architect the rent for covered area towards service charge and open areas and states that the same is based on market conditions.

(vi) PW10 has detailed about the circumstances leading to requisition of property as also about the rental in the area. He also deposed that Ministry of Information & Broadcasting has offered rent @ Rs. 5 per sq. ft. in the covered area. He also states that brokers had quoted Rs. 6 to 7 per sq. ft. He also states that fair rent is Rs. 7 per sq. ft.

11. The contention of the appellant is that rent has been increasing progressively inasmuch as (a) ExPW5/1 dt. 14.6.74 mentions rent at Rs. 3 plus per sq. ft. (b) ExPW3/2 dt. 11.5.76 mentions rent at Rs. 4.25 per sq. ft. (c) ExPW1/1 dt. 4.2.77 shows rent being offered at Rs. 5.50 per sq. ft. (d) Ex.PW2/1 (dt. 17.10.77) and ExPW2/2 (dt. 28.11.77 show that the rent being offered was Rs. 6 per sq. ft. (e) ExPW2 mentions having let out 3/90 Connaught Circus at Rs. 7 in the year 1978 (f) PW1 states that rentals in 1979 were in the range of Rs. 8.50 to Rs. 9 per sq. ft. (g) PW-4 witness from the Ministry of Information & Broadcasting (for whom the property was requisitioned) states that the Ministry was not able to find any place in Connaught Place at any rate and the rates being quoted in Connaught Place in 1976 were in the range of Rs. 5 to 6 per sq. ft. (h) PW-6 mentions in his report (PW6/1) that rental of Rs. 7 was on the basis of similarly located properties let out. On the other hand the respondent along with the reply in the present appeal annexed letter dated 24.9.76 sent by the appellant to the Secretary, Min. of Information & Broadcasting offering the building and mentioning the rent being between Rs. 4 to 5 per sq. ft. then.

12. In FAO 423/2000, for the period 15.03.82 to 14.03.87 the evidence relied upon is a rent agreement dated 22.08.84 in respect of Flat No. 301 in M-47 2nd Floor Connaught Place. The rent was paid @ Rs. 18 per sq. ft. Another rent agreement which has been relied upon is dated 29.06.84 in respect to flat No. 401 & 402 at 5th floor of Connaught

Place comprising of 1140 sq. ft. having rent of Rs. 16 per sq. ft. per month for the period 15.03.87 to 14.03.87. For the period 15.03.87 to 14.03.92 evidence relied upon is a rent agreement dated 1.8.88 in respect of flat No. 305, 1st floor, Tolstoy Marg, New Delhi comprising of 551 sq. ft. having rent of Rs. 26 per sq. ft. per month with enhancement of 35%. Another rent agreement which has been relied upon is dated 15.06.89 in respect of 17 Barakhamba Road, 8th floor New Delhi comprising of 11238 sq. ft. having rent of Rs. 25 per sq. ft. per month with enhancement of 25%. Another rent agreement which has been relied upon is dated 23.11.89 in respect of 12th floor 17, Barakhamba road, New Delhi comprising of 1545 sq. ft. having rent of Rs. 25 per sq. ft. per month with enhancement of 20%. For the period 15.03.92 to 14.03.94 evidence relied upon is a rent agreement dated 19.8.93 in respect of upper ground Floor at 15 K.G. Marg, New Delhi comprising of 972 sq. ft. having rent of Rs. 50 per sq. ft. per month with enhancement of 20%. Another rent agreement which has been relied upon is dated 30.04.93 in respect of flat no. 201 in M-47 Connaught place, New Delhi comprising of 795 sq. ft. having rent of Rs. 31.70 per sq. per month with 9 month advance and enhancement by 15% after 3 years. For the period 15.03.94 to 31.12.96 evidence relied upon is a rent agreement dated 4.11.95 in respect of 1st floor at 15 Barakhamba road, New Delhi comprising of 370 sq. ft. having rent of Rs. 150 per sq. ft. per month with 18 months advance and enhancement of 25% after 3 years.

13. After discussing the evidence, the Arbitrator has made the following observations:-

> The claimants and the respondents 3 to 5 have field copies of rent agreements in respect of the exclusively commercial properties located either across the road or in other nearby commercial areas. A sketch has also been placed on record showing the location of such properties. C-1/XVII is the copy of the rent agreement dated 27th August, 1984 wherein flat No.301 in M-2 at the back of M-47, Connaught Place middle circle, 11th floor was let out at the rate of Rs. 18 per. Sq.ft. per month to be enhanced by 20% after three years with six months advance rent and 18 months deposit and Ex.C-1/XVIII is the rent agreement dated 29th June, 1984 of Flats No. 401 and 402 in the same building on 4th floor being let out for Rs. 16 per sq.ft. per month

with 24 months advance rent and enhancement of 15% after every three years. These instances are of the completely commercial property in total commercial area. **Mere user of the property in question for office purpose would not make the property as such a commercial property. We do not know when these properties were constructed. The property in question is a very old construction of the year 1940 with some renovations taking place in 1975. Still this property was not constructed as a commercial property. So these instances, I am afraid, would not help us in determining the market rent of property in question for the period from 15th March, 1982 to 14th March, 1987.** Thus we have only the fact that the compensation of this property was fixed by Mr. justice M.K. Chawla (retired) at the rate of Rs. 2.50 per sq.ft. per month for the earlier period and would have to see as to what could be reasonable enhancement which can be given on this rate for the period from 15th March, 1982 to 14th March, 1987. Charts have been filed showing the details of the properties of which the agreements have been placed on record. One is the property pertaining to Tolstoy Marg let out at the rate of Rs. 7/- per sq.ft. per month for the year 1982 at No. 1.90, Connaught Circus and a property of Gopal Das Estate, M-3, Connaught Place let out to Daljit Singh at the same rent and another property 202, Deep Building let out to Prof. S.N. H at the rent of Rs. 22 per sq.ft. and another flat 205 205 in the same building let out to J. Karna at the same rent in 1985 and property, Ground Floor 87, Tolstoy marg let out at the rate of Rs. 32 per sq.ft. per month in 1986. All these properties are commercial properties located in commercial areas and thus cannot be treated as basis for fixing market rent of the property in question which is, as already mentioned was constructed as residential house in the year 1940 and is having land use of residential under the law.

Now coming to the period 14th March, 1987 to 13th march, 1992. Ex.C-1/919 is the copy of the rent agreement dated 1st August, 1988 by which first floor of 305, Tolstoy Marg house was let out at the rent of Rs. 26 per sq.ft. per month with enhancement of 35% after five years. C-1/20 is the copy of the

rent agreement dated 15th June, 1989 on 8th Floor of 17, barakhamba Road showing the rent of Rs. 25 per sq.ft. per month with enhancement of 25% after five years. Ex. C-1/21 is the rent agreement dated 23rd August, 1987 on 12th floor in the same building of barakhamba Road having the same rent.

There is a reference to house at kasturba Gandhi Marg house let out at the rental of Rs. 29 per sq.ft. per month in 1991 and premises let out in 606, MDC, Tolstoy Marg at the rent of Rs. 30 per month for the year 1991. Again these properties have no comparison with the property in question for parity of reasons and thus cannot be seen as basis for fixing the market rent of the property in question for the relevant period. One can take judicial notice of the fact that the rents have been increasing every year all over Delhi.

now coming to the period 15th march, 1992 to 14th march, 1994 again the copy of the rent agreement dated 19th August, 1993 has been produced letting out flat on ground floor, 15, kasturba Gandhi Marg at the rent of Rs. 50 per sq.ft. per month with 20% enhancement after three years and Ex.c-1/24 rent agreement dated 30th April, 1993 of Flat No. 201 in M-2, Connaught Place, Middle Circle at the rental of Rs. 31.70 per sq.ft. per month with nine months as advance to be adjusted in next 18 months and 12 month rent as deposit and 15% increase after every three years. Then reference is made to 9th floor, Gopal Das Building letting out at the rental of Rs. 62.50 per sq.ft. per month in 1994 and area in that building let out at Rs. 70 per sq.ft. per month in 1994. In view of the reasons already given, these instances cannot be relied upon for fixing the market rent of the building in question.

Now coming to the last period 15th March, 1994 to 31st December, 1996, the copy of the rent agreement (Ex.C-1/24) dated 4th November, 1995 showing that some portion has been let out at Rs. 150/- per sq.ft. per month with 18 months rents in advance and 25% enhancement for every three years. Reference is made to C-1/27, Himalaya House let out at the rate of `100 per sq.ft. per month in the year 1996 and 11th floor area let out in

Gopal Das building at the rent of Rs. 75/- per sq.ft. per month in 1996. Again these are the same commercial buildings already referred to earlier and thus cannot be taken as the base for fixing market rent of the property in question.

14. It has been observed by the Arbitrator that from the evidence led by the parties it was apparent that no evidence regarding payment of rent/compensation with respect to any residential property was led by the appellant. They only relied upon rent payable for commercial purposes in the vicinity of the property in question and had been harping upon their plea that since the user of the property was for running Government offices, they ought to have been paid commercial rent.

15. The Arbitrator further observed that on that side of the road where the property in question was located, adjacent buildings were also constructed as residential houses. Though it was not disputed that across the road on the other side commercial buildings have come up during the last few years but the locality on that side of the road where the said property was located remained residential, hence according to the arbitrator there cannot be any comparison with the rent being charged for the commercial properties in the exclusively commercial area like across the road or in inner or outer circle of Connaught Place and in other commercial localities. The appellants and the respondents 3 to 5 though laid emphasis on the open area available in the property in question for parking the vehicles but according to the Arbitrator those open areas were left according to the building bye laws under which the residential house was constructed and they were part and parcel of the covered area and were not an independent area which could be separately let out.

16. The arbitrator also observed the vital differences between the commercial properties of which instances have been given and the property in question. These were as follows:-

> 35. Those are the properties built in commercial properties in duly sanctioned commercial places whereas the properties in question is constructed as a residential house as its sanctioned use is 'residential' only.
>
> 36. The property in question is a very old construction of 1941 with some renovations done in 1975 while the commercial properties seem to be constructed quite recently.

37. The instances of letting are of small commercial areas while the letting area in this house is quite large.

38. There are varied services provided in said commercial multi-storied commercial buildings while no such services were provided in this house.

39. The maintenance of house was not the responsibility of the owners whereas such is not the case with letting of other commercial properties.

40. The liability to pay house tax was again not the responsibility of the owner while that is not the case with owners of other commercial properties.

17. Hence the Arbitrator came to the conclusion that the rent being fetched by such other commercial property cannot be any indication of as to what market rent the property in question could fetch in the relevant periods. Further the parties have not brought on record any instance where similar type of property might have been let out for similar purpose and is fetching rent as what appellants and respondents 3 to 5 claim.

18. The arbitrator had also emphasized on the fact that Sh.P.L. Singhla, Addl. District judge, who was the first arbitrator appointed to fix the compensation for this property for the period for which Delhi Administration had requisitioned the building, had fixed Rs. 20,000/- per month as the compensation which comes to approximately Rs. 1.50 sq. ft. The owner had not challenged the said order although the Government had filed an appeal against that order, which appeal was pending at the relevant time. It is informed that the said appeal has now been dismissed.

19. Thus, keeping in view all the facts discussed above, the Arbitrator fixed Rs.4.50/- per sq.ft. per month as compensation for the period 15th March, 1982 to 14th March, 1987 and Rs. 8/- per sq.ft. per month as the compensation for the period 15th March, 1987 to 14th March, 1992 and Rs. 14/- per sq.ft. per month as the compensation for the period 15th march, 1992 to 14th March, 1994 and Rs. 20/- per sq.ft. per month as the compensation for the period 15th March, 1994 to 31st December, 1996.

20. Before me, the appellants are maintaining their stand as taken before the arbitrator and submit that the arbitrator has failed not only to consider the pleadings but also the evidence on record inasmuch as appellants had specifically averred in para 17 (v) of the claim petition that the rent in the locality was Rs. 7 per sq ft as the prevalent rent in the adjourning buildings was at the rate of Rs. 6 to 7 per sq ft. and there was no denial of that fact in the reply initially filed by the respondents. Though, the reply was later amended but still no denial was made. The appellants further submit that they had also led evidence to corroborate the specific averment made in the claim petition. However, neither the evidence was rebutted nor the witnesses were cross-examined on that aspect.

21. The appellants submit that the most important evidence i.e PW-4, S.Harcharan Singh – Research Officer, Ministry of Information and Broadcasting- respondent No 2 for whom the premises were requisitioned had stated that the rentals in Connaught Place ranged from Rs. 5 to 6 per sq. ft., however there was no cross –examination of the said witness on that aspect rather the Arbitrator ignored that evidence.

22. The appellants also submit that the respondents have annexed a copy of the letter along with their reply which proves the fact that an offer had been made by the appellants to respondents to let out the premises at Rs. 4 to 5 per sq. ft and that was being negotiated in Sept. 76 before requisitioning of the property.

23. The appellant further submit that whether the premises were residential or commercial in nature they were used for commercial purpose by respondent No 2 and it was also on record that modifications etc were carried out in the building to be used as an office. Hence, it goes beyond comprehension that though the building was used as an office but commercial rates could not be applied as the premise was initially residential.

24. The appellants also submit that rules of natural justice have been violated and the compensation had been fixed without regard to the location of the building, its condition and the prevalent market rent. Further the appellants submit that even the compensation awarded by the Arbitrator Shri P.L.Singla was on the basis of a lease deed for use of the premises as commercial and not residential.

25. I have heard the parties and have also perused the records, the impugned awards as well as the written submissions and the judgments relied upon by both the parties. The only ground taken by the appellants in their written submission is that though the building was residential in nature but was used for commercial purpose by the respondents, hence appellants should be compensated in terms of commercial rates prevalent in the adjoining areas. The appellants have also relied upon a Single Bench judgment in **Naresh Chandra Jain & Ors Vs UOI,** decided on February 9,2000 in suit No 580/77 to further substantiate their point. However the facts of the case relied upon by the appellants are different from the case in hand inasmuch as in the abovementioned case the respondents had agreed with the appellants through execution of lease agreement and in various correspondences exchanged that they would pay the rent at commercial rates though the building was designed and constructed for residential purpose but the same is not the case in the instant case. In the instant case respondents never agreed to pay rent according to commercial rates nor did they execute any lease agreement for the same.

26. The appellants have also argued that Section 8 of the Act states that the amount of compensation payable should be as would be made payable for the use and occupation of the property. Therefore, since the property was used for commercial purpose the compensation payable should be according to commercial rates. However when we read through the language of the Section 8 of the Act, the argument of the appellant does not seem correct. The relevant Section is produced hereunder:-

> "8. 1) Where any property is requisitioned or acquired under this Act, there shall be paid compensation the amount of which shall be determined in the manner and in accordance with the principles hereinafter set out, that is to say,-
>
> (a) where the amount of compensation can be fixed by agreement, it shall be paid in accordance with such agreement ;
>
> (b) where no agreement can be reached, the Central Government shall appoint as arbitrator a person who is, or has been, or is qualified for appointment as, a judge of a High Court;
>
> (c) the Central Government may, in any particular case, nominate a person having expert knowledge as to the nature of the property requisitioned or acquired to assist the arbitrator and where such

> nomination is made, the person to be compensated may also nominate an assessor for the same purpose;
>
> (d) at the commencement of the proceedings before the arbitrator, the Central Government and the person to be compensated shall state what in their respective opinion is a fair amount of compensation.
>
> (e) the arbitrator shall, after hearing the dispute, make an award determining the amount of compensation which appears to him to be just and specifying the person or persons to whom such compensation shall be paid; and in making the award, he shall have regard to the circumstances of each case and the provisions of sub-sections (2) and (3), so far as they are applicable;
>
> (f) when there is any dispute as to the person or persons who are entitled to the compensation the arbitrator shall decide such dispute and if the arbitrator finds that more persons than one are, entitled to compensation, he shall apportion the amount thereof amongst such persons;
>
> (g) nothing in the Arbitration Act, 1940 shall apply to arbitration under this section.
>
> (2) The amount of compensation payable for the requisitioning, of any property shall, consist of subject to the provisions of sub-sections (2A) and (2B), consist of-]
>
> **(a) a recurring payment, in respect of the period of requisition, of a sum equal to the rent which would have been payable for the use and occupation of the property, if it had been taken on lease for that period; and**
>
> (b) such sum or sums, if any, as may be found necessary to compensate the person interested for all or any of the following matters, namely :-
>
> (i) pecuniary loss due to requisitioning ;
>
> (ii) expenses on account of vacating the requisitioned premises;
>
> (ii) expenses on account of reoccupying the premises upon release from requisition; and

(iii) damages (other than normal wear and tear) caused to the property during the period of requisition, including the expenses that may have to be incurred for restoring the property to the condition in which it was at the time of requisition.

(2A) The recurring payment, referred to in clause (a) of sub-section (2), in respect of any property shall, unless the property is sooner released from requisition under section 6 or acquired under section 7, be revised in accordance with the provision of sub-section (2B)-

(a) in a case where such property has been subject to requisition under this Act for the period of five years or a longer period immediately preceding the commencement of the Requisitioning and Acquisition of Immovable property (Amendment) Act,1975-

(i) first with effect from the date of such commencement, and

(ii) secondly with effect from the expiry of five years, thirdly with effect from the expiry of ten years, from such commencement;]

(b) in a case where such property has been subject to requisition under this Act immediately before such commencement for a period shorter than five years and the maximum period within which such property shall, in accordance with the provision of sub-section (1A) of section 6, be released from requisition or acquired, extends beyond five years from such commencement,-

(i) first with effect from the date of expiry of five years from the date on which possession of such property has been surrendered or delivered to, or taken by, the competent authority under section 4, and

(ii) secondly with effect from the date of expiry of five years, and thirdly with effect from the date of expiry of ten years, from the date on which the revision made under sub-clause (I) takes effect;]

(c) in any other case,-

(i) first with effect from the date of expiry of five years from the date on which possession of such property has been

surrendered or delivered to, or taken by, the competent authority under section 4, and

(ii) secondly with effect from the date of expiry of five years, and thirdly with effect from the date of expiry of ten years, from the date on which the revision under sub-c1. (I) takes effect.]

(2B) The recurring payment in respect of any property shall be revised by re-determining such payment in the manner and in accordance with the principles set out in sub-section (1) read with clause (a) of sub-section (2), as if such property had been requisitioned under this Act on the date with effect from which the revision has no be made under sub-section (2A).]

(3) The compensation payable for the acquisition of any property under section 7 shall be the price which the requisitioned property would have fetched in open market, if it had remained in the same condition as it was at the time or requisitioning and been sold on the date of acquisition.]

27. I would like to observe here that the term "for the use and occupation of the property" does not mean the current use of the property i.e. the commercial purpose for which the respondents were using the property. The meaning that the language conveys is the initial purpose/ usage for which the property was constructed and that is residential. Hence in my view, the appellants have totally misinterpreted the language of Section 8 of Act and therefore, cannot take the benefit of it.

28. I would also like to make a reference of the judgment of the Apex Court Judgment in the case of **Rao Narain Singh (Dead) by L.R.s Vs UOI,** AIR 1993 SC 1557,

7. Method of valuation to be resorted to by a court in determining acquired land's just equivalent price, has to, necessarily depend on the nature of evidence adduced by parties in that regard. When, in a given case, the parties produce evidence of sales relating to the acquired land or lands in the vicinity of the acquired land and require the concerned court to determine the compensation payable for such acquired land, such court naturally resorts to what is known as 'the Comparable Sales Method' of valuation of land. Indeed, 'Comparable Sales Method' of valuation

of an acquired land is invariably resorted to by every 7 court ever since the Privy Council in **Atmaram Bhagwant Ghadgay v. Collector of Nagpur** regarded that method as one which furnishes 'a healthy criterion' for determining the market value of an acquired land. As regards the acquired land, with the market value of which we are concerned, parties themselves had produced evidence of sales of lands before the arbitrator in order to enable him to determine its market value based on prices fetched for lands under those sales. The same sale deeds are considered by the High Court to find as to which of them could form the basis for determining the market value of the acquired land. It is why, we have now to see, whether the sale deeds relied upon by the High Court to determine the market value of the acquired land did really furnish a proper basis to make such determination by resorting to 'the comparable sales method' of valuation of land.

8. Building potentiality of the acquired land, claimed to be possessed by the acquired land, can assume no significance in the instant case as 'the comparable sales method' of valuation of land is resorted to by the High Court. Such method is resorted to, as the acquired land was found to be comparable in its essential features with land(s) respecting which evidence of certain sale deed(s), was produced. Hence, the contention of the learned counsel for the appellant raised to establish that the acquired land had building potentiality at the time of its acquisition, need not engage our consideration.

9. The High Court, as is seen from its judgment, has examined the sale deeds produced as evidence of comparable sales with a view to find out as to which of them could be taken to relate to a land or lands comparable to the acquired land. Such examination was necessary to find whether the land covered under a genuine sale deed was basically similar to the acquired land. If so found, it would not be difficult for the Court to hold that the price fetched for such land could be regarded as the price of the acquired land, although some amount may have to be either added to sale price or deducted out of the sale price in balancing certain factors not common to the land(s) sold and the land

acquired.

29. Thus what could be gathered from the above judgment is that the appellants in order to seek enhancement of compensation should have put evidences relating to the properties which had been acquired in similar fashion in the near vicinity and the rents fixed for such properties, so that the court can use'the Comparable Sales Method' to fix the actual rent for the property. In the alternative the appellants should have led evidence of payment of rent/compensation in respect of a similar property which was a residential property as the case in hand, may be used for commercial purposes. However, the appellants have put no such evidences of the acquired buildings in the vicinity or evidences which could match–up appellants. case inasmuch as no comparable evidence of a residential property which might have been acquired in a similar fashion by the respondents has been let on record.

30. Thus in the absence of any such evidences which would enable the Arbitrator to use 'Comparable Sales Method' in computing the compensation, the decision given in above two appeals taking into consideration all the circumstances i.e. nature and permissible user of the property as per the sanctioned plan and giving reasonable increase from time to time, the Arbitrator has fixed reasonable rent/compensation which does not call for any further enhancement. From the award given by the arbitrator it is apparent that they have given periodical rise in the amount of rent/compensation as awarded to the appellants inasmuch as, the rate of rent/compensation ranges from Rs. 2.50 sq.ft. for the period 15.03.1977 to 14.03.1982 to Rs. 4.50 sq.ft. for the period 15.03.1982 to 14.03.1987, Rs. 8 per sq. ft. for the period 15.03.1987 to 14.03.1992, Rs. 14 per sq. ft. for the period 15.03.1992 to 14.03.1994, and Rs. 20 per sq. ft. for the period 15.03.1994 to 31.12.1996.

31. Therefore, in view of the aforesaid, neither I find any infirmity in the awards passed by the arbitrator nor I find this to be a case for enhancement of compensation. Hence the appeals are dismissed with no orders as to costs.

33. TCR be sent back along with a copy of this order.

C.Ms.3299/89 & 5954/009 in FAO 383/1980

C.M.2706/2009 in FAO 423/2000

Dismissed as infructuous.

ILR (2011) III DELHI 625
RFA

THE NEW INDIA ASSURANCE CO. LTD. ....APPELLANT

VERSUS

M/S. T.T. FINANCE LTD. & ORS. ....RESPONDENTS

(VALMIKI J. MEHTA, J.)

RFA NO. : 211/2001 DATE OF DECISION: 28.02.2011

Code of Civil Procedure Code, 1908—Section 96—Appeal by insurance company against finance Company on grounds of lack of privity of contract and insurable interest—Respondent financed a vehicle and later took it back on not being paid the installments—Gave it to Respondent No.2 under hire-purchase agreement—Accident resulted in loss of vehicle—Claim for insurance—Appellant contended-lack of privity of contract with them—Respondent was not the owner of the vehicle, having no insurable interest in the vehicle. Held—Contract of insurance entered into by Appellants with Respondent—Name of the loanee in cover note—Only an identification of cover note—No lack of privity as contended—Respondent had the right to take possession of the vehicle on default in making payment—Had insurable interest.

It could not be disputed by learned counsel for the appellant that the cover note/insurance policy was issued by the appellant/insurance company in the name of M/s. T.T. Finance A/c Jagdish Prashad. Merely because after the

name of the finance company it is written "A/c Jagdish Prashad" cannot make any difference because a finance company finances various vehicles at one point of time and the object of writing the name of the loanee/customer by the finance company-insured in the cover note/insurance policy is to identify the relevant cover note/insurance with the specific customer/hirer/loanee out of many who have taken finance from the company. No doubt ordinarily a person who is not party to the contract cannot sue upon the same, however, in my opinion, the facts of the present case clearly show that the contract of insurance was entered into by the appellant/insurance company with the respondent/plaintiff/ finance company, and therefore, I reject the argument of the learned counsel for the appellant that there was no privity of contract of the insurance company with the insured. The Trial Court has also rightly, by giving additional reasons arrived at a finding of fact, and portions of which have been reproduced above, to hold that there was in fact privity of contact between the parties. **(Para 6)**

The question is what is an insurable interest? Insurable interest is not complete ownership. It need not necessarily even strictly be title and interest in the object insured. Insurable interest qua a vehicle policy is such interest in the subject matter of insurance whereby the insured can seek to recover the monetary claim for any damage or loss to the insured vehicle. The Supreme Court in the case of **New India Assurance Co. Ltd. Vs. B.N. Sainani** (1997) 6 SCC 383 has given the meaning of insurable interest as under :-

> "15. The interest of the insured must exist in the case of marine insurance at the time of loss and the assured must have some relation to or concern in, the subject of the insurance. The service which the insurer offers is with reference to the goods and the insurable interest has to be in respect of the goods. To put it in other words, insurable interest in property would be such interest as shall make the loss of the property to cause pecuniary damage to the assured." **(Para 8)**

In the facts of the present case to decide whether the insured had an insurable interest, one will have to see the agreement, Exhibit P5, the hire purchase agreement entered into between the parties. Let us examine the terms of this document to see it any insurable interest can be said to exist in favour of the respondent/plaintiff/insured. In my opinion, there is no doubt at all that there was an insurable interest in favour of the respondent/plaintiff/finance company inasmuch as the finance company had a right to take possession of the vehicle on default of making payment of loan installments and other defaults by the loanee and the value of which vehicle after disposing of, had to be credited to the account of the loanee for adjusting the dues of the respondent/plaintiff/finance company. The following portion of para 14 of the hire purchase agreement is relevant, more particularly sub para (c), and the same reads as under:-

"14. **Rights of Owner on termination**

(a) Repossession On the termination of this Agreement the Owner or its solely authorized agent shall be entitled to enter upon the premises where the product is situated and take possession of the Product without being liable in any matter whatsoever.

(b) Adjustment of sums due

On repossession of the Product the Hirer shall forthwith pay to the Owner all Hire Charges in arrears alongwith any other dues upto the date of repossession by the Owner. All costs and charges payable under this Agreement including the cost of repossession and other incidental costs and costs incurred in putting the Product in a proper state of repair will be due and payable by the Hirer to the Owner. It is expressly agreed that in no event will any sum already paid under the provisions of this Agreement be refundable by the Owner to the Hirer.

(c) Sale of Product

Upon repossession of the product the Owner shall have the sole right to sell the product and in the event of any short fall between the sum of the sale proceeds and any sum due to the Owner under this Agreement the amount of such shortfall shall be paid by the Hirer to the Owner on demand and in the event of delay the Hirer shall continue to pay instalments of Hire Charges as stipulated herein. The Hirer shall render all necessary assistance and execute and handover all necessary papers and documents as may be required by the Owner to effect such sale.

(d) Payment of Instalments

Upon this Agreement being terminated the Hirer shall pay to the Owner the Periodical Hire Charge for the remaining period of the Agreement duly discounted at such rate as may be determined by the Owner alongwith other dues including late charge." **(Para 11)**

Important Issue Involved: Where the contract of insurance was entered into by the insurance company with the finance company, it cannot be said that there was no privity of contract of the insurance company with the insured. Insurable interest qua a vehicle policy is such interest in the subject matter of insurance whereby the insured can seek to recover the monetary claim for any damage or loss to the insured vehicle. Where the finance company had the right to take vehicle back in case of default in payment, the finance company had insurable interest in the vehicle.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. Pankaj Seth, Advocate.

FOR THE RESPONDENTS : None.

CASES REFERRED TO:

1. *New India Assurance Company Ltd.* vs. *Chandrakant Bhujangrao Jogdand,* Revision Petition 4387/09 decided in March, 2010.

2. *M/s. ˇOriental Insurance Company Ltd.* vs. *Sham Lal Matoo* AIR 2006 Jammu & Kashmir 103.

3. *United India Insurance Company Ltd. & Ors.* vs. *Sri Balaji Dental Laboratory* 103 (2001).

4. *New India Assurance Co. Ltd.* vs. *B.N. Sainani* (1997) 6 SCC 383.

5. *Gnana Sundaram* vs. *Vulcan Insurance Co.Ltd.* [1931] 1 Comp Cas 365 (Rang).

RESULT: Appeal dismissed.

VALMIKI J. MEHTA, J. (ORAL)

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 17.3.2001 whereby the suit of the respondent/ plaintiff/insured against the appellant/defendant/insurance company was decreed.

2. Before the Trial Court and before this court, there were two principal issues on which arguments were addressed. The first was with ˇrespect to the stand of the appellant of lack of privity of contract of the respondent/plaintiff with the appellant and the second was of the respondent/plaintiff being not the owner of the insured vehicle and hence not having an insurable interest in the vehicle with respect to which claim was filed.

3. The facts of the case are that the respondent/plaintiff a finance company, entered into a lease agreement with one Mr. Jagdish Prashad for a Bajaj Matador Tempo No. DL-1L-A-7297 (make 1994) vide agreement dated 17.2.1994 and thereby financed the vehicle. According to the insured/ respondent/plaintiff since lease installments were not being paid by Sh. Jagdish Prashad, the vehicle was taken back from him and thereafter given to the respondent no. 2, Sh. Prempal Kashyap under a hire- purchase agreement dated 5.4.1995 and which has been exhibited as Ex. P5. The vehicle was involved with an accident on 28.4.1995 resulting in a total

loss of the vehicle. The respondent/plaintiff therefore preferred the claim against the appellant/insurance company/defendant and which having been rejected, the respondent/plaintiff filed the subject suit.

4. The Trial Court after completion of pleadings framed the following issues:-

"1. Whether there is no privity of contract between the defendant no.1 as per submission made in para 2 and 3 of the preliminary objection of the WS of defendant no.1? OPD

2. Whether the plaintiff is a Ltd. Co., the suit has been signed & verified by a duly authorised perons? OPP

3. To what amount is the plaintiff entitled?OPP.

4. Whether the plaintiff is entitled to any interest, if so, at what rate and to what amount?OPP

5. Relief."

5. With respect to the issue of privity of contract, the Trial Court has held as under:-

"The onus of this issue is on the defendant and Ld. counsel for the defendant has stated that there is no privity of contract between the plaintiff and answering defendant no.1 in respect of the suit amount in question and the plaintiff has no locus standi to file the suit against the defendant no.1 in respect of the amount claimed and due against defendant no.2. The defendant no.2 is the insurer of the plaintiff in respect to the insurance policy in question and counsel for defendant no.2 has not challenged the repudiation of the insurance claim and has also not filed any suit challenging the said repudiation of the insurance claim within 12 months from the date of the said repudiation of the insurance claim, the plaintiff has no legal right or authority to challenge the repudiation of the insurance claim on any ground and he has drawn the attention on document Ex.DW1/5 i.e. letter written by the plaintiff do defendant no.1 dated 25.8.95 and Ex.DW2/1 in which it is stated that vehicle was found registered in the name of Sh. Prem Pal Kashyap S/o Sh. Chottey Lal and Ex.DW1/2 and Ex.DW1/3 and D1 i.e. claim form filed by Sh. Prempal Kashyap.

On the other hand Ld. counsel for the plaintiff has strongly opposed the arguments of the Ld. counsel for the defendant and stated that the plaintiff is a Finance Company and vehicle in question was given to one Sh. Jagdish but due to non payment of the installment, Jagdish Prasad handed over the vehicle to the plaintiff vide Ex.PW1/4 and thereafter the said vehicle was given to Sh. Prempal Kashyap vide hire purchase agreement Ex.PW1/5 and he has drawn the attention on the said hire purchase agreement clause 12 & 13 and also drawn the attention on the Ex.P6 i.e. schedule of repayment of the hire purchase agreement & undertaking which was given by Sh. Prempal Kashyap as Ex.P7 and Ex.P8 i.e. letter written by Prempal Kashyap to the plaintiff dated 5.4.95 and Ex.P9 & Ex.P11 i.e. letter dated 9.5.95 written by Prempal to the plaintiff and other Ex.P12 to Ex.P19 and stated that the vehicle has been given to Sh. Prempal Kashyap on the basis of Ex.P5 i.e. hire purchase agreement but the plaintiff was still the owner of the vehicle. So, the defendant has failed to prove this issue and the plaintiff is entitled for the insurance amount.

In consideration of the submissions made by both the counsels, it is not disputed that the insurance was in the name of M/s T.T.Finance (A/c Jagdish Prasad) but as per the exhibited document Ex.P4, he has returned the vehicle to the plaintiff and the said vehicle was given to Sh. Prempal Kashyap vide Ex.P5. I have also perused the clause no.12, termination by hirer of the said agreement at page 5 wherein it is written that 'the hirer may at any time terminate this agreement by returning the product to the owner at the original delivery place. The return of the product shall be at the cost of the hirer and the hirer shall be solely responsible for any damage caused to the product during the course of such return. Upon such termination the hirer shall not be relieved of his obligations to pay any sum then due from him under this agreement including the amounts due to accordance with clause 14(d) hereof nor such termination shall prejudice any claim of the owner or entitle the hirer for the return of any money already paid by the hirer. Clause 13 contemplates termination by owner in the event of (a) Breach by the hirer of any of the terms of this agreement (b) The hirer making default

in payment of any sum payable by him under this agreement. In this only (b) clause is relevant because Prempal has not paid the installment which is mentioned in schedule of payment Ex.P6 & as per Ex.P11 Prempal has written letter to the plaintiff that he surrendered the vehicle in question on his own will because the plaintiff can claim from the insurance company."

6. It could not be disputed by learned counsel for the appellant that the cover note/insurance policy was issued by the appellant/insurance company in the name of M/s. T.T. Finance A/c Jagdish Prashad. Merely because after the name of the finance company it is written "A/c Jagdish Prashad" cannot make any difference because a finance company finances various vehicles at one point of time and the object of writing the name of the loanee/customer by the finance company-insured in the cover note/insurance policy is to identify the relevant cover note/insurance with the specific customer/hirer/loanee out of many who have taken finance from the company. No doubt ordinarily a person who is not party to the contract cannot sue upon the same, however, in my opinion, the facts of the present case clearly show that the contract of insurance was entered into by the appellant/insurance company with the respondent/plaintiff/finance company, and therefore, I reject the argument of the learned counsel for the appellant that there was no privity of contract of the insurance company with the insured. The Trial Court has also rightly, by giving additional reasons arrived at a finding of fact, and portions of which have been reproduced above, to hold that there was in fact privity of contact between the parties.

7. The second issue, and which was very vehemently argued by learned counsel for the appellant, was that the registration certificate with respect to the vehicle was not in the name of the finance company but was in the name of Mr. Prempal Kashyap and therefore since the insurance company was not the owner of the vehicle, there was no insurable interest in favour of the insured entitling the respondent/plaintiff/insured to take out an insurance policy.

Learned counsel for the appellant has very heavily relied upon the decision of the National Consumer Disputes Redressal Commission in the case of **New India Assurance Company Ltd. vs. Chandrakant Bhujangrao Jogdand, Revision Petition** 4387/09 decided in March,

2010. The decision in the case of **Chanderkant Bhujangrao** (supra) however would have no application to the facts of the present case because that was not a case dealing with a finance company taking out an insurance policy with respect to the insured vehicle. Similar is the position with respect to various other judgments which have been cited by learned counsel for the appellant and which I am not reproducing herein as the same do not apply in the facts of the present case.

8. The question is what is an insurable interest? Insurable interest is not complete ownership. It need not necessarily even strictly be title and interest in the object insured. Insurable interest qua a vehicle policy is such interest in the subject matter of insurance whereby the insured can seek to recover the monetary claim for any damage or loss to the insured vehicle. The Supreme Court in the case of **New India Assurance Co. Ltd. Vs. B.N. Sainani** (1997) 6 SCC 383 has given the meaning of insurable interest as under :-

> "15. The interest of the insured must exist in the case of marine insurance at the time of loss and the assured must have some relation to or concern in, the subject of the insurance. The service which the insurer offers is with reference to the goods and the insurable interest has to be in respect of the goods. To put it in other words, insurable interest in property would be such interest as shall make the loss of the property to cause pecuniary damage to the assured."

9. The legal principle applicable qua meaning of an insurable interest will remain the same whether for marine insurance or for motor vehicles. The meaning of insurable interest has been further expounded by a Division Bench of Jammu & Kashmir High Court in the case of **M/s. Oriental Insurance Company Ltd. vs. Sham Lal Matoo** AIR 2006 Jammu & Kashmir 103, wherein the Division Bench reproduced and adapted a paragraph from Banerjee's Law of Insurance and the same reads as under:-

> "13. It may also be advantageous to clarify any cobwebs in this regard by quoting the following passage from Banerjee's Law of Insurance:
>
> "Insurable interest is not synonymous with legal interest. Thus an interest on an agreement to purchase is an insurable interest. A warehouse man who has assumed the obligation to insure the goods while in his possession has an insurable interest. Even the interest of a bailee is sufficient to establish an interest and an unpaid vendor of goods as an insurable interest in the property. Similarly, a husband has an insurable interest in his wife's property and a wife in turn has an insurable interest in the property of her husband. So also a landlord may insure his rent which he may lose through the destruction of his premises, a tenant of premises has an insurable interest founded upon the beneficial enjoyment of the premises, which he loses in the event of their destruction so also a tenant renting a furnished house has an insurable interest in the furniture. Likewise a creditor whose debt is secured by legal or equitable mortgage upon any specific property has an insurable interest in the property mortgaged. A bankrupt remaining in possession of his estate has an insurable interest in it. A man may also insure the profits which he expects from some undertaking or adventure of from the carrying on a business." (Emphasis added)

10. Another relevant judgment is the Division Bench decision of the Andhra Pradesh High Court in the case reported as **United India Insurance Company Ltd. & Ors. vs. Sri Balaji Dental Laboratory** 103 (2001) Company cases 58. Following observations of the said judgment are relevant:-

> "The next question is whether the respondent has an insurable interest in the property. The admitted fact is that the respondent is a lessee and he has mortgaged the leasehold interest to the corporation. Learned counsel for the appellant contended that he being not the owner of the property has no insurable interest in the premises insured, therefore, they are not entitled for the insured amount. In this context reference may be made to the judgment of the **Gnana Sundaram v. Vulcan Insurance Co.Ltd.** [1931] 1 Comp Cas 365 (Rang). The said judgment explains the meaning of "insurable interest". The said judgment reads as follows (pages 369 and 370):
>
> " A man is interested in a thing to whom advantage may

arise or prejudice happen from the circumstances which may attend it and whom it importeth that its condition as to safety or other quality should continue. Interest does not necessarily imply a right to the whole or part of the thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in the subject of the insurance; which relation or concern, by the happening of the perils insured against, may be so affected a to produce a damage, detriment or prejudice to the person insuring. And where a man is so circumstanced with respect to matters exposed to certain risks of dangers as to have a moral certainty of advantage or benefit but for those risks and dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice, from its destruction……..

Only those can recover who have an insurable interest, and they can recover only to the extent to which that insurable interest is damaged by the loss. In the course of the argument, it has been sought to establish a distinction between a fire policy and a marine policy. It has been urged that a fire policy is not quite a contract of indemnity, and that the assured can get something more than what he has lost. It seems to me that there is no justification in authority, and I can see no foundation in reason for any reason, for any suggestion of that kind. What is it that is insured in fire policy? Not the bricks and the materials used in building the house, but the interest of the assured in the subject-matter of insurance, not the legal interest only, but the beneficial interest."

From the passages referred to above, it is clear that the interest need not be an interest of ownership. It can be an interest other than the ownership also. The facts of the said case are that a suit was filed for recovery of an amount under an insurance policy in respect of a house, and the objection that was raised by the insurance company was that the plaintiff is only an agreement

holder and since he has no right of ownership he is not entitled to claim the amount insured. In that context, it was held that an interest need not necessarily be a right to the whole but can be a part. A person is interested in the preservation of a thing and such interest can be insured. The learned judges also held that the insurer can recover an insurable interest and they can recover only to that extent to which that insurable interest is damaged by the loss and not the amount insured as such. In other words, the insurer is entitled to the actual loss or damages sustained and not the amount insured. This judgment is an authority for the proposition that insurable interest need not necessarily be whole interest, it can also be a part of the interest. In our considered view, the right to enjoy the property is transferred and the lessee has interest in part in the leasehold property and he is entitled to continue in possession as long as the lease subsists. His possession should to be disturbed so long as the lease subsists. To enjoy peaceful possession of the premises which he has taken on lease is an interest and it can be said that he has insurable interest in the property. We, therefore, are of the view that the leasehold interest of a lessee is an insurable interest in the property that is insured." (Emphasis added)

11. In the facts of the present case to decide whether the insured had an insurable interest, one will have to see the agreement, Exhibit P5, the hire purchase agreement entered into between the parties. Let us examine the terms of this document to see it any insurable interest can be said to exist in favour of the respondent/plaintiff/insured. In my opinion, there is no doubt at all that there was an insurable interest in favour of the respondent/plaintiff/finance company inasmuch as the finance company had a right to take possession of the vehicle on default of making payment of loan installments and other defaults by the loanee and the value of which vehicle after disposing of, had to be credited to the account of the loanee for adjusting the dues of the respondent/plaintiff/finance company. The following portion of para 14 of the hire purchase agreement is relevant, more particularly sub para (c), and the same reads as under:-

"14. **Rights of Owner on termination**

(a) Repossession On the termination of this Agreement the Owner or its solely authorized agent shall be entitled to

enter upon the premises where the product is situated and take possession of the Product without being liable in any matter whatsoever.

(b) Adjustment of sums due

On repossession of the Product the Hirer shall forthwith pay to the Owner all Hire Charges in arrears alongwith any other dues upto the date of repossession by the Owner. All costs and charges payable under this Agreement including the cost of repossession and other incidental costs and costs incurred in putting the Product in a proper state of repair will be due and payable by the Hirer to the Owner. It is expressly agreed that in no event will any sum already paid under the provisions of this Agreement be refundable by the Owner to the Hirer.

(c) Sale of Product

Upon repossession of the product the Owner shall have the sole right to sell the product and in the event of any short fall between the sum of the sale proceeds and any sum due to the Owner under this Agreement the amount of such shortfall shall be paid by the Hirer to the Owner on demand and in the event of delay the Hirer shall continue to pay instalments of Hire Charges as stipulated herein. The Hirer shall render all necessary assistance and execute and handover all necessary papers and documents as may be required by the Owner to effect such sale.

(d) Payment of Instalments

Upon this Agreement being terminated the Hirer shall pay to the Owner the Periodical Hire Charge for the remaining period of the Agreement duly discounted at such rate as may be determined by the Owner alongwith other dues including late charge."

12. In view of the above, it is quite clear that there did exist an insurable interest in favour of the respondent company with respect to the insured vehicle, and therefore, I do not find any merit in the arguments raised on behalf of the appellant that there was no insurable interest of the respondent/plaintiff so that it could have been insured the subject

vehicle.

13. In view of the above, I do not find any illegality or perversity in the impugned judgment and decree which calls for any interference by this Court in appeal. The appeal is accordingly dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.

ILR (2011) III DELHI 638
W.P.(CRL)

ASHOK CHAWLA ....PETITIONER

VERSUS

RAM CHANDER GARVAN, INSPECTOR CBI ....RESPONDENT

(MUKTA GUPTA, J.)

W.P.(CRL) NO. : 1429/2010 DATE OF DECISION: 28.02.2011

The Official Secrets Act, 1929—Section 13—Code of Criminal Procedure, 1973—Section 91, 173, 207, 208, 227, 228—Indian Evidence Act, 1872—Section 3, 45, 124—Constitution of India, 1950—Article 21—Complaint filed against petitioner under Official Secrets Act—Application filed before trial Court for summoning of documents/reports/final reports prepared by erstwhile IO who carried out investigation of case and was of view that closure report be filed—Application dismissed by trial Court as documents sought by petitioner were not meant to be used against him as they were not relied upon by CBI and petitioner was not entitled to production of said documents—Order challenged in High Court—Held- Final report prepared after investigation is opinion rendered by IO—Said opinion can not bind either his Superior Officer or any

other person much less Court—Opinions of IO are not statements of facts and thus not relevant—These opinions can not be used except for limited purpose of confronting IO as no other witness is bound by it—Before a charge sheet is filed, IO is bound to investigate into all aspects of matter and file a report thereon—During pendency of investigation there is no bar, if on being not satisfied by one officer investigation is transferred to another officer by senior officer and a final report is filed on being satisfied by investigation conducted—Accused can not claim indefeasible legal right to claim every document of Police file—No case made out for issuance of a writ.

The case of the Petitioner is that according to him he believes that DSP Ram Chandra exonerated him and since he had exonerated him the subsequent handing over of the investigation to Inspector Ram Chander Garvan was a reinvestigation and not a further investigation. It is contended that the Hon'ble Supreme Court in **Ram Chandra** (supra) and **Virender Prasad Singh** (supra) has held that under Section 173 (8) Cr.PC the police has a right to further investigate and not reinvestigate. This contention of the Petitioner is at the outset fallacious. In the present case no charge sheet has been filed. A complaint has been filed by Inspector Ram Chander Garvan who is the complainant, along with the list of witnesses and documents. The decision referred to applies in a case where after filing of the charge sheet, that is, a report under Section 173 Cr.PC the investigating agency proceeds to further investigate the matter under Section 173(8) CrPC, when it cannot reinvestigate. Since no charge sheet has been filed under Section 173(2) CrPC the stage of Section 173(8) Cr.P.C. has not arrived. Moreover, before a charge sheet is filed under Section 173 CrPC the Investigating Agency is bound to investigate into all aspects of the matter and file a report thereon. During the pendency of the investigation there is no bar, if on being not satisfied by one officer the investigation

is transferred to another officer by the senior officer and a final report is filed on being satisfied by the investigation conducted. Moreover, in the present case, since it is proceeding as a complaint, no charge sheet under Section 173(2) Cr.P.C. is filed but a complaint has been filed.

(Para 17)

Important Issue Involved: (A) A final report prepared after investigation is an opinion rendered by investigating officer which can not bind either his Superior Officer or any other person much less the Court.

(B) Before a charge sheet is filed under Section 173 Cr.P.C the Investigating Agency is bound to investigate into all aspects of the matter and file a report thereon. During the pendency of the investigation there is no bar, if on being not satisfied by one officer the investigation is transferred to another officer by the senior officer and a final report is filed on being satisfied by the investigation conducted.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. O.S. Bajpai, Sr. Advocate with Mr. V.N. Jha, Advocate.

FOR THE RESPONDENT : Mr. Vikas Pahwa, Standing Counsel for DBI with Mr. Saurabh Soni, Advocate.

CASES REFERRED TO:

1. *Mohammed Ankoos & Ors.* vs. *Public Prosecutor, HC of Andhra Pradesh, Hyderabad* (2010) 1 SCC 94.
2. *Sidhartha Vashisht @ Manu Sharma* vs. *State (NCT of Delhi),* 2010 (6) SCC 1.
3. *Naresh Kumar Yadav* vs. *Ravindra Kumar and Ors.* 2008 (1) SCC 632.

4. *Sunita Devi* vs. *State of Bihar,* 2005 (1) SCC 608.
5. *State of Orissa* vs. *Debendra N. Padhi,* 2005 (1) SCC 568.
6. *Surya Devi Rai* vs. *Ram Chander Rai and others,* 2003 (6) SCC 675.
7. *Om Prakash Sharma* vs. *CBI,* 2000 (5) SCC 679.
8. *Rajesh Prasad* vs. *State of Rajasthan* 1998 (Supp) Cri.L.R.265.
9. *Suptd. & Remembrance of Legal Affairs, West Bengal* vs. *Satyen Bhowmick and others,* 1981 (2) SCC 109.
10. *Navin Ramji Kamani* vs. *Shri K.C. Shekhran, Dy. Chief Controller of Imports & Exports,* 1981 RCC 218.
11. *T.C. Basappa* vs. *T. Nagappa,* AIR 1954 SC 440.

RESULT: Dismissed.

MUKTA GUPTA, J.

1. A complaint under Section 13 of the Official Secrets Act, 1929 (in short 'the OS Act') was filed by Shri Ram Chander Garvan, Inspector of Police, CBI against the Petitioner herein and one Ms. Vijaya Rajgopal. The complaint is pending since 20th November, 2000 and not even a single witness has been examined so far. On the petitioner filing a petition being Criminal M.C. 1927/2009 this Court vide order dated 15th February, 2010 exempted the Petitioner from personal appearance subject to certain conditions and directed the learned Trial Court to expedite the recording of pre-charge evidence and conclude the same within one year from that date. Soon thereafter on 20th February, 2010 the Petitioner moved an application under Section 91 Cr.P.C. for summoning of documents/reports/ final reports before the learned Trial Court. The prayer in the application was not for the supply of documents relied upon by the prosecution but the Final Report-I (FR-I) and Final Report-II (FR-II) prepared by the erstwhile Investigating Officer DSP Ram Chandra who carried out the investigation of the case from September, 1996 to April, 1997. The contention of the Petitioner was that these final reports showed that the searches were motivated and there were circumstances under which the planting of documents cannot be ruled out and therefore the recovery and possessions of the documents itself was in serious doubt. Shri Ram

Chandra DSP, CBI who conducted the investigation from September, 1996 to April, 1997 recorded the statements of the Petitioner, his employees and other income tax Officials and submitted his Final Report – I and further Final Report-II not recommending the prosecution of the Petitioner and the other accused because he was of the view that the recovery of the document itself could not be proved beyond doubt and any further investigation particularly examination of defence personal etc. would not be fruitful. It was thus, the view of the Investigating Officer that a closure report be filed.

2. The learned Trial Court after hearing the arguments dismissed the application of the Petitioner inter alia for the reasons; that no doubt the Court has power to call for the record and peruse the same but the satisfaction has to be of the Court and the accused is entitled to be supplied with the copies of the material used by the prosecution against the accused so that he can defend himself properly. It was held that the documents sought by the Petitioner were not meant to be used against him as they were not being relied upon by the CBI and thus, the Petitioner was not entitled to the production of the said documents. Challenging this order the Petitioner first filed a Criminal Revision Petition bearing No. 381/2010 before this Court which was dismissed as withdrawn vide order dated 3rd August, 2010. The Petitioner has thereafter filed the present petition challenging the impugned order dated 30th April, 2010.

3. Learned counsel for the Petitioner contends that the scope of provision of Section 91 Cr.P.C. is much wider than Sections 207 or Section 208 Cr.P.C. According to Section 91 of the Code, whenever a Court considers that the production of any document or other thing is necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings before the Court, such Court may issue summons to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it. Under Section 91 of the Code, the Court has power to call documents not even relied upon by the prosecution. It is stated that under Section 3 of the Evidence Act a final report prepared by the Investigating Officer is a 'Document'; and the 'Evidence' under the said Section means and includes all documents produced for the inspection of the Court; such documents being called "documentary evidence". The prosecution in this case has taken contrary stands; first stating that no such report was prepared and then taking

legal objections. Once the privilege claimed by CBI of those documents in terms of the CBI manual has been turned down by the learned Trial Court, and the Respondent having not challenged the said finding, the same has attained finality and cannot be allowed to be reopened in this writ petition. The prosecution cannot also claim recourse to Section 124 of the Indian Evidence Act as no public interest would suffer by the production or disclosure of the documents asked for. The CBI manual cannot override the provisions of Cr.P.C. and in any case the same cannot take away the fundamental right of the accused guaranteed under Article 21 of the Constitution of India of a proper defence of his case. Reliance is placed on **Neelesh Jain vs. State of Rajasthan,** 2006 Crl. L.J. 2151 wherein the Court directed production of documents like photos, love letters between the prosecutrix and the accused petitioner, some STD bill slips and the ledger book which were though recovered but not filed by the police along with the charge sheet.

4. It is contended that the prosecution is not expected to collect one-sided evidence and present it to the Court. A fair investigation is the hallmark of rule of law. The right to defend which follows from the fundamental right to 'life' and 'personal liberty' enshrined in Article 21 of the Constitution of India is not an illusionary right but a substantive one. Reliance is place on **Navin Ramji Kamani vs. Shri K.C. Shekhran, Dy. Chief Controller of Imports & Exports,** 1981 RCC 218 and **Rajesh Prasad vs. State of Rajasthan,** 1998 (Supp) Crl.L.R. (Raj.) 265.

5. It is next contended that in case the Final Report-I and II are made available the Petitioner would be in a position to find out whether reinvestigation was conducted or further investigation was conducted. According to the Petitioner a fresh investigation as held by the Hon'ble Supreme Court in **Ramchandran vs. R. Udayakumar**, AIR 2008 SC 3102 and **Virender Prasad Singh vs. Rajesh Bhardwaj,** 2010 (9) SCC 171, is illegal.

6. On the contrary, learned Standing Counsel for the Respondent contends that the jurisdiction under Section 91 Cr.P.C cannot be invoked by the Petitioner at the preliminary stage of framing of the charge. At the stage of framing of charge the Trial Court can only evaluate the material and documents on record placed by the prosecution. It is a settled principle of law that for an order under Section 91 Cr.P.C. the concerned

Court has to look into the necessity and desirability for invoking the provision. The necessity and desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage of framing of charge would not arise since defence of the accused is not relevant at that stage. When the section states of the investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. In so far as the accused is concerned, his entitlement to seek an order under Section 91 would ordinarily not come till the stage of defence. When the section states about the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such prayer for summoning and production is made and the party who makes it, whether the police or the accused. Since at the stage of discharge or framing of charge under Section 227/228 Cr.P.C only the material relied upon by the prosecution has to be looked into, the request made by the accused for producing documents in defence is totally irrelevant in the context of the stage of trial. Reliance is placed on **State of Orissa vs. Debendra N. Padhi,** 2005 (1) SCC 568 and **Om Prakash Sharma vs. CBI,** 2000 (5) SCC 679 to canvass that invocation of Section 91 Cr.P.C at the preliminary stage of trial is not permissible.

7. It is contended that the Petitioner is not entitled to ask for the documents which are not relied upon by the CBI and that the Petitioner is only entitled to the documents which are referred to in Section 207 or 208 Cr.P.C. The right of the accused with regard to the disclosure of documents is a limited right and the accused cannot claim an indefeasible legal right to claim documents of the police file or even the portions which are permitted to be excluded from the documents annexed to the report under Section 173 (2) Cr.P.C. as per the order of the Court. In the present case the complaint was filed under Section 13 (3) of the OS Act and the provisions of Section 208 Cr.P.C. are applicable which reads, "Any documents produced before the Magistrate on which the prosecution proposes to rely" and thus what is referred in Section 208 (iii) are the documents filed along with the complaint under Section 13 (3) of the OS Act and nothing more than that. Sections 207 and 208 Cr.P.C. pertains to the documents which are commonly known as police

report which are to be supplied to the accused with the objective to make him aware of the materials which are sought to be utilized against him. In this regard reliance is placed on **Sidhartha Vashisth @ Manu Sharma vs. State,** 2010 (6) SCC 1, **Suptd. & Remembrance of Legal Affairs, West Bengal vs. Satyen Bhowmick and others,** 1981 (2) SCC 109 and **Naresh Kumar Yadav vs. Ravindra Kumar and Ors.** 2008 (1) SCC 632.

8. It is further contended that the documents referred by the Petitioner are the internal communication between the officers of the Respondent. FR-I and FR-II which are the opinions of the Investigating Officer and the Law Officer and which are not being relied upon by the prosecution, are for the in house use of the CBI, not supposed to be discussed or quoted outside. Reference is made to **Sunita Devi vs. State of Bihar,** 2005 (1) SCC 608. The present petition deserves to be dismissed as the same seeks a relief which cannot be granted by this court in a Writ Jurisdiction.

9. I have heard learned counsel for the parties. The first and foremost issue would be the scope of consideration of the impugned order in a writ petition. The Hon'ble Supreme Court in **Surya Devi Rai vs. Ram Chander Rai and others,** 2003 (6) SCC 675 following the Constitution **Bench in T.C. Basappa vs. T. Nagappa,** AIR 1954 SC 440 observed as under:-

> "14.....That certiorari may be and is generally granted when a court has acted (i) without jurisdiction, or (ii) in excess of its jurisdiction. The want of jurisdiction may arise from the nature of the subject-matter of the proceedings or from the absence of some preliminary proceedings or the court itself may not have been legally constituted or suffering from certain disability by reason of extraneous circumstances. Certiorari may also issue if the court or tribunal though competent has acted in flagrant disregard of the rules or procedure or in violation of the principles of natural justice where no particular procedure is prescribed. An error in the decision or determination itself may also be amendable to a writ of certiorari subject to the following factors being available if the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or disregard of the provisions of law but a mere wrong decision is not amendable to a writ of certiorari."

10. I would now proceed to examine the impugned order passed by the learned Trial Court in the light of the above mentioned decision rendered by the Constitution Bench. The learned Trial Court discarding the plea of privilege raised by CBI, held that from a perusal of the decisions rendered by the Hon'ble Supreme Court and this Court it was clear that copies of all the documents which are to be used against the accused must be supplied to him whether the prosecution terms them to be classified or not. It was held that in the present case the documents sought in the application under Section 91 Cr.P.C. are not being relied upon by the CBI, thus not being used against the accused during the course of the trial and so the accused is not entitled to their production.

11. Section 91 Cr.P.C. states:-

> "(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.
>
> (2) XXXX XXXX XXXX
>
> (3) Nothing in this section shall be deemed-
>
> (a) to affect sections 123 and 124 of the Indian Evidence Act, 1872,(1 of 1872) or the Bankers' Books Evidence Act, 1891,(13 of 1891) or
>
> (b) XXXX XXXX XXXX"

Thus, this Section provides that whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons or such officer a written order, requiring the person in whose possession or

power such documents are believed to be to attend and produce the same.

12. The stage of trial in the present case is pre-charge evidence. This Court vide order dated 15th February, 2010 while permitting the Petitioner to withdraw the petition that is Criminal M.C. 1927/2009 directed that the pre-charge evidence should be recorded expeditiously and to be concluded within one year from that date. The case of the Petitioner is that he requires the said FRs for the purpose of his defence to show that he has been falsely implicated. A final report prepared after investigation is an opinion rendered by the Investigating Officer. The said opinion cannot bind either his Superior Officer or any other person much less the Court. By the impugned application the Petitioner does not seek the statements of the witnesses but the final opinions of the Investigating Officer. These opinions are not statements of facts and thus not relevant. They are not even relevant under Section 45 of the Evidence Act which makes the opinion evidence relevant as the opinion so envisaged under the Section is that of an expert upon a point of (a) foreign law, (b) science, (c) art, (d) identity of handwriting, and (e) finger impression. An Investigating Officer can by no stretch be considered to be an expert and thus his opinion is not relevant. Even if considered as the statement of Investigating Officer, these opinions cannot be used except for the limited purpose of confronting the Investigating Officer as no other witness is bound by it. It is not the case of the petitioner that DSP Ram Chandra is cited as a witness and these documents are required to confront him. There is yet another fallacy in the argument of the learned counsel for the Petitioner. It is settled law that the Court while recording evidence has to examine the relevant and admissible statements and documents and not the opinion of the Investigating Officer.

13. In **Mohammed Ankoos & Ors. vs. Public Prosecutor, HC of Andhra Pradesh, Hyderabad** (2010) 1 SCC 94, it has been held by the Hon'ble Supreme Court:

> " A criminal court can use the case diary in the aid of any inquiry or trial but not as an evidence. This position is made clear by Section 172(2) of the Code. Section 172(3) places restrictions upon the use of case diary by providing that the accused has no right to call for the case diary but if it is used

> by the police officer who made the entries for refreshing his memory or if the court uses it for the purpose of contradicting such police officer, it will be so done in the manner provided in Section 161 of the Code and Section 145 of the Evidence Act. The court's power to consider the case diary is not unfettered. In light of the inhibitions contained in Section 172(2), it is not open to the court to place reliance on the case diary as a piece of evidence directly or indirectly."

14. In **Sidhartha Vashisht @ Manu Sharma v. State** (NCT of Delhi), 2010 (6) SCC 1 it was held:

> "220. The right of the accused with regard to disclosure of documents is a limited right but is codified and is the very foundation of a fair investigation and trial. On such matters, the accused cannot claim an indefeasible legal right to claim every document of the police file or even the portions which are permitted to be excluded from the documents annexed to the report under Section 173(2) as per orders of the Court. But certain rights of the accused flow both from the codified law as well as from equitable concepts of constitutional jurisdiction, as substantial variation to such procedure would frustrate the very basis of a fair trial. To claim documents within the purview of scope of Sections 207, 243 read with the provisions of Section 173 in its entirety and power of the Court under Section 91 of the Code to summon documents signifies and provides precepts which will govern the right of the accused to claim copies of the statement and documents which the prosecution has collected during investigation and upon which they rely.
>
> 221. It will be difficult for the Court to say that the accused has no right to claim copies of the documents or request the Court for production of a document which is part of the general diary subject to satisfying the basic ingredients of law stated therein. A document which has been obtained bonafidely and has bearing on the case of the prosecution and in the opinion of the public prosecutor, the same should be disclosed to the accused in the interest of justice and fair investigation and trial should be furnished to the accused. Then that document should be disclosed to the accused giving him chance of fair defence, particularly when

non-production or disclosure of such a document would affect administration of criminal justice and the defence of the accused prejudicially.

222. The concept of disclosure and duties of the prosecutor under the English System cannot, in our opinion, be made applicable to Indian Criminal Jurisprudence stricto senso at this stage. However, we are of the considered view that the doctrine of disclosure would have to be given somewhat expanded application. As far as the present case is concerned, we have already noticed that no prejudice had been caused to the right of the accused to fair trial and non- furnishing of the copy of one of the ballistic reports had not hampered the ends of justice. Some shadow of doubt upon veracity of the document had also been created by the prosecution and the prosecution opted not to rely upon this document. In these circumstances, the right of the accused to disclosure has not received any set back in the facts and circumstances of the case. The accused even did not raise this issue seriously before the Trial Court."

15. In **Sunita Devi** (supra) while dealing with Section 207 and 208 of the Code as regards the documents to be supplied to the accused it was held:

"27. The supervision notes can in no count be called. They are not a part of the papers which are supplied to the accused. Moreover, the informant is not entitled to the copy of the supervision notes. The supervision notes are recorded by the supervising officer. The documents in terms of Sections 207 and 208 are supplied to make the accused aware of the materials which are sought to be utilized against him. The object is to enable the accused to defend himself properly. The idea behind the supply of copies is to put him on notice of what he has to meet at the trial. The effect of non-supply of copies has been considered by this Court in **Noor Khan v. State of Rajasthan and Shakila Abdul Gafar Khan (Smt.) v. Vasant Raghunath Dhoble and Anr.** It was held that non-supply is not necessarily prejudicial to the accused. The Court has to give a definite finding about the prejudice or otherwise. The supervision notes cannot be utilized by the prosecution as a piece of material or evidence

against the accused. At the same time the accused cannot make any reference to them for any purpose. If any reference is made before any court to the supervision notes, as has noted above they are not to be taken note of by the concerned court. As many instances have come to light when the parties, as in the present case, make reference to the supervision notes, the inevitable conclusion is that they have unauthorized access to the official records. We, therefore, direct the Chief Secretary of each State and Union Territory and the concerned Director General of Police to ensure that the supervision notes are not made available to any person and to ensure that confidentiality of the supervision notes is protected. If it comes to light that any official is involved in enabling any person to get the same appropriate action should be taken against such official. Due care and caution should be taken to see that while supplying police papers supervision notes are not given."

16. The reliance of the Petitioner on the decision in the case of **Neelesh Jain** (Supra) is misconceived. In the said case the investigating agency had recovered documents like photos, love letters between the prosecutrix and the accused Petitioner, some STD bill slips and a ledger book. The Petitioner therein was facing prosecution for offences under Section 342/376 (g)/323/328 IPC. The photos, the love letters and the STD bills being that of the prosecutrix were certainly documents which were relevant for confronting the prosecutrix when she would have entered the witness box. It is for this reason the Court held those documents to be necessary and desirable. In **Neelesh Jain** (Supra) the Court also noted **Navin Ramji Kamani vs. Shri K.C. Shekhran, Dy. Chief Controller of Imports & Exports** (supra) and held:

"The power given under section 91 of the code is a general and wide power which empowers the court, the production of any document or any other thing at any stage of any investigation, inquiry or other proceedings under the Cr.P.C. It is no doubt true that the legislature has circumscribed this power to be exercised only where the court considers that the summoning of such document or things was necessary or desirable in its view, then the court could pass an order both in favor of the accused as well as the prosecution. It is no doubt true that such power

would not be exercised where the documents or thing may not be found relevant or it may be for the mere purpose or delaying the proceedings or the order is sought with an oblique motive." Similar view has also been expressed in **Rajesh Prasad v. State of Rajasthan** 1998 (Supp) Cri.L.R.265".

17. The case of the Petitioner is that according to him he believes that DSP Ram Chandra exonerated him and since he had exonerated him the subsequent handing over of the investigation to Inspector Ram Chander Garvan was a reinvestigation and not a further investigation. It is contended that the Hon'ble Supreme Court in **Ram Chandra** (supra) and **Virender Prasad Singh** (supra) has held that under Section 173 (8) Cr.PC the police has a right to further investigate and not reinvestigate. This contention of the Petitioner is at the outset fallacious. In the present case no charge sheet has been filed. A complaint has been filed by Inspector Ram Chander Garvan who is the complainant, along with the list of witnesses and documents. The decision referred to applies in a case where after filing of the charge sheet, that is, a report under Section 173 Cr.PC the investigating agency proceeds to further investigate the matter under Section 173(8) CrPC, when it cannot reinvestigate. Since no charge sheet has been filed under Section 173(2) CrPC the stage of Section 173(8) Cr.P.C. has not arrived. Moreover, before a charge sheet is filed under Section 173 CrPC the Investigating Agency is bound to investigate into all aspects of the matter and file a report thereon. During the pendency of the investigation there is no bar, if on being not satisfied by one officer the investigation is transferred to another officer by the senior officer and a final report is filed on being satisfied by the investigation conducted. Moreover, in the present case, since it is proceeding as a complaint, no charge sheet under Section 173(2) Cr.P.C. is filed but a complaint has been filed.

18. In **State of Orissa vs. Debendra N. Padhi** (Supra) while considering the scope of Section 91 Cr.P.C. the Hon'ble Supreme Court held:

"25. Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is 'necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code'. The first and foremost requirement of the section is about the document being

necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the Court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. In so far as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it whether police or accused. If under Section 227 what is necessary and relevant is only the record produced in terms of Section 173 of the Code, the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. Under Section 91 summons for production of document can be issued by Court and under a written order an officer in charge of police station can also direct production thereof. Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may be initiated to compel production thereof.

26. Reliance on behalf of the accused was placed on some observations made in the case of **Om Parkash Sharma v. CBI.** In that case the application filed by the accused for summoning and production of documents was rejected by the Special Judge and that order was affirmed by the High Court. Challenging those orders before this Court, reliance was placed on behalf of the accused upon **Satish Mehra's** case (supra). The contentions based on Satish Mehra's case have been noticed in para 4 as under:

"4. The learned counsel for the appellant reiterated the

stand taken before the courts below with great vehemence by inviting our attention to the decision of this Court reported in **Satish Mehra v. Delhi Admn.**, laying emphasis on the fact the very learned Judge in the High Court has taken a different view in such matters, in the decision reported in **Ashok Kaushik v. State.** Mr Altaf Ahmed, the learned ASG for the respondents not only contended that the decisions relied upon for the appellants would not justify the claim of the appellant in this case, at this stage, but also invited, extensively our attention to the exercise undertaken by the courts below to find out the relevance, desirability and necessity of those documents as well as the need for issuing any such directions as claimed at that stage and consequently there was no justification whatsoever, to intervene by an interference at the present stage of the proceedings."

27. In so far as Section 91 is concerned, it was rightly held that the width of the powers of that section was unlimited but there were inbuilt inherent limitations as to the stage or point of time of its exercise, commensurately with the nature of proceedings as also the compulsions of necessity and desirability, to fulfill the task or achieve the object. Before the trial court the stage was to find out whether there was sufficient ground for proceeding to the next stage against the accused. The application filed by the accused under Section 91 of the Code for summoning and production of document was dismissed and order was upheld by High Court and this Court. But observations were made in para 6 to the effect that if the accused could produce any reliable material even at that stage which might totally affect even the very sustainability of the case, a refusal to look into the material so produced may result in injustice, apart from averting an exercise in futility at the expense of valuable judicial/public time, these observations are clearly obiter dicta and in any case of no consequence in view of conclusion reached by us hereinbefore. Further, the observations cannot be understood to mean that the accused has a right to produce any document at stage of framing of charge having regard to the clear mandate of Sections 227 and 228 in Chapter 18 and Sections 239 and 240 in Chapter 19.

28. We are of the view that jurisdiction under Section 91 of the Code when invoked by accused the necessity and desirability would have to be seen by the Court in the context of the purpose - investigation, inquiry, trial or other proceedings under the Code. It would also have to be borne in mind that law does not permit a roving or fishing inquiry.

19. As held in **Sidhartha Vashisht** (Supra) the accused cannot claim an indefeasible legal right to claim every document of the police file. Even giving an expanded application to the doctrine of disclosure, the Petitioner is neither entitled to these documents, nor is it the stage necessitating production under Section 91 Cr.P.C. nor the transfer of investigation to another officer amounted to reinvestigation forbidden under Section 173(8) Cr.P.C and does not call for issuance of a writ in terms of the dictate of the Hon'ble Supreme Court in **T.C. Basappa** (Supra).

20. Writ petition is dismissed.

ILR (2011) III DELHI 654

LPA

VIBHOR ANAND ....APPELLANT

VERSUS

VICE CHANCELLOR, GURU GOBIND SINGH I.P. UNIVERSITY & ORS. ....RESPONDENTS

(DIPAK MISRA, CJ. & SANJIV KHANNA, J.)

LPA NO. : 191/2011 DATE OF DECISION: 03.03.2011

Constitution of India, 1950—Article 226—Letter Patent Appeal—Appellant denied permission to appear in examination for shortage of attendance—Said denial

challenged—Appellant also challenged appointment of Dean of University of Law and Legal Studies—Said challenge rejected—Appellant only attended 28.5% of classes against 75% requirement—Appellant permitted to appear in examination—Result kept in sealed cover—Appellants contended that attendance record of college forged and fabricated—Appellant claimed entitled for remission of recorded attendance for participation in Commonwealth Games. Hence instant appeal—Held; Need for attending requisite lectures for LLB course repeatedly highlighted and emphasized—Student of law has to be dedicated person required to take study of law seriously—College records—No dispute that minimum requirement is 75% Difficult to accept that attendance records forged—Cannot be challenged on mere ipse dixit—Writ Courts not to get embroiled in such factual disputes—Credit for attending Commonwealth Games even if granted, Appellant to still have shortfall in attendance—Appellant allowed to sit for examination provided meeting of eligibility criteria—Allegations against Dean, School of Law and Legal Studies constitutes a distinct and separate cause of action—Cannot be ground for granting grace attendance to Appellant—Said question left open.

This court in **Sukriti Upadhyay Versus University of Delhi,** decided on 04.10.2010, has observed :

> "14. Before parting with the case, we are obliged to state that the field of legal education has its own sacrosanctity. With the passage of time, the field of law is getting a larger canvas. A well organized system for imparting of education and training in law has become imperative. In a democratic society where the rule of law governs, a student of law has a role to play. Roscoe Pound has said "Law is experience developed by reason and applied continually in further experience". A student of law has to be a dedicated

> person as he is required to take the study of law seriously as pursuit of law does not countenance any kind of idleness. One may conceive wholesome idleness after a day's energetic and effective work. An active mind is the mother of invention. A student prosecuting study in law, in order to become efficient in the stream of law, must completely devote to the learning and training. One should bear in mind that learning is an ornament to continuous education and education fundamentally is how one engages himself in acquiring further knowledge every day. If a law student does not attend lectures or obtain the requisite percentage of attendance, he cannot think of taking a leap to another year of study. Mercy does not come to his aid as law requires a student to digest his experience and gradually discover his own ignorance and put a progressive step thereafter." **(Para 8)**

Original records were produced before the learned Single Judge and on that basis, the learned Single Judge had accepted the contention of the respondent that the appellant had attended only 28.5% of the total lectures though the minimum requirement is 75%. It was not disputed that the requirement of 75% is fixed and stipulated. Accordingly, learned single Judge has observed that it was difficult to accept the contention of the appellant that he had attended classes but his attendance was not marked and that the respondent had fabricated the records. We agree with findings and observations of the single judge in this regard. We may add that it is difficult to accept that the attendance record can be forged as attendance is marked by different teachers on day to day basis. Attendance records cannot be challenged on mere ipse dixit and by making vague allegations. Otherwise it will result in needless and futile litigation. Unless imperative and justified grounds ex-facie are shown to exist, writ courts should be reluctant to get embroiled and confounded in such factual disputes.

(Para 9)

Further, even if the appellant is given credit for participating as a volunteer in the Common-wealth Games, it is difficult to accept that he should be given waiver or extra attendance for the entire short-fall of 46.5% in attendance. Learned Single Judge has mentioned that even if the appellant is granted grace of 40 attendance being voluntary trainee in Common-wealth Games, even then his attendance will be 49% which is much below what is prescribed by the respondent university and the Bar Council of India. Similarly, even if some leverage is given for the moot courts etc., the entire short fall of 46.5% cannot be covered. It may be noted grace/extra attendance for moot courts etc. is subject to proof and cannot be granted on mere asking. **(Para 11)**

Allegations have been made against the Dean, School of Law and Legal Services. It was alleged that she does not have requisite qualifications and her appointment is illegal and contrary to law. It was made clear to the counsel for the appellant that the said question is separate and distinct and cannot be a ground to grant grace attendance to the appellant. We are not inclined to examine the said question in this appeal. It is, however, clarified that the said question is left open and the appellant, if so advised, may file a separate Public Interest Litigation. **(Para 13)**

Important Issue Involved: Need for attending requisite lectures for LLB course repeatedly highlighted and emphasized—Student of law has to be dedicated person required to take study of law seriously.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. V.K. Anand, Advocate.

FOR THE RESPONDENTS : Mr. O.P. Saxena, Advocate.

CASES REFERRED TO:

1. *Shri Satyendra Singh* vs. *University of Delhi and Anr.* 2008 (103) DRJ 97.
2. *S.N. Singh* vs. *Union of India (UOI) and Ors.* 106 (2003) DLT 329.
3. *Baldev Raj Sharma* vs. *Bar Council of India,* [1989]2SCR862.

RESULT: Appeal dismissed.

SANJIV KHANNA, J.

CM No. 4148/2011 (for exemption)

Allowed, subject to all just exceptions.

LPA No. 191/2011

1. The appellant Vibhor Anand has filed the present intra court Appeal assailing the judgment dated 7th December, 2010, dismissing his Writ Petition (Civil) No. 3163/2010.

2. The appellant was denied permission to appear in the Sixth Semester End-term Examination for shortage of attendance. This action of the respondent-University School of Law and Legal Studies, Guru Gobind Singh Indraprastha University was challenged/questioned. The appellant also challenged appointment of the Dean of University of Law and Legal Studies and made a prayer for striking down her appointment. As noticed above the challenge has been rejected by the learned single judge.

3. The appellant, by an interim order passed in the above writ petition, was permitted to appear in the Sixth End-term Examination but his result was directed to be kept in a sealed cover. It may, however, be noted that the appellant has not attended the seventh Semester classes, which were held in the second half of 2010.

4. Learned single Judge has held that the appellant has attended only 28.5% classes in the Sixth Semester as against the requirement of 75%. The learned Single Judge has also referred to the stand of the respondent that the appellant had cleared 5 out of 30 papers and that he had been reappearing in several papers but repeatedly failing. He was allowed to appear in the Sixth Semester Examination owing to the policy of allowing promotion upto Sixth Semester on the condition of clearing the requisite

papers. The impugned judgment records that the appellant has not cleared the requisite number of papers which are required to get promotion from Sixth Semester to Seventh Semester.

5. We have heard the appellant who appeared in person and his father who is a practicing Advocate. They have alleged and stated that the attendance record of college is forged and fabricated. Our attention was drawn to the allegations made in the appeal that on 10th May, 2010, the previous counsel who had appeared for the respondent University had stated that the appellant had attended 67 lectures out of 229 lectures but as per the records produced, the appellant had attended 55 lectures out of 193 lectures. It is further stated that as per the chart placed on record a total of 229 lectures were held, but in the case of the appellant as per the chart 193 lectures were held. The appellant has contended that he had participated in the Common-wealth Games and, therefore, he is entitled to remission/addition to the recorded attendance. It is further alleged that he is entitled to 25% attendance for participating in activities like moot courts and attending seminars, etc.

6. LL.B. is a professional course and the need for attending the requisite lectures has been repeatedly emphasized and highlighted by this Court. In **S.N. Singh Vs. Union of India (UOI) and Ors.** 106 (2003) DLT 329, it was observed by a Division Bench of this Court:-

> "27. We find force in the submission of the learned counsel for the petitioner in respect of the first four submissions noted by us above. A law course cannot be acquitted (sic. equated) with a normal academic course. Attendance of lectures, tutorials and seminars is very essential to train the law students. Under the Advocates Act 1961, the Bar Council of India has been empowered, amongst others, "to promote legal education and to lay down standards of such education". The Bar Council of India has framed statutory rules which bind all institutions conferring LL.B. Degree Course which are recognised by the Bar Council of India. Section 4 of the Delhi University Act 1922 empowers the University to confer degrees of students who have pursued a course of study in the University or in any college attached or affiliated to the University. No student can be deemed to have pursued a course of study who does not comply with the various requirements prescribed under the Act, Statute, Ordinances or

Rules framed by the Academic Council. Needless to state that the Academic Council is the Supreme Academic Body of the University. Clause 8 of Ordinance 7 clearly provides that no student shall be deemed to have pursued a regular course of study unless he has attended at least two-thirds of the total number of lectures delivered in each year. The proviso permits relaxation of shortage of attendance up to 10%. Thus, as per the attendance norms prescribed under the Ordinances, pertaining to LL.B. Degree Course, shortage of attendance beyond 10% is not permissible. However, the Academic Council in exceptional cases is empowered to grant a further relaxation. The examination Rule framed by the Bar Council of India also provides for relaxation, but makes a different provision for relaxation. The Bar Council of India Rule requires 66% attendance in each paper and empowers relaxation in a particular paper, provided however total attendance in all the papers is 66%. The Academic Council decision to accept the Justice V.S. Deshpande Committee recommendation is thus a resolution limiting the exercise of power of relaxation unanimously adopted by the Academic Council. The Academic Council would thus be bound by its own resolution. The decision not to grant relaxation was a conscious decision taken for which even a high powered Committee was constituted and was taken in the interest of legal education.

36. In matters pertaining to education no court can permit total violation of the norms. LL.B. Degree Course is expected to produce trained legal minds, ready to take on the challenges of the 21st Century. Decline in education norms in professional law courses was noted by the Supreme court as far back as 1989. In the judgment [1989] 2 SCR 862 titled **Baldev Raj Sharma Vs. Bar Council of India,** it was observed that there is a substantial difference between a course of study pursued as a regular student and a course of study pursued as a private candidate. It was observed that regular attendance for the requisite number of lectures, tutorials etc. has a purpose. Rules framed by the Bar Council of India were upheld. Whatever be the equities, we cannot permit a total violation of the norms. Promotion of all students who have cleared only 4 or 14 papers respectively to the third term and fifth term are thus quashed."

7. Similar observations have been made in **Shri Satyendra Singh Vs. University of Delhi and Anr.** 2008 (103) DRJ 97.

8. This court in **Sukriti Upadhyay Versus University of Delhi,** decided on 04.10.2010, has observed :

> "14. Before parting with the case, we are obliged to state that the field of legal education has its own sacrosanctity. With the passage of time, the field of law is getting a larger canvas. A well organized system for imparting of education and training in law has become imperative. In a democratic society where the rule of law governs, a student of law has a role to play. Roscoe Pound has said "Law is experience developed by reason and applied continually in further experience". A student of law has to be a dedicated person as he is required to take the study of law seriously as pursuit of law does not countenance any kind of idleness. One may conceive wholesome idleness after a day's energetic and effective work. An active mind is the mother of invention. A student prosecuting study in law, in order to become efficient in the stream of law, must completely devote to the learning and training. One should bear in mind that learning is an ornament to continuous education and education fundamentally is how one engages himself in acquiring further knowledge every day. If a law student does not attend lectures or obtain the requisite percentage of attendance, he cannot think of taking a leap to another year of study. Mercy does not come to his aid as law requires a student to digest his experience and gradually discover his own ignorance and put a progressive step thereafter."

9. Original records were produced before the learned Single Judge and on that basis, the learned Single Judge had accepted the contention of the respondent that the appellant had attended only 28.5% of the total lectures though the minimum requirement is 75%. It was not disputed that the requirement of 75% is fixed and stipulated. Accordingly, learned single Judge has observed that it was difficult to accept the contention of the appellant that he had attended classes but his attendance was not marked and that the respondent had fabricated the records. We agree with findings and observations of the single judge in this regard. We may add that it is difficult to accept that the attendance record can be forged as attendance is marked by different teachers on day to day basis.

Attendance records cannot be challenged on mere ipse dixit and by making vague allegations. Otherwise it will result in needless and futile litigation. Unless imperative and justified grounds ex-facie are shown to exist, writ courts should be reluctant to get embroiled and confounded in such factual disputes.

10. Regarding the statement made by the previous counsel with regard to the total number lectures, it has been stated in the appeal that the said statement was orally made in the court. This is neither here nor there. We are not inclined to go into the said aspect especially when the original records were produced before the learned Single Judge.

11. Further, even if the appellant is given credit for participating as a volunteer in the Common-wealth Games, it is difficult to accept that he should be given waiver or extra attendance for the entire short-fall of 46.5% in attendance. Learned Single Judge has mentioned that even if the appellant is granted grace of 40 attendance being voluntary trainee in Common-wealth Games, even then his attendance will be 49% which ˇis much below what is prescribed by the respondent university and the Bar Council of India. Similarly, even if some leverage is given for the moot courts etc., the entire short fall of 46.5% cannot be covered. It may be noted grace/extra attendance for moot courts etc. is subject to proof and cannot be granted on mere asking.

12. During the course of hearing, it was suggested to the appellant that he should re-join the Sixth Semester and attend classes. There was some reluctance on the part of the appellant. We wish to clarify that if the appellant wants to join Sixth Semester, the respondents will permit him to do so. However, he will be permitted to sit in the Sixth Semester End-term examination only if he has requisite attendance as per the rules and regulations. He should also meet other eligibility norms.

13. Allegations have been made against the Dean, School of Law and Legal Services. It was alleged that she does not have requisite qualifications and her appointment is illegal and contrary to law. It was made clear to the counsel for the appellant that the said question is separate and distinct and cannot be a ground to grant grace attendance to the appellant. We are not inclined to examine the said question in ˇthis appeal. It is, however, clarified that the said question is left open and the appellant, if so advised, may file a separate Public Interest Litigation.

14. With the aforesaid observations, the appeal is dismissed but it is clarified that the second aspect has been left open and has not been examined. There will be no order as to costs.

ILR (2011) III DELHI 663
W.P. (C)

DELHI TRANSPORT COPORATION ....PETITIONER

VERSUS

SH. MANMOHAN ....RESPONDENT

(ANIL KUMAR & VEENA BIRBAL, JJ.)

W.P (C) NO. : 7696/2010 & CM NO. : 19998/2010 **DATE OF DECISION: 07.03.2011**

Constitution of India, 1950—Article 226 & 227—Personal with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995—Section 47—Petition challenging the order passed by the Central Administrative Tribunal, Principal Bench dated 18.05.2010 allowing the petition of the respondent quashing the order of pre-mature retirement—Directions given to reinstate the respondent in service on deemed basis with all consequential benefits—Respondent was employed as conductor with the petitioner—He met with an accident on 07.01.1991 and remained admitted in the hospital upto 07.06.1991—On 08.06.1991, respondent joined his duties after getting medical fitness certificate—Posted in Ticketing Section—Working upto 25.01.1992—Sent to DTC Medical Board for examination—Medical Board declared him medically unfit—On his application, he was again examined by another Board and was declared

permanently unfit for the post of conductor—He preferred a petition seeking appropriate directions not to terminate his service—Court directed that he be examined again—Medical Board declared the respondent unfit for the post of conductor permanently—Directions issued to examine the respondent's case and provide such employment to him protecting his salary—No alternative job was available—Competent Authority approved the compensation amount of Rs. 39,278,40/-—Not collected by the respondent—He moved contempt petition, which was dismissed—Respondent moved another writ petition challenging the order declaring him unfit for the post or any other lower post and his premature retirement—On account of jurisdiction, writ was transferred to Central Administrative Tribunal—Order passed—Petition—Held—Section 47 of the Act casts statutory obligation on the employer to protect employee acquiring disability during service—Petitioner ought to have considered the case of respondent under the aforesaid Act—The petitioner has not been able to show as to how Section 47 of the Act is not applicable to the facts and circumstances of the case either before the Tribunal or before this Court despite the fact that full liberty was given to the petitioner—Rather, considering the facts and circumstances of the case, a duty was cast upon the petitioner to consider on its own the case of the respondent under Section 47 of the Act—The Tribunal relying upon the provisions of Section 47 of the Act as well as judgments of the Supreme Court in Kunal Singh v. Union of India (supra) has allowed the petition of the respondent and has granted relief to him as has been stated above—In view of above discussion, no illegality or irrationally is seen in the order of the Tribunal which calls for interference of this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

By the aforesaid order, liberty was granted to the respondent that if he was aggrieved by the decision of petitioner as was stated in the contempt proceedings, it would give rise to a fresh cause of action and it was open for him to challenge the said decision in accordance with law. In terms thereof respondent had availed the liberty granted and had filed WP(C) 5393/2005 on the basis of fresh cause of action which had accrued in not providing him equivalent or lower post. The said petition was ultimately transferred to the Tribunal wherein the impugned order dated 18th May, 2010 has been passed.

Further, vide order dated 16.10.1996 of this court, the directions were given to the petitioner to examine the case of the respondent for any other equivalent or lower post protecting his salary as he was unfit for conductor's post, failing which his case was to be considered under the relevant Scheme formulated by petitioner in this regard. The above order does not mean that respondent could not have agitated the outcome of said decision of petitioner any further as is contended. Thus, the contention of the petitioner that the issue involved was already decided in Civil Writ No.3113/1992 and the petitioner could not have been permitted to raise the same again has no force and is rejected.

It may also be noted that the letter dated 27.06.1997, by which his case has been rejected, holding that any other equivalent lower post could not be given to respondent, does not give any cogent or rational reasons. The said letter only mentions that on account of premature retirement, he is requested to collect the cheque of compensation. Further, when the directions were passed by this court for consideration of the case of the respondent on 16.10.1996, the Act had already come into force. Section 47 of the Act casts statutory obligation on the employer to protect employee acquiring disability during service. Petitioner ought to have considered the case of respondent under the aforesaid Act.

No reasons are given as to why the case of the respondent was not considered under Section 47 of the Act which provides that:-

> "47. Non- discrimination in Government employment.
>
> (1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service: Provided that if an employee after acquiring disability is not suitable for the post he was holding, could be shifted to some other post With the same pay scale and service benefits: Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.
>
> (2) No promotion shall he denied to a person merely on the ground of his disability; Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

As regards not taking specific plea about the applicability of Section 47 of the Act in the application before the Tribunal, it may be mentioned that the basic issue raised by the respondent before the Tribunal was not to prematurely retire him but to give him a job on account of disability suffered. The Tribunal in its wisdom has permitted the respondent to raise the contention in this regard under Section 47 of the Act which is dealt at length in the impugned order. The petitioner has not been able to show as to how Section 47 of the Act is not applicable to the facts and circumstances of the case either before the Tribunal or before this Court despite the fact that full liberty was given to the petitioner. Rather, considering the facts and circumstances of the case, a duty was cast upon the petitioner to consider on its

own the case of the respondent under Section 47 of the Act. The Tribunal relying upon the provisions of Section 47 of the Act as well as judgment of the Supreme Court in **Kunal Singh v. Union of India** (supra) has allowed the petition of the respondent and has granted relief to him as has been stated above. **(Para 13)**

In view of above discussion, no illegality or irrationality is seen in the order of the Tribunal which calls for interference of this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. **(Para 16)**

Important Issue Involved: Section 47 of the Act casts a duty upon the employer to consider the case of an employee acquiring disability during service.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Ms. Avnish Ahlawat with Ms. Latika Chaudhary, Advocates.

FOR THE RESPONDENT : Mr. Som Dutt Kaushik, Advocate.

CASES REFERRED TO:

1. *Kunal Singh* vs. *Union of India* 2003 SCC (L&S) 482.
2. *State of Haryana* vs. *Narendra Kumar Chawla* MANU/SC/0106/1995 : [1994] 1 SCR 657.
3. *Shri Vedi Prakash Singh, Conductor* vs. *DTC and Others*, Special Leave Petition (Civil) No. 1575 of 1991.

RESULT: Petition disposed of.

VEENA BIRBAL, J.

1. By way of this petition under Article 226 read with 227 of the Constitution of India petitioner-DTC has challenged the impugned order dated 18th May, 2010 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as `the Tribunal.) in T.A.No.843/2009 wherein the order dated 27th June, 1997 passed by the

petitioner retiring the respondent prematurely on medical grounds and asking him to collect the cheque of compensation, is set aside. By the impugned order, the Tribunal has directed the petitioner to continue the respondent on deemed basis on a supernumerary post in an equivalent grade of Conductor protecting his pay till he attains the age of retirement and the superannuation may be personal to him. The Tribunal has further directed the petitioner that if the respondent is reinstated in service on deemed basis, he would be entitled to all the consequential benefits including back wages from 27.6.1997 till date which would be paid to him within a period of three months.

2. Briefly the facts relevant for disposal of present petition are as under:

Respondent was employed as a conductor with the petitioner in May, 1982. On 7th January, 1991, the respondent met with an accident while he was on duty and was taken to hospital where he was admitted upto 7th June, 1991. On 8th June, 1991, the respondent joined his duties after getting a medical fitness certificate and was posted in the ticketing section where he worked upto 25th January, 1992. It is alleged that the respondent was not performing his duties properly as he was not fit to do the same and was sent to the DTC medical board for examination. The DTC medical board declared him medically 'unfit'. Against the order of the DTC medical board, the respondent filed an appeal before the CMD for having him medically examined from another Board. Petitioner was again examined by the DTC medical board and vide its report dated 16th July, 1992 the Board declared him permanently unfit for the post of Conductor. It is alleged that thereafter the petitioner asked the respondent to give his consent for re-designation in Class IV or a lower post vide memo dated 22nd August, 1992 but he did not reply to the same. Thereafter, the respondent filed a WP(C) No.3113/1992 before this court praying for issuance of appropriate directions restraining the petitioner from terminating the services of the respondent or forcing the respondent to retire voluntarily and also allowing the respondent to perform light duties.

In the said writ petition, this court ordered for a medical examination of the petitioner by the Medical Board of the petitioner in order to see whether he was fit to perform his duty as a conductor or not. The Medical Board as per its report dated 23rd May, 1995 declared the

respondent unfit for the post of Conductor permanently. This court vide order dated 16th October, 1996 disposed of the said writ petition directing the petitioner that as the respondent was unfit for the conductor's post, in case there was any other equivalent or lower post on which the respondent could be accommodated, the petitioner would examine the respondent's case and provide such employment to him protecting his salary, failing which the petitioner's case will be duly considered and examined under the Scheme which has been formulated by the petitioner for providing compensation to any of the employees who are medically found unfit for performing their jobs and for whom no alternative jobs are available. As no alternative job was available, the Competent Authority of petitioner approved a compensation amount of Rs. 39,278.40 but the same was not collected by the respondent. Respondent had filed a contempt petition alleging therein non-compliance of order of this court dated 16.10.1996 which was disposed of by the learned Single Judge of this court vide order dated 20th April, 2004 with the direction that since the respondent had been found unfit for any equivalent or lower post and if he was aggrieved by the said decision, it would give rise to a fresh cause of action and it was open for him to challenge the said decision in accordance with the law. Thereafter, the respondent filed another writ petition being W.P.(C) No.5393/2005 praying for quashing the order dated 27th June, 1997 declaring the respondent unfit for the post or any other lower post and was asked to collect the compensation for his premature retirement.

3. On account of change of jurisdiction, the said writ petition was transferred to the Tribunal and was renumbered as T.A. No.843/2009.

4. Before the Tribunal, the petitioner had contended that the case of the respondent was considered for an adjustment to Class IV post as no post was available and as per the staffing norms the respondent did not fulfil the requisite qualifications, an order was passed on 3rd April, 1997 prematurely retiring him and offering compensation which he had not taken.

5. The stand of the respondent before the Tribunal was that his case was covered under Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as 'the Act'), as he incurred disability

during the service, as such, as per the aforesaid Act even if an alternate employment was not available, the employee could be continued on a supernumerary post till an attainment of age of retirement. As this has not been done in his case, the same is in violation of Section 47 of the aforesaid Act which has an overriding effect on all the Schemes, law etc. on the subject.

6. The Tribunal relying on the judgment of the Supreme Court in **Kunal Singh Vs. Union of India** 2003 SCC (L&S) 482, vide order dated 18th May, 2010 had allowed the petition of the respondent by holding that the case of respondent was covered under the aforesaid Act and quashed the order of premature retirement and directed the petitioner to reinstate the respondent in service on a deemed basis with all consequential benefits as is stated above.

7. Aggrieved with the same, the present writ petition has been filed by the petitioner/DTC.

8. Learned counsel for the petitioner has contended that the dispute raised before the Tribunal has already been decided in the earlier writ petition being W.P.(C) 3113/1992 filed by respondent and is covered vide order of this court dated 16th October, 1996, which was not challenged by the respondent and had become final. It is further contended that the Tribunal has decided the matter on the basis of applicability of Section 47 of the Act. It is contended that such a stand was never raised in the TA nor the same was argued, as such petitioner did not have any occasion to deal with the same, as such respondent is not entitled to any further relief.

9. On the other hand, learned counsel for the respondent has argued that the matter has been decided by the Tribunal on the basis of contentions raised before it. It is contended that whether Section 47 of the Act is applicable or not is a legal issue and even if the same was not stated in the T.A. filed before the Tribunal, there was no bar for raising the same at the time of arguments before the Tribunal. It is further contended that respondent never accepted the amount of compensation of Rs. 39,278.40 as was offered to him.

10. It is not the case of the petitioner that the "disability" of respondent does not fall within the meaning of the Act nor any such stand is taken before this court. It is also an admitted position that after

the accident and after having suffered the disability, the respondent had rejoined the duty on 08.07.1991 in Ticketing Section where he had worked uptil 25.01.1992. Even in August, 1992, the petitioner had offered the post of Class IV to respondent and thereafter he was put off duty as a result of which respondent had approached this court by filing C.W. No. 3113/1992 with the following prayer:-

> "It is, therefore, prayed that an appropriate writ be issued to the respondents restraining them from terminating the services of the petitioner or forcing the petitioner to retire voluntarily. A writ of prohibition be also issued, restraining the respondents from not allowing to perform light duty as the petitioner is doing now. To issue appropriate writ or writs directing the respondents to allow the petitioner to change his cadre from Conductor to Ancillary worker and such order or orders be passed as the Hon'ble Court deem fit and proper."

The aforesaid writ petition was disposed of on 16.10.1996 wherein the following order was passed:-

> "16.10.96
>
> Present : Mr. Pradeep Gupta for the petitioner. Mr. Jayant Tripathi for the respondent.
>
> **CW.3113/92**
>
> The petitioner had come to the Court at the stage when it was proposed by the respondent to terminate his services since he was found unfit for performing the duties of conductor. After filing of petition, on petitioner's application an interim order was passed on 10.9.1992 for maintaining status quo. By a further order passed on 21.2.1995, it was directed that the petitioner be got examined by a Medical Board of the respondent in order to know whether he is fit to perform his duties as a conductor. The petitioner appeared before the Medical Board on 23.5.1995 and as per the affidavit of Shri Taranjeet Singh, Secretary D.T.C. I.P. Estate, New Delhi the Medical Board has opined :-
>
> "Examined Shri Manmohan, Conductor Badge No. 15805 on …… May, 1995. He is an old case of crush injury Left upper limb with non-united and mal-united fractures of shaft of humerus

> (L) and shaft of ulna and radius of left side with shortening of upper limb, left elbow joint movement restricted. Board opines that he is unfit for conductor's post permanently w.e.f. 23.5.95."
>
> As per the above opinion of the Medical Board the petitioner is unfit for conductor's post permanently w.e.f. 23.5.95.
>
> In the facts and circumstances that the petitioner is unfit for conductor's post, in case there is any other equivalent or lower post on which the petitioner can be accommodated, the respondents will examine the petitioner. case and provide such employment to him protecting his salary, failing which the petitioner's case will be duly considered and examined under the Scheme, which has been formulated by the respondents for providing compensation to such of the employee, who are medical found unfit for performing their jobs and for whom no alternative jobs are available. The writ petition with these directions stands disposed of."

11. When the petitioner did not comply with the aforesaid order, respondent had to file a contempt petition on 16.09.1997 being Contempt Petition No. 314/1997 alleging therein that the petitioner had not complied with the order of this court dated 16.10.1996 and as such had committed contempt of court. The directions were sought from this court to direct the petitioner to strictly comply with order dated 16.10.1996 passed by this court in aforesaid writ petition.

12. In the said contempt petition, the petitioner had taken a stand that in compliance of order of this court dated 16.10.1996, compensation had been offered to the petitioner and a letter dated 27.06.1997 had been issued to him wherein the respondent was informed that he was at liberty to collect the cheque of compensation on account of premature retirement on medical grounds on any working day during office hours. It is the respondent who did not come to collect the cheque as such no contempt was committed by it. The said contempt petition was disposed of on 26.04.2004. The relevant portion of the said order is reproduced below:-

> "……A perusal of the Order of the Division Bench shows that in terms thereof the respondent in its wisdom has found the petitioner unfit for an equivalent or a lower post.

If the petitioner is aggrieved by the decision, it would give rise to a fresh cause of action and it is open to the petitioner to impugn the said decision in accordance with law.

Needless to say, if the petitioner is satisfied with the consideration of his case under the scheme, it is open to him to go and collect the compensation.

The contempt petition stands disposed of with the aforesaid liberty and the contempt notices stand discharged."

13. By the aforesaid order, liberty was granted to the respondent that if he was aggrieved by the decision of petitioner as was stated in the contempt proceedings, it would give rise to a fresh cause of action and it was open for him to challenge the said decision in accordance with law. In terms thereof respondent had availed the liberty granted and had filed WP(C) 5393/2005 on the basis of fresh cause of action which had accrued in not providing him equivalent or lower post. The said petition was ultimately transferred to the Tribunal wherein the impugned order dated 18th May, 2010 has been passed.

Further, vide order dated 16.10.1996 of this court, the directions were given to the petitioner to examine the case of the respondent for any other equivalent or lower post protecting his salary as he was unfit for conductor's post, failing which his case was to be considered under the relevant Scheme formulated by petitioner in this regard. The above order does not mean that respondent could not have agitated the outcome of said decision of petitioner any further as is contended. Thus, the contention of the petitioner that the issue involved was already decided in Civil Writ No.3113/1992 and the petitioner could not have been permitted to ˇraise the same again has no force and is rejected.

It may also be noted that the letter dated 27.06.1997, by which his case has been rejected, holding that any other equivalent lower post could not be given to respondent, does not give any cogent or rational reasons. The said letter only mentions that on account of premature retirement, he is requested to collect the cheque of compensation. Further, when the directions were passed by this court for consideration of the case of the respondent on 16.10.1996, the Act had already come into force. Section 47 of the Act casts statutory obligation on the employer to protect

employee acquiring disability during service. Petitioner ought to have considered the case of respondent under the aforesaid Act. No reasons are given as to why the case of the respondent was not considered under Section 47 of the Act which provides that:-

"47. Non- discrimination in Government employment.

(1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service: Provided that if an employee after acquiring disability is not suitable for the post he was holding, could be shifted to some other post With the same pay scale and service benefits: Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(2) No promotion shall he denied to a person merely on the ground of his disability; Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

As regards not taking specific plea about the applicability of Section 47 of the Act in the application before the Tribunal, it may be mentioned that the basic issue raised by the respondent before the Tribunal was not to prematurely retire him but to give him a job on account of disability suffered. The Tribunal in its wisdom has permitted the respondent to raise the contention in this regard under Section 47 of the Act which is dealt at length in the impugned order. The petitioner has not been able to show as to how Section 47 of the Act is not applicable to the facts and circumstances of the case either before the Tribunal or before this Court despite the fact that full liberty was given to the petitioner. Rather, considering the facts and circumstances of the case, a duty was cast upon the petitioner to consider on its own the case of the respondent under Section 47 of the Act. The Tribunal relying upon the provisions of Section 47 of the Act as well as judgment of the Supreme Court in **Kunal Singh v. Union of India** (supra) has allowed the petition of the respondent and has granted relief to him as has been stated above.

14. In **Kunal Singh v. Union of India** (supra), it has been held by the Apex court that a person acquiring disability during service is ˇentitled to be protected under section 47 of the Act. It is also held that provisions of Section 47 of the Act are mandatory in nature. The relevant paragraph of the judgment is reproduced which is as under:-

> "9.
>
> xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx It must be remembered that person does not acquire or suffer disability by choice. An employee, who acquires disability during his service, is sought to be protected under Section 47 of the Act specifically. Such employee, acquiring disability, if not protected, would not only suffer himself, but possibly all those who depend on him would also suffer. The very frame and contents of Section 47 clearly indicate its mandatory nature. The very opening part of Section reads "no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service". The Section further provides that if an employee after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits; if it is not possible to adjust the employee against any post he will be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. Added to this promotion shall be denied to a person merely on the ground of his disability as is evident from sub section (2) of Section 47. Section 47 contains a clear directive that the employer shall not dispense with or reduce in rank an employee who acquires a disability during the service. In construing a provision of social beneficial enactment that too dealing with disabled persons intended to give them equal opportunities, protection of rights and full participation, the view that advances the object of the Act and serves its purpose must be preferred to the one which obstructs the object and paralyses the purpose of the Act. Language of Section 47 is plain and certain casting statutory obligation on the employer to protect an employee acquiring disability during service."

15. The Act had come into force on 07.02.1996 but even prior to the said Act the Courts have been passing appropriate orders for

rehabilitation of such employees who suffered disabilities during the course of employment. In Special Leave Petition (Civil) No. 1575 of 1991 entitled **Shri Vedi Prakash Singh, Conductor Vs. DTC and Others,** Supreme Court gave directions vide order dated 5th August, 1991 to the effect that he should be posted against an equivalent post and be also paid salary for the intervening period. Similarly, in the case of **State of Haryana Vs. Narendra Kumar Chawla** MANU/SC/0106/1995 : [1994] 1 SCR 657 the Apex Court held that in case of employees rendered physically handicapped due to disease, the court has the power to give directions regarding the absorption of such employee carrying a pay scale equal to that of his original post. Even essential requirement for appointment to that post can also be relaxed. It is further observed in that judgment that such an employee has right to protection of pay. Even when he is absorbed in a lower post, he is entitled to protection of the pay scale of his original post in view of Article 21 of the Constitution of India.

16. In view of above discussion, no illegality or irrationality is seen in the order of the Tribunal which calls for interference of this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

17. The writ petition stands dismissed.

In the facts and circumstances of the case, the parties are left to bear their own costs.

ILR (2011) III DELHI 677
RSA

SHRI GANGA DUTT ....APPELLANT

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(INDERMEET KAUR, J.)

RSA NO. : 124/2009 & CM NO. : 14115/2009 **DATE OF DECISION: 10.03.2011**

Land Acquisition Act, 1894—Jurisdiction of civil Court—Barred—Appellant claimed to be owner of suit property—Land acquired by Award No.35 dated 10.11.1981 under Land Acquisition Act 1894—No physical possession taken—No notice of taking possession given—Appellant filed suit seeking, inter alia, permanent injunction against Defendant not to be dispossessed from suit property—Suit dismissed—Dismissal upheld on appeal—Hence present second appeal.

Held:

(A) Jurisdiction of civil Court—Scheme under Land Acquisition Act complete—Civil Courts therefore barred—Reliance placed on ration on Laxmi Chand's case.

In 1995 IV AD (SC) 389 **Laxmi Chand Vs. Gram Panchayat Kararia** the Apex Court while dealing with the objection to acquisition proceedings under the Land Acquisition Act the Apex Court had noted:

> "The scheme of the Act is complete in itself and thereby the jurisdiction of the Civil Court to take the

> cognizance of the case arising under the Act is barred. The Civil Courts were held to be devoid of the jurisdiction to give declaration on the invalidity of the procedure contemplated under the Act and only High Court and Supreme Court were held to have power under Article 226 and Article 136." **(Para 7)**

(B) Proof of possession—Recording of memo/panchnama is proof of possession—Possession memo proved in instant case—Same cannot be assailed by way of suit.

In AIR 1996 SC 3377 **Tamil Nadu Housing Board Vs. A. Viswam** Apex Court had held that the recording of a memo/ panchnama is proof of possession. Ex.PW-4/3 had proved this. **(Para 8)**

Oral and documentary evidence had established that the physical possession of the land had been taken over by the defendant on 12.3.1981 vide Ex. PW-4/3. If the plaintiff was aggrieved by this possession memo he could not assail it by way of a suit; this was not the remedy or the forum as has been held by the Apex Court in the case of **Laxmi Chand**(supra). No substantial question of law having arisen, the application as also pending application is dismissed in limine. **(Para 11)**

Important Issue Involved: Land Acquisition Act, 1894—Proof of possession—Recording of memo/panchnama is proof of possession—Possession memo proved in instant case—Same cannot be assailed by way of suit.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Lalit Kumar, Advocate.

FOR THE RESPONDENT : Mr. Rakesh Mittal for DDA/R-3, Mr. Kirti Uppal, Advocate For R-4.

CASES REFERRED TO:

1. *Tamil Nadu Housing Board* vs. *A. Viswam* AIR 1996 SC 3377.
2. *Laxmi Chand* vs. *Gram Panchayat Kararia* 1995 IV AD (SC) 389.

RESULT: Appeal dismissed.

INDERMEET KAUR, J. (Oral)

CM No.14116/2009 (for exemption)

Allowed subject to just exceptions.

RSA No. 124/2009 & CM No.14115/2009 (for stay)

1. This appeal has impugned the judgment and decree dated 13.8.2009 which has endorsed the finding of the trial judge dated 27.11.2004 whereby the suit filed by the plaintiff seeking a declaration, permanent injunction against the defendant to the effect that he should not be dispossessed from the suit property i.e. property bearing Khasra Nos.70/22 and 70/23 situated in Village Badli, Delhi and further praying that the report of possession dated 12.11.1981 be declared illegal and non-binding upon the plaintiff had been dismissed.

2. Plaintiff claimed to the owner of the aforenoted suit property. It was in the physical cultivatory possession of the plaintiff. The said land was acquired by Award No.35 dated 10.11.1981. There is no dispute to this fact. The contention raised before this Court is that after the passing of Award on 10.11.1981 no physical possession of the suit land was taken. The possession memo dated 12.11.1981 was a formality and not binding upon the plaintiff. No notice of taking possession had been given to the plaintiff. Present suit was accordingly filed.

3. In the written statement the defence was that the suit land had been acquired and physical possession of the same had been taken and handed over to the DDA on 12.11.1981.

4. Issues were framed. Oral and documentary evidence was led. Issue no.3 is relevant for the controversy in dispute. It reads as follows:

"Whether the plaintiff is entitled for the relief of declaration as

prayed for ?OPP"

5. The first court i.e. the trial court had held that the report of the possession dated 12.11.1981 pursuant to the Award had been proved as Ex.PW-4/3. The contention of the plaintiff that he had crops standing on the land therefore physical possession of the land had not actually been taken over had been rejected. Attention has been drawn to the document dated 12.3.1985 of the Land Acquisition Collector (LAC) wherein it had been recorded that compensation will be paid to the applicant only when he surrenders possession to the government and files an affidavit to the said effect. Counsel for the appellant has submitted that this order of the LAC has clinched the issue. This document by itself established that the physical possession of the land had not been taken over. Compensation to the applicant had also not been paid. The document dated 12.3.1985 was admittedly not filed before the trial court. This had been filed before the first appellate court. Trial court had dismissed the suit on 27.11.2004. It had held that the plaintiff is an encroacher upon the government land as physical possession of the suit land had been taken over. Reliance has also been placed on various authorizes of the Apex Court to hold that no injunction can be granted against a true owner.

6. The impugned judgment had endorsed this finding. It was held that the physical possession of the land had been taken over and the proceedings under Section 6 of the Land Acquisition Act in fact stood completed.

7. In 1995 IV AD (SC) 389 **Laxmi Chand Vs. Gram Panchayat Kararia** the Apex Court while dealing with the objection to acquisition proceedings under the Land Acquisition Act the Apex Court had noted:

> "The scheme of the Act is complete in itself and thereby the jurisdiction of the Civil Court to take the cognizance of the case arising under the Act is barred. The Civil Courts were held to be devoid of the jurisdiction to give declaration on the invalidity of the procedure contemplated under the Act and only High Court and Supreme Court were held to have power under Article 226 and Article 136."

8. In AIR 1996 SC 3377 **Tamil Nadu Housing Board Vs. A. Viswam** Apex Court had held that the recording of a memo/ panchnama

is proof of possession. Ex.PW-4/3 had proved this.

9. The impugned judgment suffers from no infirmity; no interference is called for.

10. Substantial questions of law have been embodied on page 2 of the appeal. They read as follows:

> "i. Whether the possession of the appellant can be protected by this Hon'ble Court under the circumstances when the possession, as per the admission of the DDA/LAC is still with appellant despite passing of the acquisition award as mentioned in the proceeding of acquisition dated 26.11.84 wherein the Collector has mentioned that no compensation can be paid to the appellant till the possession is handed over to the Collector?
>
> ii. Whether the Respondent can dispossess the appellant in view of the order passed by Lt. Governor on 12.12.2007 whereby the status of the land has been termed as private land in view of clause 1 of the notification dated 12.12.2007 (copy of order dated 122.12.2007 is enclosed herewith as annexure A-2)?
>
> iii. Whether the suit land still vests with the Government in terms of section 16 of the Land Acquisition Act and more particularly in the backdrop of the fact that it has been admitted by the respondents that the physical possession has not been take over by the appellant?
>
> iv. Whether the appellant who admittedly is in the settled and legal possession of the suit land, has a right to protect the same from any third person and/or the Government?
>
> v. Whether the order dated 12.12.2007 issued by the Lieutenant Governor of Delhi, to the effect that suit land falls in the category of private land, since the physical possession of the same is with the appellant, and more particularly no compensation having been taken by the appellant, would not be rendered ineffective, if the admitted possession of the appellant is disturbed.
>
> vi. Whether the appellant is not entitled for the injunction as prayed for in the suit to protect his settled possession upon the suit land."

11. Oral and documentary evidence had established that the physical possession of the land had been taken over by the defendant on 12.3.1981 vide Ex. PW-4/3. If the plaintiff was aggrieved by this possession memo he could not assail it by way of a suit; this was not the remedy or the forum as has been held by the Apex Court in the case of **Laxmi Chand**(supra). No substantial question of law having arisen, the application as also pending application is dismissed in limine.

ILR (2011) III DELHI 682
CS (OS)

TATA FINANCE LTD. ....PLAINTIFF

VERSUS

P.S. MANGLA & ORS. ....DEFENDANTS

(V.K. JAIN, J.)

CS (OS) NO. : 2569/2000 DATE OF DECISION: 11.03.2011
& CS (OS) NO. : 524/2004

Transfer of Property Act, 1882—Section 106—Suit for recovery—Plaintiff took flat no. 401, New Delhi, House no. 27, Barakhamba Road, New Delhi on rent for a period of three years vide registered lease deed dated 18.04.1995—Furnishings and fittings provided in the premises were leased out to plaintiff by defendant no. 4—Clause 17 of the agreement provided for giving a prior six English calendar months notice during the initial or renewed lease term for vacating the premises—Plaintiff on 07.10.1997 wrote a letter exercising option to renew the lease, which was to expire on 31.03.1998 for a further period of three years—On 16.12.1998 plaintiff claims to have written to the defendants to expressing its intention to vacate

the tenanted premises six months therefrom—Vide subsequent letters dated 14.05.1999 and 14.07.1999 plaintiff sought extension from the defendants to continue to occupy the premises on a month to month basis till 31.08.1999—Vide letter dated 29th September, 1999 plaintiff finally called upon the defendants to take possession of tenanted premises and collect keys—Defendants failed to take possession—Plaintiff demanded the security deposit along with interest with effect from 30th September, 1999—Defendants contested the suit and filed counter claim for recovery of Rs. 19,18,079/- from plaintiff—Defendants denied receipt of letters dated 16th December 1998 and 14th May 1999—Admitted receipt of letter dated 14th July, 1999—No notice terminating the tenancy in terms of clause 17 of the lease agreement—The Lease expired only by efflux of time on 31st March 2001—Defendants claimed rent from 1st September, 1999 to 31st March, 2001—Damages for the same period, Maintenance charges, electricity and water charges etc.—Another suit filed by defendants no. 1 to 3 claiming possession of the aforesaid tenanted premises as well as furnishings and fittings and for recovery of damages for use and occupation, maintenance charges, charges towards increase in property tax etc.—Defendant denied its liability—Held—Since the plaintiff company, on expiry of the lease by efflux of time on 31st March, 1998, continued in possession with the consent of the landlords, it became 'a tenant holding over' the tenanted premises, and is not a 'tenant at sufferance' Tenancy of the plaintiff company could have been determined by giving 15 days notice in accordance with Section 106 of the Transfer of Property Act—The purpose of giving notice of termination of tenancy by a tenant to the landlord is to make it known to him that he does not propose to continue in possession of the tenanted premises after the date from which the tenancy is being terminated by him—The letter dated

14th July, 1999 meets all necessary requirements of a notice of termination of tenancy—Adopting a pragmatic and constructive approach in interpretation of such notices, letter amounted to valid notice of termination of tenancy on the part of plaintiff company—The month to month tenancy, therefore, stood terminated with effect from 31st August 1999.

Section 116 of Transfer of Property Act, to the extent it is relevant, provides that if a lessee remains in possession of the tenanted premises after the determination of the lease granted to him, and the lessor or his legal representative accepts rent from the lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106. Section 106 of Transfer of Property Act, to the extent it is relevant, provides that in the absence of a contract or local law or usage to the contrary, a lease of immoveable property for other than agricultural or manufacturing purposes shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice. Therefore, since the defendants allowed the plaintiff to continue in possession of the tenancy premises and also accepted rent from it, even after the term of the lease had expired by afflux of time, the lease came to be renewed from month to month being a lease for commercial purpose.

In **Bhawanji Lakhamshi and others v. Himatlal Jamnadas Dani and others,** (1972) 1 SCC 388, Supreme Court observed as under:-

> "The act of holding over after the expiration of the term does not create a tenancy of any kind. If a tenant remains in possession after the determination of the lease, the common law rule is that he is a tenant on sufferance. A distinction should be drawn between a tenant continuing in possession after the

determination of the term with the consent of the landlord and a tenant doing so without his consent. The former is a tenant at sufferance in English Law and the latter a tenant holding over or a tenant at will. In view of the concluding ˇwords of Section 116 of the Transfer of Property Act, a lessee holding over is in a better position than a tenant at will. The assent of the landlord to the continuance of possession after the determination of the tenancy will create a new tenancy. What the section contemplates is that on one side there should be an offer of taking a new lease evidenced by the lessee or sub-lessee remaining in possession of the property after his term was over and on the other side there must be a definite consent to the continuance of possession by the landlord expressed by acceptance of rent or otherwise."

The Court also referred to the following observations made by Patanjali Sastri, J. in **Kai Khushroo Bezonjee Capadia** (supra) :-

"Turning now to the main point, it will be seen that the section postulates the lessee remaining in possession after the determination of the lease which is conduct indicative, in ordinary circumstances, of his desire to continue as a tenant under the lessor and implies a tacit offer to take a new tenancy from the expiration of the old on the same terms so far as they are applicable to the new situation, and when the lessor assents to the lessee so continuing in possession, he tacitly accepts the latter's offer and a fresh tenancy results by the implied agreement of the parties. When, further, the lessee in that situation tenders rent and the lessor accepts it, their conduct raises more readily and clearly the implication of an agreement between the parties to create a fresh tenancy."

In the case before this Court, since the plaintiff company, on expiry of the lease by efflux of time on 31st March, 1998,

continued in possession with the consent of the landlords, it became 'a tenant holding over, the tenanted premises, and is not a 'tenant at sufferance'. **(Para 19)**

Regarding the decision of the Full Bench of the Allahabad High Court in **Burma Shell Oil Storage and Distributing Co. of India Ltd.** (supra), the Full Bench \of this Court, inter alia, observed as under:-

"We may now consider the decision cited by Mr. Nayyar. A Full Bench of Allahabad High Court in **Burmah Shell Oil Storage and distributing Co of India Ltd v. State of Uttar Pradesh,** AIR 1984 Allahabad 89, proceeded on the basis that the term of the new lease would be the same as of old lease, except the conditions of the original lease as to the period of the lease. With utmost respect to the learned Judges, we cannot subscribe to the said view. If an indenture of lease comes to an end by efflux of time the terms and conditions of the said lease do not subsist. The terms and conditions embodied in a deed of lease perish with it. Renewal being a fresh grant, the terms and conditions thereof either must refer to the original lease or fresh terms and conditions must be agreed to by the parties. In the instant case, admittedly an unregistered agreement of lease was executed. It is not the case of the defendant that service of six months. notice for terminating the tenancy was also stipulated therein. In any event, the said agreement of tenancy being an unregistered one, the same would not be admissible in evidence being for the purpose of relevance on the terms and conditions thereof. In terms of Section 116 also the lease becomes month to month one. As such for the said purpose, service of 15 days. notice terminating the tenancy with the expiry of the tenancy month would meet the requirement of law."

In view of the above referred decision of the Full Bench of

this Court, I hold that the tenancy of the plaintiff company could have been determined by giving 15 days notice in accordance with Section 106 of the Transfer of Property Act. **(Para 23)**

Exhibit P-3 is the letter sent by the plaintiff company to the defendants on 14th July, 1999 referring to its earlier letters dated 16th December, 1998 and 14th May, 1999 regarding termination of the lease agreement and handing over possession of the tenanted premises and seeking extension upto 31st August, 1999 for vacating the premises. This letter was received by the defendants on or before 3rd August, 1999 as is evident from letter Exhibit P-5, which contains a reference to this letter and is an admitted document. Vide letter dated 29th September, 1999 (Exhibit PW1/5), informing them that despite their telephonic messages since 27th September, 1999 to take possession of the tenanted premises, no one from their side had come forward to collect the keys, they conveyed to the defendants that they would not be liable to pay rent after 30th September, 1999 and they should take possession of the tenanted premises and refund the security deposit lying with them. In my view, the letter dated 14th July, 1999 can, in the facts and circumstances of the case, be safely taken as a notice under Section 106 of the Transfer of Property Act terminating, with effect from 31st August, 1999, the month to month tenancy, which was created by the plaintiff continuing in possession even after expiry of tenancy by efflux of time on 31st March, 1998 and acceptance of rent by the defendants from the plaintiff. In this regard, it would be useful to refer to the provisions of sub-Section 3 of Section 106 of the Transfer of Property Act, which provides that a notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.

In **Bhagabandas Agarwalla v. Bhagwandas Kanu and**

others, (1977) 2 SCC 646, SupremeCourt held that a notice to quit must be constructed not with a desire to find faults in it, which would render it defective, but it must be construed ut res magis valeat quam pereat and not ˇwith a desire to find faults in it. It was further observed that the notice should not be read in a hyper-critical manner but must be constructed in a common sense way.

The purpose of giving notice of termination of tenancy by a tenant to the landlord is to make it known to him that he does not propose to continue in possession of the tenanted premises after the date from which the tenancy is being terminated by him, so that the landlord is not taken by surprise and gets adequate time to take possession of the tenanted premises and to look for another tenant in case he wants to let it out to another person. The letter dated 14th July, 1999 meets all the necessary requirements of a notice of termination of tenancy. Vide this letter, the plaintiff company expressed an unequivocal intention not to continue in occupation of the tenanted premises after 31st August, 1999, it gave more than 15 days time to the defendants to take possession and the date stipulated in this letter for vacating the premises also expired by the end of the month. Adopting a pragmatic and constructive approach to interpretation of such notices, I am of the considered view that this letter amounts to a valid notice of termination of notice on the part of the plaintiff company. The month to month tenancy, therefore, stood terminated with effect from 31st August, 1999. The issue is decided accordingly. **(Para 27)**

Important Issue Involved: If tenant continues in possession of tenanted premises after the expiry of lease by efflux of time with the consent of the landlord he becomes a tenant holding over the tenanted premises and not a tenant at sufferance.

[Vi Ba]

APPEARANCES:

FOR THE PLAINTIFF : Mr. T.K. Ganju, Sr. Advocate with Mr. B.L. Wali, Ms. Shalini Kapoor.

FOR THE DEFENDANTS : Mr. T.K. Ganju, Sr. Advocate with Mr. B.L. Wali, Ms. Shalini Kapoor.

CASES REFERRED TO:

1. *Tamil Nadu Handloom Weavers' Co-operative Society* vs. *Harbans Lal Gupta,* 2009 (107) DRJ 418 (DB).
2. *Aktiebolaget Volvo and others* vs. *R. Venkatachalam and another* (I.A. No.5683/2008 in CS(OS) No.516/2007.
3. *ICRA Ltd.* vs. *Associated Journals Limited and another,* 2007 (98) DRJ 638.
4. *Punjab National Bank* vs. *Khajan Singh,* AIR 2004 Punjab and Haryana 282.
5. *Ramnik Vallabhdas Madhvani and others* vs. *Taraben Pravinlal Madhvani,* (2004) 1 SCC 497.
6. *Uberoisons (Machines) Ltd.* vs. *Samtel Color Ltd.,* 105 (2003) DLT 383.
7. *Onida Finance Ltd.* vs. *Mrs. Malini Khanna,* 2002 III AD (Delhi) 231.
8. *Mrs. Daman Kaur Sethi and others* vs. *Indian Bank* (Suit No.2075/1999 decided on 31st January, 2002).
9. *Rajesh Wadhwa* vs. *Sushma Govil,* AIR 1989, Delhi 144.
10. *Raja Laksman Singh* vs. *State,* AIR 1988 Rajasthan 44.
11. *Bharat Petroleum Corporation Ltd.* vs. *Khaja Midhat Noor and Others,* (1988) 3 SCC 44.
12. *Burma Shell Oil Storage and Distributing Co. of India Ltd.* vs. *State of Uttar Pradesh,* AIR 1984 Allahabad 89.
13. *Bhagabandas Agarwalla* vs. *Bhagwandas Kanu and others,* (1977) 2 SCC 646.
14. *Rayappa Basappa Killed* vs. *The Land Tribunal and others,* AIR 1976 Karnataka 205.

15. *State of U.P.* vs. *Zahoor Ahmad and another,* AIR 1973 SC 2520.
16. *Bhawanji Lakhamshi and others* vs. *Himatlal Jamnadas Dani and others,* (1972) 1 SCC 388.
17. *Jugraj Singh and Anr.* vs. *Jaswant Singh and Ors.,* AIR 1971 SC 761.
18. *Shiv Nath* vs. *Shri Ram Bharosey Lal,* AIR 1969 Allahabad 333.
19. *The Calcutta Credit Corporation Ltd., & another* vs. *Happy Homes (P) Ltd.,* AIR 1968 SC 471.
20. *Mahant Narayana Dasjee Varu and Others* vs. *Board of Trustees, Tirumalai Tirupathi Devasthanam,* AIR 1965 SC 1231.
21. *Zahoor Ahmad Abdul Sattar* vs. *State of U.P.,* AIR 1965 Allahabad 326.
22. *Radha Ballabh* vs. *Bahore Ram Chand,* AIR 1955 Allahabad 679.
23. *Suiti Devi* vs. *Banarsidas Bhagwan-das,* AIR 1949 Allahabad 703.
24. *Kai Khushroo Bezonjee Capadia* vs. *Bai Jerbai Hirjibhoy Warden and Another,* AIR 1949 (50) FC 124.
25. *K. Gnanadesikam Pillai and Ors.* vs. *Antony Benathu Boopalarayar,* AIR 1934 Madras 458.
26. *Krishna Char an Sukladas* vs. *Nitya Sundari Devi,* AIR 1926 Calcutta 1239.

V.K. JAIN, J.

CS(OS) No.2569/2000

1. This is a suit for recovery of Rs. 32,53,824/- instituted by the Tata Finance Ltd. through its attorney Mr. Anil Sharma. The plaintiff – company had taken flat No. 401, New Delhi, House 27, Barakhamba Road, New Delhi – 110 001 admeasuring 1076 sq. ft. and comprising of one hall and a toilet on rent, from defendants 1 to 3 for a period of three

years vide registered lease deed executed on 18.04.1995. Vide another agreement of the same day, defendant No.4 leased the furnishings and fittings provided in the aforesaid premises to the plaintiff company, for the same period. A sum of Rs.25,82,400/- was deposited by the plaintiff company as security vide yet another agreement executed between the plaintiff company and all the four defendants on the same date.

2. Clause 17 of the lease agreement gave an option to the plaintiff company to renew the lease for a further term of three years by giving notice in writing, by registered post at least six months before the expiry of the lease term, on the same terms and conditions except that in case of renewal, the rent was to increase 25% from the last paid rent. In case of renewal, a fresh lease agreement was to be executed on the stamp papers of appropriate value at the cost of the plaintiff company. It was further stipulated in Clause 17 of the lease agreement that the lessee would be entitled to vacate the premises after giving a prior six English calendar months notice during the initial or renewed lease term. On expiry of six years, the lessee was to hand over vacant possession of the premises to the lessor unless the lease was renewed by execution of a fresh lease agreement. The security deposit was to be refunded to the lessee without any interest on the expiry of the said lease or the vacation of the said premises by lessee, whichever is earlier, against handing over peaceful vacant possession of the flat, furnishings and fittings in good condition and after deducting dues, if any.

3. The plaintiff company wrote a letter dated 07.10.1997 to the defendants exercising its option to renew the initial lease which was to expire on 31.03.1998 for a further period of three years, on payment of 25% higher rent in terms of clause 17 of the lease deed. Similar letter was issued by the plaintiff company with respect to furnishings and fittings provided in the premises. However, vide letter dated 16.12.1998, the plaintiff company claims to have written to the defendants expressing its intention to vacate the tenanted premises six months therefrom, in exercise of its option to terminate the lease as per clause 17. Similar notice was given to defendant No.4 with respect to agreement for furnishings and fittings. However, vide subsequent letters dated 14.5.1999 and 14.07.1999, the plaintiff company sought extensions from the defendants to continue to occupy the premises on a month to month basis till 31.08.1999 on the ground that they had not been able to remove

all their furnitures etc. and shift to a new premises.

4. Vide letter dated 29th September, 1999, the plaintiff company finally called upon the defendants to take possession of the tenanted premises and collect keys without any further delay. The defendants, according to the plaintiff company, failed to take possession and also did not refund the interest free security amount, which the plaintiff company had deposited with them. By letter dated 4th May, 2000, the plaintiff demanded the security deposit of Rs.25,82,400/- along with interest on that amount at the rate of 24% per annum with effect from 30th September, 1999. The amount of interest comes to Rs.6,71,424/-, thereby making a total of Rs.32,53,824/-.

5. Defendant Nos. 2 to 4 have contested the suit and have also filed a counter claim for recovery of Rs.19,18,079/- from the plaintiff company. They have denied the authority of Mr. Anil Sharma to institute the suit on behalf of the plaintiff company. It has been claimed by them that defendant No.1 had gifted his share in the tenanted premises to defendant No.3 on 31st October, 1998 and the plaintiff was informed accordingly. On merits, execution of registered lease deed dated 18th April, 1995 has been admitted by the contesting defendants, who have claimed that the lease deed as also the agreement with respect to furnishing and fittings expired by efflux of time on 31st March, 2001. The contesting defendants have denied receipt of letters dated 16th December, 1998 and 14th May, 1999. They have, however, admitted receipt of letter dated 14th July, 1999 from the plaintiff company. They have also claimed that the plaintiff company wrongly stopped payment of rent with effect from September, 1999. The receipt of plaintiff's letter dated 29th September, 1999 has also been admitted by the contesting defendants. This is also their case that no notice terminating the tenancy in terms of Clause 17 of the lease agreement dated 18th April, 1995 was given by the plaintiff company to them at any point of time and, therefore, the lease expired only by efflux of time on 31st March, 2001. The contesting defendants have claimed rent at the rate of Rs.1,34,500/- per month for the period from 1st September, 1999 to 31st March, 2001, Rs.4,03,500/- towards damages for use and occupation at the same rate for the period 1st April, 2001 to 31st June, 2001, Rs.48,984/- towards maintenance charges payable to the Capital Maintenance Society, Rs.12,09,381/- towards increase in property tax for the years 1995-96 to 2000-2001, Rs.1,05,114/- towards

charges for use of electricity and water upto February, 2001 and Rs.18,000/- towards ground rent and insurance for the period of 1st April, 1995 to 31st March, 2001. They have also claimed Rs.1,60,000/- towards interest at the rate of 18% per annum on the balance amount after adjusting the security deposit. Thus, an amount of Rs.19,18,079/- has been claimed by the defendants after deducting the security deposit of Rs.25,82,400/-.

6. CS(OS) No.524/2004 has been filed by Shri P.S. Mangla, Shri Kamal Mangla and Smt. Sneh Lata Mangla, who are defendants No. 1 to 3 in CS(OS) No.2569/2010, claiming possession of the aforesaid tenanted premises as well as furnishing and fittings provided therein as also for recovery of Rs.38,87,050/- towards damages for use and occupation for the period from 1st July, 2001 to 30th April, 2004 at the rate of Rs.1,14,325/- per month, Rs.6,85,950/- towards hire charges for the period from 1st July, 2001 to 30th April, 2004 at the rate of Rs.20,175/- per month, Rs.12,94,092/- towards increase in property tax for the years 2000-01 to 2003-04, Rs.1,17,909/- towards maintenance charges for the period from 1st August, 2001 to 30th April, 2004 at the rate of Rs.3573/- per month and Rs.9,250/- as ground rent and insurance for the period from 1st April, 2001 to 30th April, 2004. They have also claimed interest on the aforesaid amount at the rate of 12% per annum amounting to Rs.10,19,022/- besides claiming future damages for use and occupation as well as hire charges for the future.

7. The defendant company in this suit, which is plaintiff in CS(OS) No.2569/2000 has denied its liability towards payment of damages for use and occupation, hire charges, increase in house tax, maintenance charges, ground rent and insurance. As regards claim for increase in house tax, it has been stated by the tenant that since no assessment has been finalized, the defendant company is not liable to pay any amount to the plaintiffs towards increase in house tax.

8. The following issues were framed on the pleadings of the parties in respect of both suits:-

1. Whether the plaint is signed, verified and suit filed by a duly authorized person? OPP.
2. Whether the suit is bad for misjoinder of defendant No.3, if so, to what effect? OPD

3. Whether the plaintiff has duly terminated the tenancy in terms of Clause 17 and/or otherwise in accordance with law? OPP
4. Whether the plaintiff is entitled to refund of security amount, if so, to what extent? OPP.
5. Whether the plaintiff is entitled to interest, if so, at what rate and for what period? OPP.
6. Whether the plaintiff is liable to pay rent, electricity charges, water charges, property tax w.e.f. 1st September, 1999 and if so, till what date? OPD.
7. Whether the defendants are entitled to claim amount stated in the counter claim and, if so, to what extent? OPD.
8. Whether the defendants are entitled to interest, if so, at what rate and for what period? OPD.
9. Whether the defendants are entitled to adjust the security amount, if so, to what effect and what extent? OPD.
10. What is the liability of the plaintiff in regard to payment of rent/damages and, if so, till what date? OPD.
11. Relief.

ISSUE NO.1

9. PW-1 Mr. Pradeep Sehrawet, Regional Legal Incharge of the plaintiff company identified the signatures of Mr. Anil Sharma, Manager (Law) of the plaintiff company on the plaint and verification clause and stated that he was duly authorized to sign and institute the present suit vide power of attorney executed in his favour on 26th July, 2000. The original power of attorney in favour of Mr. Anil Sharma has not been filed by the plaintiff company though a photocopy is available on record, having been filed on 8th September, 2003. The cross-examination of the witness, however, shows that the original was not brought by him.

10. In **Aktiebolaget Volvo and others v. R. Venkatachalam and another** (I.A. No.5683/2008 in CS(OS) No.516/2007 decided by this Court on 18th May, 2009), this Court held that since a photocopy or a copy would also be a document and it cannot be said that the provisions of the CPC for filing of documents necessarily relate to original documents.

Dealing with the question as to whether under Order 13 Rule 1 of the CPC, the original documents has to be placed on the file of the Court and whether Evidence Act while providing for proof of documents by primary evidence requires filing/placing of the original document on the record of the Court, it was held that the legislative scheme permits production of originals for inspection only and filing of copies only. It was also held that endorsement/exhibit mark can also be put on the copies of the court record as well.

11. A perusal of the photocopy filed by the plaintiff shows that the power of attorney in favour of Mr. Anil Sharma was attested by public notary on 26th July, 2000. Since the power of attorney in favour of Mr. Anil Sharma purports to be attested by a Public Notary, there is a statutory presumption under Section 85 of Evidence Act that the Power of Attorney was executed by the person by whom it purports to have been executed and the person who executed the power of attorney was fully competent in this regard. In **Jugraj Singh and Anr. Vs. Jaswant Singh and Ors.,** AIR 1971 SC 761, the Power of Attorney attested by a Public Notary was disputed on the ground that it did not show on its face that the Notary had satisfied himself about the identity of the executant. Supreme Court held that there was a presumption of regularity of official acts and that the Notary must have satisfied himself in the discharge of his duties that the person who was executing it was the proper person. In **Rajesh Wadhwa vs. Sushma Govil,** AIR 1989, Delhi 144, it was contended before this Court that till it is proved that the person who signed the said power of attorney was duly appointed attorney, the court cannot draw a presumption under Section 57 and 85 of the Evidence Act. Repelling the contention, it was held by this Court that the very purpose of drawing presumption under Sections 57 and 85 of the Evidence Act would be nullified if proof is to be had from the foreign country whether a particular person who had attested the document as a Notary Public of that country is in fact a duly appointed Notary or not. When a seal of the Notary is put on the document, Section 57 of the Evidence Act comes into play and a presumption can be raised regarding the genuineness of the seal of the said Notary, meaning thereby that the said document is presumed to have been attested by a competent Notary of that country. In **Punjab National Bank vs. Khajan Singh,** AIR 2004 Punjab and Haryana 282, the Power of Attorney in favour of a bank, which had been duly attested, was rejected by the learned District Judge

on the ground that the presumption under Section 85 of Evidence Act was available to a particular class of Power of Attorneys described in the section, which was confined to its execution and authenticity alone. The High Court, however, rejected the view taken by the learned District Judge holding that absence of proof of resolution authorizing the executant to execute the Power of Attorney could not be sustained and a presumption in favour of the attorney would arise under Section 85 Act. Hence in this case also, the Court can presume not only that the power of attorney dated 26th July, 2000 was executed by Shri Dilip Sudhakar Pendse, Managing Director of the plaintiff company in favour of Shri Anil Sharma, the then Manager (Law) of the plaintiff company, it can be further presumed that Mr. Dilip Sudhakar Pendse was duly authorized by the plaintiff company to execute a power of attorney in favour of Mr. Anil Sharma. Hence, it was not necessary for the plaintiff company to produce the power of attorney executed by the plaintiff company in favour of Mr. Dilip Sudhakar Pendse, Managing Director of the plaintiff company. In any case, since no arguments were advance on behalf of the defendants in CS(OS) No.2569/2000 on this issue, I need not dilate further and record a specific finding on this issue.

ISSUE NO.2

12. There appears to be a typographical error in this issue since the case of the plaintiff is that it was defendant No.1, who had transferred his share in the tenanted premises to defendant No.3. It appears that the word defendant No.1 ought to have been typed in placed of defendant No.3 in this issue.

13. In para 2 of the written statement, the contesting defendants have specifically alleged that defendant No.1 had gifted his share of the tenanted premises to defendant No.3 Sneh Lata Bansal on 31st October, 1998 and informed the plaintiff about it vide letter dated 31st October, 1998 and 5th November, 1998. It is further alleged that by these letters, defendant No.1 had advised the plaintiff company to pay the rent of his share to defendant No.3. It is also alleged that defendant No.1 had also written to the plaintiff company that the security deposit had been transferred to defendant No.3, who had undertaken to abide by all the terms and conditions of the lease agreement. These averments have not been specifically denied in para 2 of the replication/written statement to

the counter claim and, therefore, are deemed to have been admitted. On the other hand, the plaintiff company claimed that the alleged transfer does not absolve defendant No.1 to refund the security deposit paid to him thereby admitting the transfer and claim by the contesting defendants. Exhibit DW2/1 is the letter dated 31st October, 1998 written jointly by defendant Nos. 1 and 3, Shri P.S. Mangla and Mrs. Sneh Lata Mangla to the plaintiff company informing it that defendant No.1 had gifted his 20% share in flat No.401, New Delhi House to Mrs. Sneh Lata Mangla, who already held 20% share in the aforesaid flat and requested the plaintiff company to pay future rent for the period commencing 1st November, 1998 to her. Exhibit DW2/2 is a letter dated 5th November, 1998 from defendant Nos. 1 and 3 to the plaintiff company requesting the plaintiff company to pay his share in the rent to defendant No.3 Smt. Sneh Lata Mangla and also informing that security deposit had also been transferred to defendant No.3, who had undertaken to abide by all the terms and conditions of the lease deed. In fact, PW1, Mr. Pradeep Sehrawat has also admitted in para 9 of his affidavit dated 31st May, 2006 that defendant No.1 had informed the plaintiff company that he was gifting his interest in the property to defendant Nos. 2 and 3 as a part of his tax planning and the company had accordingly agreed to remit the future rent to defendant Nos. 2 and 3. Since, the rent with effect from 1st November, 1998 was required to be paid only to defendant Nos. 2 and 3 and the security deposit was also transferred to defendant No.3, the suit is bad for misjoinder of defendant No.1, whose name is struck off from the array of defendants in CS(OS) No.2569/2000.

ISSUE No.3

14. Clause 17 of the lease deed dated 18th April, 1994 reads as under:-

> "On the expiry of the initial lease period of three years the lessees shall have the option to renew the lease for a further term of 3 years by giving notice in writing by Registered Post at least six months before the expiry of this lease term on the same terms and conditions except that the lease amount for the renewed 3 years term shall be increased by 25% of the last lease amount paid. In case of renewal of a fresh Lease Agreement will be executed on the stamp paper of appropriate value at Lessee's cost. It is however agreed that the Lessee shall be entitled to vacate the premises by giving a prior six English calendar months notice during the initial or renewed lease term. After the expiry of six years period of 31st March, 2001, the Lessee would handover peaceful vacant possession of the demised premises to the Lessors, unless of course, the lease is renewed further at mutually agreed terms 6 months prior to 31st March, 2001 by execution of a fresh Lease Agreement."

15. In exercise of the option given to the plaintiff company, a letter dated 7th October, 1997 was written by the plaintiff company to defendant Nos. 1 to 3, giving a notice exercising option to renew the lease agreement for further period of 3 years from 1st April, 1998 on the same terms and conditions except that the monthly rent to increase by 25%. Similar notice was given to defendant No.4 with respect to furnishing and fittings provided to the plaintiff company and the same is Exhibit P-2. However, admittedly no lease agreement was executed between the parties despite exercise of option in this regard by the plaintiff company.

16. Clause 17 of the lease deed dated 18th April, 1998 specifically stipulated that in case of renewal, a fresh lease agreement would be executed on the stamp paper of appropriate value at Lessee's cost. Even otherwise, a lease for three years, even if it was a renewed lease in exercise of an option given to the tenant under the original lease, could be created only by execution and registration of an instrument as required by Section 107 of the Transfer of Property Act, which to the extent it is relevant, provides that a lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made only by a registered instrument.

17. In Burmah Shell Oil Distributing now known as **Bharat Petroleum Corporation Ltd. v. Khaja Midhat Noor and Others,** (1988) 3 SCC 44, the lease was executed for a period of 10 years which expired on January 16, 1958. The lease could be renewed for a further period of 5 years. On considering the provisions of Sections 106 and 107 of the Transfer of Property Act, Supreme Court, inter alia, observed as under:-

> "In view of the para 1 of Section 107 of the Act, since the lease was for a period exceeding one year, it could only have been extended by a registered instrument executed by both the lessor and the lessee. In the absence of registered instrument, the lease

shall be deemed to be "lease from month to month". It is clear from the very language of Section 107 of the Act which postulates that a lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument. In the absence of registered instrument, it must be a monthly lease."

Hence, in the absence of a registered lease deed, the lease dated 18th April, 1995 did not get renewed for a further period of 3 years and expired by efflux of time on 31st March, 1998.

18. It is, however, an admitted case that even after expiry of the lease deed dated 18th April, 1995 by efflux of time on 31st March, 1998, the tenant continued to occupy the tenancy premises and the landlords continued to accept rent from the tenant.

19. Section 116 of Transfer of Property Act, to the extent it is relevant, provides that if a lessee remains in possession of the tenanted premises after the determination of the lease granted to him, and the lessor or his legal representative accepts rent from the lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106. Section 106 of Transfer of Property Act, to the extent it is relevant, provides that in the absence of a contract or local law or usage to the contrary, a lease of immoveable property for other than agricultural or manufacturing purposes shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice. Therefore, since the defendants allowed the plaintiff to continue in possession of the tenancy premises and also accepted rent from it, even after the term of the lease had expired by afflux of time, the lease came to be renewed from month to month being a lease for commercial purpose.

In **Bhawanji Lakhamshi and others v. Himatlal Jamnadas Dani and others,** (1972) 1 SCC 388, Supreme Court observed as under:-

"The act of holding over after the expiration of the term does not create a tenancy of any kind. If a tenant remains in possession after the determination of the lease, the common law rule is that he is a tenant on sufferance. A distinction should be drawn

between a tenant continuing in possession after the determination of the term with the consent of the landlord and a tenant doing so without his consent. The former is a tenant at sufferance in English Law and the latter a tenant holding over or a tenant at will. In view of the concluding words of Section 116 of the Transfer of Property Act, a lessee holding over is in a better position than a tenant at will. The assent of the landlord to the continuance of possession after the determination of the tenancy will create a new tenancy. What the section contemplates is that on one side there should be an offer of taking a new lease evidenced by the lessee or sub-lessee remaining in possession of the property after his term was over and on the other side there must be a definite consent to the continuance of possession by the landlord expressed by acceptance of rent or otherwise."

The Court also referred to the following observations made by Patanjali Sastri, J. in **Kai Khushroo Bezonjee Capadia** (supra) :-

"Turning now to the main point, it will be seen that the section postulates the lessee remaining in possession after the determination of the lease which is conduct indicative, in ordinary circumstances, of his desire to continue as a tenant under the lessor and implies a tacit offer to take a new tenancy from the expiration of the old on the same terms so far as they are applicable to the new situation, and when the lessor assents to the lessee so continuing in possession, he tacitly accepts the latter's offer and a fresh tenancy results by the implied agreement of the parties. When, further, the lessee in that situation tenders rent and the lessor accepts it, their conduct raises more readily and clearly the implication of an agreement between the parties to create a fresh tenancy."

In the case before this Court, since the plaintiff company, on expiry of the lease by efflux of time on 31st March, 1998, continued in possession with the consent of the landlords, it became 'a tenant holding over, the tenanted premises, and is not a 'tenant at sufferance'.

20. The next question which comes for consideration is as to whether the tenancy could have been determined by the plaintiff company by giving 15 days notice in terms of Section 106 of the Transfer of

Property Act or it was required to give six months notice in terms of Clause 17 of the lease deed dated 18th April, 1995. It was contended by the learned counsel for the defendants that since the provisions of Section 106(1) of the Transfer of Property Act providing for termination of tenancy for any purpose other than agricultural or manufacturing purposes by giving 15 days notice apply only in the absence of a contract to the contrary, and since clause 17 of the lease agreement dated 18th April, 1995, which is a contract between the parties, provides for six English Calendar Month's notice and no such notice was ever given by the plaintiff, the tenancy was not validly terminated.

21. In **Burma Shell Oil Storage and Distributing Co. of India Ltd. v. State of Uttar Pradesh,** AIR 1984 Allahabad 89, the following question of law was referred for the opinion of the Full Bench:-

> "Whether, for the purposes of Section 116 of Transfer of Property Act, it was necessary that there should be a contract subsequent to the termination of the original lease regarding the period of notice required under Section 106, P.T. Act."

During the course of the judgment, the Full Bench noted that a Division Bench of that Court in an earlier decision in **Suiti Devi v. Banarsidas Bhagwan-das,** AIR 1949 Allahabad 703, had taken a view that the contract regarding the period of notice could also be earlier to the termination of the lease and had, to ascertain the period of notice, looked into the original contract between the parties. It was further noted that another Division Bench of that High Court in **Radha Ballabh v. Bahore Ram Chand,** AIR 1955 Allahabad 679 had clearly laid down that the contract regarding the period of tenancy could be either in the original lease deed itself or could be arrived at between the parties after the extermination of the original lease. It also took note of an earlier decision of its Full Bench in **Shiv Nath v. Shri Ram Bharosey Lal,** AIR 1969 Allahabad 333 wherein the above referred two decisions were approved and a decision of Oudh High Court holding that where a new tenancy is created by reason of the landlord allowing the tenant to hold over after termination of the original lease deed then in the absence of any terms in respect of the new tenancy, the terms governing the original lease deemed to have been accepted by the parties. The Full Bench was of the view that the decision of another Division Bench of the Court in **Zahoor Ahmad Abdul Sattar v. State of U.P.,** AIR 1965 Allahabad 326 was also to the

same effect that renewal of lease under Section 116 of the Transfer of Property Act would be on the same terms as the original lease except that it would be a lease from year to year or from month to month according to the nature of the tenancy, the other conditions remaining the same. The question referred to the Full Bench was answered holding that it is not necessary that there should be a contract subsequent to the termination of the original lease regarding the period of notice required under Section 116 of the Transfer of Property Act and that the contract could be either in the original lease or could be arrived at between the parties after termination of the original lease. This was also the view taken by the Calcutta High Court in **Krishna Char an Sukladas vs. Nitya Sundari Devi,** AIR 1926 Calcutta 1239 and by Madras High Court in **K. Gnanadesikam Pillai and Ors. vs. Antony Benathu Boopalarayar,** AIR 1934 Madras 458. It would also be pertinent to note here that the decision of the Allahabad High Court in the case of **Zahoor Ahmad** (supra) was affirmed by the Supreme Court in **State of U.P. v. Zahoor Ahmad and another,** AIR 1973 SC 2520 though the issue as to whether the agreement envisaged in Section 116 of the Transfer of Property Act had necessarily to be post termination of tenancy or could also be an earlier agreement was not examined by Supreme Court.

The following was the view of the Federal Court in **Kai Khushroo Bezonjee Capadia v. Bai Jerbai Hirjibhoy Warden and Another,** AIR 1949 (50) FC 124, where the Court agreed with the following statement contained in Woodfall's "Law of Landlord and Tenant"

> "Where a tenant for a term of years holds over after the expiration of his lease he becomes a tenant on sufferance, but when he pays or expressly agrees to pay any subsequent rent at the previous rate a new tenancy from year to year is thereby created upon the same terms and conditions as those contained in the expired lease so far as the same are applicable to and not inconsistent with an yearly tenancy."

22. However, this issue also came to be considered by a Full Bench of this Court in **Mrs. Daman Kaur Sethi and others v. Indian Bank** (Suit No.2075/1999 decided on 31st January, 2002). In that case, the plaintiffs before the Court had let out premises to the defendant bank by way of registered lease deed for a period of 5 years, which expired on 13th February, 1994. The lease could be renewed at the option of

the defendant bank for the further period of four years by enhancing the rent by 15%. The defendant bank started paying rent to the plaintiffs at the enhanced rate though no lease deed was got registered. The plaintiffs terminated the tenancy of the defendant bank by 15 days notice. Relying upon a clause in the lease deed providing for termination of the tenancy only by serving a six months. notice, it was contended on behalf of the defendant bank that 15 days notice issued by the plaintiff to them was not a valid notice. The contention of the plaintiffs, however, was that on expiry of the period of lease, a month to month tenancy came into being, which could be terminated by 15 days notice as provided in Section 106 of the Transfer of Property Act. The contention on behalf of the bank was that since the period of notice terminating the tenancy as stipulated in Section 106 of Transfer of Property Act is subject to an agreement to the contrary and the lease deed dated 27th January, 1989 contained a requirement for six months. notice to be served by the tenant, the notice dated 28th May, 1999 terminating the monthly tenancy from 13th July, 1999 must be held to be bad in law. It was also contended that the mode of termination provided in the registered deed of lease remains applicable even in the case where the tenant continues to be in possession of the tenanted premises as a tenant holding over in terms of Section of 116 of the Transfer of Property Act. Rejecting the contention of the defendant bank, the Full Bench, inter alia, held as under:-

> "The expression 'agreement to the contrary', used in Section 116 is referable to the terms of the tenant holding over and not to the terms of the original lease. In the absence of any agreement to contrary statutory tenancy created under Section 116 has to be invariably determined in accordance with Section 106 (See **Rayappa Basappa Killed v. The Land Tribunal and others,** AIR 1976 Karnataka 205."
>
> "The parties, however, in this case proceeded on the basis that the defendant became a tenant holding over. In such a situation, in our opinion, the lease becomes month to month lease, as the nature of tenancy in terms of Section 106 is directly relatable to the purpose for which a lease has been granted. Where the period of lease, as specified in the registered instrument, comes to an end, the lease itself comes to an end. Subsequent

> lease must, therefore, be in terms of the provisions contained in Section 107 of the Transfer of Property Act. The purported agreement of lease not being a registered one the same having been made in contravention of Section 107 as also Section 17(1) (d) of the Indian Registration Act, it having regarding to the purpose mentioned in Section 106 must be held to be a month to month lease. The stipulation as regards the service of six-months. notice for termination of tenancy as embodied in the original lease deed cannot have an application after the same came to an end."

23. Regarding the decision of the Full Bench of the Allahabad High Court in **Burma Shell Oil Storage and Distributing Co. of India Ltd.** (supra), the Full Bench \of this Court, inter alia, observed as under:-

> "We may now consider the decision cited by Mr. Nayyar. A Full Bench of Allahabad High Court in **Burmah Shell Oil Storage and distributing Co of India Ltd v. State of Uttar Pradesh,** AIR 1984 Allahabad 89, proceeded on the basis that the term of the new lease would be the same as of old lease, except the conditions of the original lease as to the period of the lease. With utmost respect to the learned Judges, we cannot subscribe to the said view. If an indenture of lease comes to an end by efflux of time the terms and conditions of the said lease do not subsist. The terms and conditions embodied in a deed of lease perish with it. Renewal being a fresh grant, the terms and conditions thereof either must refer to the original lease or fresh terms and conditions must be agreed to by the parties. In the instant case, admittedly an unregistered agreement of lease was executed. It is not the case of the defendant that service of six months. notice for terminating the tenancy was also stipulated therein. In any event, the said agreement of tenancy being an unregistered one, the same would not be admissible in evidence being for the purpose of relevance on the terms and conditions thereof. In terms of Section 116 also the lease becomes month to month one. As such for the said purpose, service of 15 days. notice terminating the tenancy with the expiry of the tenancy month would meet the requirement of law."

In view of the above referred decision of the Full Bench of this

Court, I hold that the tenancy of the plaintiff company could have been determined by giving 15 days notice in accordance with Section 106 of the Transfer of Property Act.

24. In the case before this Court, the case of the plaintiff is that it had determined the lease agreement vide notice dated 16th December, 1998, which is exhibit PW1/1 and purports to have been received by one T. Ramani on behalf of Shri P.S. Mangla and others on 21st December, 1998.

25. The letter Exhibit PW1/1 purports to have been received by Mr. T. Ramani on behalf of the defendants. The case of the defendants is that Mr. T. Ramani was not their agent and was not authorized to receive this letter on their behalf. Mr. T. Ramani happens to be an attesting witness to the lease deed dated 18th April, 1995. The case of the plaintiff company is that Mr. Ramani was brought by the defendants to witness the lease deed. Assuming that Mr. Ramani had witnessed the lease deed on the request of the defendants, that by itself did not make him an agent of the defendants nor did that authorize him to receive letters on behalf of the defendants. Therefore, receipt of this letter by Mr. T. Ramani does not amount to receipt by the defendants. It would be pertinent to note here that Mr. Ramani has not been produced in the witness box to prove that he had received the letters Exhibit PW1/1 and Exhibit PW1/2from the plaintiff company and that he was acting as an agent of the defendants while receiving this document from the plaintiff company.

26. This is also the plaintiff's own case that vide letters dated 14th May, 1999, Exhibit PW1/3 and Exhibit PW1/4, it had sought extension upto 31st July, 1999 to vacate the tenanted premises and vide letters dated 14th July, 1999, which are Exhibits P-3 and P-4 had sought extension of time upto 31st August, 1999 to vacate the tenanted premises.

27. Exhibit P-3 is the letter sent by the plaintiff company to the defendants on 14th July, 1999 referring to its earlier letters dated 16th December, 1998 and 14th May, 1999 regarding termination of the lease agreement and handing over possession of the tenanted premises and seeking extension upto 31st August, 1999 for vacating the premises. This letter was received by the defendants on or before 3rd August, 1999 as is evident from letter Exhibit P-5, which contains a reference to this letter and is an admitted document. Vide letter dated 29th September, 1999

(Exhibit PW1/5), informing them that despite their telephonic messages since 27th September, 1999 to take possession of the tenanted premises, no one from their side had come forward to collect the keys, they conveyed to the defendants that they would not be liable to pay rent after 30th September, 1999 and they should take possession of the tenanted premises and refund the security deposit lying with them. In my view, the letter dated 14th July, 1999 can, in the facts and circumstances of the case, be safely taken as a notice under Section 106 of the Transfer of Property Act terminating, with effect from 31st August, 1999, the month to month tenancy, which was created by the plaintiff continuing in possession even after expiry of tenancy by efflux of time on 31st March, 1998 and acceptance of rent by the defendants from the plaintiff. In this regard, it would be useful to refer to the provisions of sub-Section 3 of Section 106 of the Transfer of Property Act, which provides that a notice under sub-section (1) shall not be deemed to be invalid merely because the period mentioned therein falls short of the period specified under that sub-section, where a suit or proceeding is filed after the expiry of the period mentioned in that sub-section.

In **Bhagabandas Agarwalla v. Bhagwandas Kanu and others,** (1977) 2 SCC 646, Supreme Court held that a notice to quit must be constructed not with a desire to find faults in it, which would render it defective, but it must be construed ut res magis valeat quam pereat and not ˇwith a desire to find faults in it. It was further observed that the notice should not be read in a hyper-critical manner but must be constructed in a common sense way.

The purpose of giving notice of termination of tenancy by a tenant to the landlord is to make it known to him that he does not propose to continue in possession of the tenanted premises after the date from which the tenancy is being terminated by him, so that the landlord is not taken by surprise and gets adequate time to take possession of the tenanted premises and to look for another tenant in case he wants to let it out to another person. The letter dated 14th July, 1999 meets all the necessary requirements of a notice of termination of tenancy. Vide this letter, the plaintiff company expressed an unequivocal intention not to continue in occupation of the tenanted premises after 31st August, 1999, it gave more than 15 days time to the defendants to take possession and the date stipulated in this letter for vacating the premises also expired by

the end of the month. Adopting a pragmatic and constructive approach to interpretation of such notices, I am of the considered view that this letter amounts to a valid notice of termination of notice on the part of the plaintiff company. The month to month tenancy, therefore, stood terminated with effect from 31st August, 1999. The issue is decided accordingly.

ISSUE NO.6,7 & 10.

Rent

28. Vide letter dated 29th September, 1999, which is Exhibit PW1/5, the plaintiff company wrote to defendant No.1 Shri P.S. Mangla requesting him to take possession of the tenanted premises and informing him that they would not be liable to pay any rent after 30th September, 1999. The receipt of the letter dated 29th September, 1999 (Exhibit PW1/5) has not been disputed by the defendants. As noted earlier, receipt of this letter by the defendant on 6th October, 1999 has been acknowledged in their letter dated 11th October, 1999, which is Exhibit P-6. Earlier on receipt of a letter dated 14th July, 1999 from the plaintiff company, defendant No.1 Shri P.S. Mangla had written a letter dated 3rd August, 1999 to Mr. B.A. Suvarna, Executive Director (Legal) of the plaintiff company acknowledging the receipt of the letter dated 14th July, 1999. It is quite obvious from a bare perusal of this letter that the defendants wanted the plaintiff company to continue occupying the tenanted premises and wanted it to reconsider its decision to vacate the premises by 31st August, 1999. On receipt of the letter dated 29th September, 1999, defendant Kamal Mangla referring to Clause 17 of the lease deed informed the plaintiff company that no notice of vacating the flat as per aforesaid clause of the lease deed had been received by them and if the plaintiff company had decided to vacate the flat, they should do the needful in terms of Clause 17 of the lease deed and in the meantime continue to pay monthly rent during the notice period. Thus, the stand taken by the defendants was that the plaintiff company was required to give six months. notice to them before vacating the tenanted premises. The case of the plaintiff company is that despite their having written various letters to the defendants requiring them to take possession of the tenanted premises, the defendants failed to take possession from them and, therefore, they are not liable to pay rent for the period subsequent to September, 1999. As noted earlier, the plea taken by the defendants on receipt of the letter

dated 29th September, 1999 was that the plaintiff company was required to serve six months. notice and keep on paying rent to them during notice period. The stand taken by the defendants was not in accordance with law as held by me while deciding the issue No.3. Therefore, the defendants could not have insisted on six months. notice being given to them by the plaintiff company as a precondition to take possession of the tenanted premises. On receipt of the letter dated 29th September, 1999 from the plaintiff company, the defendants ought to have gone to the office of the plaintiff company and taken possession of the tenanted premises from them. They, however, failed to take possession despite willingness of the plaintiff company in this regard. Vide letter dated 19th February, 2000 (Exhibit P-7), defendants Kamal Mangla and Sneh Lata Mangla wrote to the plaintiff company that they had come to take possession but the possession was not given to them. However, the letter does not indicate the day on which they had gone to take possession nor does it indicate the place where they had gone and the person to whom they had met. In the natural course of human conduct, if the tenant despite offering possession to the landlords refuses to deliver possession to them, the landlords would immediately write to him specifying the day as well as the time they approached the tenant to take possession, the person whom they met and the exact response of that person to their request to hand over possession to them. It has come in the testimony of the witnesses of the plaintiff that the plaintiff company had vacated the tenanted premises and started functioning at the new premises with effect from 1st September, 1999. The plaintiff company also published an advertisement in 'Hindustan Times' New Delhi on 27th August, 1999 informing the public at large that from 31st August, 1999, they were consolidating their regional office under one roof and were shifting from 3rd and 4th floor of New Delhi House, Barakhamba Road, New Delhi to 4th Floor, Kanchenjunga Building, 18, Barakhamba Road, New Delhi. The plaintiff company, therefore, had no incentive to continue to hold possession of the tenanted premises and thereby incur liability towards payment of rent and other charges, when it was no more using those premises. It would be pertinent to note here that there is no evidence to prove that the plaintiff company was actually carrying out any activity in the tenanted premises after September, 1999. PW-3 Vaideghi Sreedharan, who was employed as a receptionist with the plaintiff company at the relevant time, has specifically stated in her affidavit that the branch

office was functioning from Flat No.401, New Delhi House, 27, Barakhamba Road, New Delhi till 31st August, 1999 and thereafter the plaintiff company had completely vacated the aforesaid premises and shifted the entire branch office to new premises at Kanchenjunga Building, 4th Floor, 18, Barakhamba Road, New Delhi-110001 with effect from 1st September, 1999. In fact, according to her, she on the instructions of Assistant General Manager of the plaintiff company contacted the defendants a number of time on telephone and requested them to come and take keys and possession of the tenanted premises. She claims to have spoken to P.S. Mangla and Kamal Mangla several times in this regard and, according to her, both of them were evasive in their replies on this issue and did not agree to take back the keys and possession of the premises. According to her, Mr. Kamal Mangla had gone to the extent of shouting on her on telephone and telling her that they would talk only to Ratan Tata on the issue. PW-4, Ram Kumar Tiwari, is an executive with the plaintiff company. He also stated that the plaintiff company had completely vacated the tenanted premises and shifted to Kanchenjunga Building with effect from 1st September, 1999. No positive evidence has been led by the defendants to controvert the deposition of these witnesses and to prove that the plaintiff company continued to carry on business from the tenanted premises even after September, 1999. I, therefore, have not hesitation in holding that the plaintiff company was not using the tenanted premises after September, 1999, it had offered possession to the defendants and the defendants, who were insisting on six months. notice, were not willing to take possession.

29. In **ICRA Ltd. v. Associated Journals Limited and another,** 2007 (98) DRJ 638, the lessee by its letter dated 18th November, 1997 sent a notice of termination with effect from 19th November, 1997 calling upon the landlords/defendants to take possession of the tenanted premises and refund the security deposit after deducting the rent of previous three months along with stipulated interest. Vide reply dated 22nd November, 1997, the defendants requested the plaintiff for a rethinking in the matter. This letter was followed by several reminders. On 16th April, 1998, the lessee communicated to the lessor that it had shifted to new building and was no longer in possession of the tenanted premises. In reply, the landlord claimed that delivery of vacant possession of the tenanted premises was a condition precedent to the refund of the security deposit. The case of the plaintiff, however, was that constructive

possession was handed over by them to the defendants with the determination of the lease and actual possession was subject to reciprocal arrangement on the part of the defendants to refund the amount of the security deposit along with stipulated interest. As per the agreement between the parties, the security was interest free and was refundable on determination/termination of the lease. Since the defendants/landlords failed to refund the security amount, the plaintiff/tenant filed a suit seeking recovery of the amount of security along with interest, after adjustment of rent payable by them. The defendants filed a counter claim claiming that determination of the lease was not in accordance with the agreement since the plaintiff continued to be in possession of the demised premises and without giving possession, the notice stood withdrawn/waived and hence no claim for refund of balance security amount was made out. This was also the case of the defendants that they had come into possession of the tenanted premises only on plaintiff's delivering the keys to them on 7th December, 1998. On receipt of letter dated 18th April, 1998 from the defendants, the plaintiff reiterated its willingness to give actual possession on receipt of the refund of the security deposit. The factual position which emerged from the correspondence between the parties was that the plaintiff/tenant had terminated the lease, and had called upon the defendants/landlords to take possession of the tenanted premises and refund the balance security. Accepting the plea taken by the plaintiff/tenant, this Court held that the offer to vacant possession of the demised premises having been made by the plaintiff company, it was the duty of the defendants thereafter to act on the same and take possession after notice of termination of the lease. Regarding handing over of possession of the tenanted premises, this Court held that constructive possession was handed over to the defendants by the plaintiff by making an offer to take over actual possession on payment of the balance security deposit, which was sufficient to fulfill the requirement of the lease agreement between the parties. Decreeing the suit filed by the tenant, this Court, inter alia, held as under:-

> 21. Taking into consideration the aforesaid, I am of the view that when possession of the tenanted premises is offered upon termination of the lease, the landlord/Lessor must act upon the same and cannot refuse to take the possession. If the Lessor/ landlord refuses to take the possession or act upon the offer being made, the lease would not continue and therefore the

contention of the defendant that the plaintiff had been in continued possession of the demised premises making him liable to pay the rent for the same would not stand. In such a case, the plaintiff who has done the needful on this part is left with no other option but to remain in possession of the said premises."

30. In **Onida Finance Ltd. v. Mrs. Malini Khanna,** 2002 III AD (Delhi) 231, the security deposit, which was equivalent to six months. rent, was refundable to tenant on expiry or termination of the lease. The plaintiff terminated the lease vide notice dated 18th January, 1997, with effect from 14th February, 1997 and called upon the defendant to return the security amount as also the amount of advance rent. The landlord was also intimated that the tenanted premises would remain vacant at her risk and the plaintiff shall not be liable to pay any rent from the date the tenancy stood terminated. The contention of the defendant before the Court was that mere offer to surrender possession was of no consequence unless actual physical possession was delivered to her. Rejecting the contention, this Court, inter alia, held as under:-

"28. It is trite that when the lease is terminated by notice and the possession is offered, the landlord cannot refuse to take the possession. If the landlord refuses to take the possession, the lease would not continue. Therefore, even if the contention of the defendant herein was that the tenancy was for a period three years, she could take possession and thereafter sued the plaintiff for rent. She did not do so. She took calculate risk by challenging the action of the plaintiff in terminating the tenancy and avoided to take possession."

31. In **The Calcutta Credit Corporation Ltd., & another v. Happy Homes (P) Ltd.,** AIR 1968 SC 471, the written lease was for a period of 12 years commencing 1st January, 1939. On expiry of the term of the lease, the tenant continued to hold over the premises. A notice was served on the landlords intimating the intention of the tenant to vacate the premises on 31st August, 1953 and the landlord was requested to arrange to take delivery of possession. However, vide subsequent letter dated 26th August, 1953, the tenant informed the landlord that they did not intend to vacate the premises as originally intimated and their notice may be treated as cancelled. The tenant continued to be in possession and

later sub-let a part of the premises. The landlord then sued the sub-tenant for possession of the premises. The suit was resisted on the ground that the tenancy of Allen Berry and Company Ltd. (the tenant) had not been determined before they sub-let the premises. Supreme Court rejected the contention of the landlords that in order to determine the tenancy under the Transfer of Property Act at the instance of the tenant, means there must be actual delivery of possession before the tenancy is effectively determined. The Court found the contention to be contrary to the provisions of Section 111(h) of the Transfer of Property Act, which, inter alia, provides that a lease of immovable property demines on the expiry of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

32. The learned counsel for the defendants has referred to **Uberoisons (Machines) Ltd. v. Samtel Color Ltd.,** 105 (2003) DLT 383 and **Tamil Nadu Handloom Weavers' Co-operative Society v. Harbans Lal Gupta,** 2009 (107) DRJ 418 (DB). In **Uberoisons (Machines) Ltd.**(supra) the parties entered into a lease agreement for a period of 3 years. The lessee had deposited an interest free security with the lessor, which was to be refunded at the time of vacation of the premises and handing over possession thereof along with fittings and fixtures in the same condition as received from the landlord. Lessor, however, was not entitled to deduct/adjust the amount of security towards dues of rent. On expiry of the term of the lease or its earlier determination, the lessee was required to hand over vacant possession of the demised premises to the lessor in good condition against refund of the security deposit. The defendant/lessee gave notice to the plaintiff, expressing intention to vacate the demised premises on completion of 3 months. When the authorized representative of the plaintiff/lessor went to take possession and for settlement of accounts, it transpired that the demised premises had not been brought back to the original condition in which the same was let out. The plaintiff/lessor wrote to the defendant/lessee emphasizing that he would be liable to pay rent till vacant possession of the tenanted premises was given to him. The defendant, in reply to the letter of the plaintiff, called him upon to pay the amount of security and take vacant possession. An estimated cost of repairs was also conveyed by the lessor to the lessee. The defendant, thereafter, informed the plaintiff that repairs had been carried out and, therefore, possession be taken after settling the accounts. Simultaneously, he also sent legal notice to the

plaintiff/lessor intimating that possession be taken on or before the date stipulated in the notice and the advance and security deposit be refunded. The plaintiff informed the defendant that the security had been forfeited and lease cancelled as arrears of rent for more than 2 months had not been paid. The defendant/lessee was called upon to pay arrears after adjusting advance rent and handing over possession within 3 days. The defendant, however, did not comply with the notice. By the time, this suit filed by lessor for possession, arrears of rent, mesne profit and damages came up for final adjudication, the only question which remained to be decided was that with respect to entitlement of the plaintiff to arrears of rent, mesne profits and damages. The plaintiff wanted arrears of rent upto the date to which the possession was retained by the defendant. The contention of the defendant on the other hand was that he had always been ready and willing to hand over possession of the premises but in view of the attitude adopted by the plaintiff in not refunding the security amount, did not hand over possession and, therefore, was not obliged to pay rent. Rejecting the contention of the defendant, this Court, inter alia, held as under:-

> "12. Now the question arises whether the tenant could have retained the possession of the premises without paying the rent thereof on account of non-refund of security amount by the plaintiff. The answer is emphatic `no'. The tenant has an independent remedy to recover the security but in no way can retain the possession of the premises on the plea that until and unless security is refunded, possession will not be handed over. Such a possession by the tenant is a possession for which he has to pay the rent as the premises could not have been put in use by the landlord nor have been let out by the plaintiff. No tenant can take the defense that he is entitled to retain the possession of the premises unless security amount is refunded to him. When there is an independent remedy to recover this amount, the retention of possession cannot be justified. In order to avoid the liability of rent, the tenant has the obligation to handover the possession. It is immaterial whether premises was put into use by the defendant/tenant or not. What is material was whether possession is retained by him or not."

33. In **Tamil Nadu Handloom Weavers' Co-operative Society**

(supra) the lease granted for six years was terminable by 3 months. notice. The plaintiff/tenant terminated the lease with effect from 31st March, 1997 and demanded the amount of security, he had deposited with the lessor. One of the isues which came up for consideration before the Division Bench of this Court in that case was as to whether the plaintiff had validly terminated the lease of the subject premises. Relying upon the decision of the Rajasthan High Court in **Raja Laksman Singh v. State,** AIR 1988 Rajasthan 44, this Court, inter alia, held as under:-

> "21. The law with respect to the termination of lease by the tenant is well settled. Where the tenant vacates the tenancy premises and notifies the landlord to take the delivery of possession, the lease comes to an end. The refusal of the landlord to accept the possession will amount to delivery of possession and the possession shall be deemed to have been delivered to the landlord though the landlord may not accept the same…"

The Court was of the view that the plaintiff had validly terminated the lease with effect from 31st March, 1997 by issuing notice of termination, which was duly received by the defendant. As regard the liability of the tenant to pay rent, the Court noticed that the plaintiff was insisting on refund of security deposit but was not ready to deliver the possession without taking back the security deposit. The Court upheld the decision of the trial Court that in such circumstances, the tenant was liable to pay rent upto 30th April, 1997 when possession was delivered to the defendant through a Local Commissioner.

However, neither of these two judgments apply to the facts of the case before this Court, since there is no evidence or even allegation that the plaintiff company was insisting on refund of the security deposit before handing over possession of the tenanted premises to the defendant though, vide letter dated 16th December, 1998 (Exhibit PW1/1 and PW1/2) terminating the tenancy with effect from 15th June, 1999, receipt of which has been denied by the defendants, the plaintiff had requested the defendants to take possession against refund of security deposit. While writing the letter dated 29th September, 1999, the plaintiff company did not insist of refund of the security deposit as a pre-condition of handing over possession to defendant though it did demand the refund of security lying with the defendants. This is not the case of the defendants that when they went to take possession of the tenanted premises, the plaintiff

company refused to hand over possession to them on the ground that the security deposit had not been refunded to it. There is no averment to this effect even in the letter dated 19th February, 2000 (Exhibit P-7) written by them to the plaintiff company. Seeking refund of the security while asking the lessor to take possession of the tenanted premises is altogether different from insisting upon payment of security deposit before handing over possession of the tenanted premises. Had the plaintiff company insisted on refund of the security deposit before handing over possession of the tenanted premises to the defendants, it would certainly have been liable to pay rent to the defendants till the time possession was actually delivered to them but, the evidence on record does not make out any such insistence on the part of the plaintiff company. In fact, since the security deposit agreement (Exhibit P-11) with respect to security deposit provided that the security would be refundable on expiry of the lease or on vacation of the premises by the lessee, whichever be earlier against handing over peaceful vacant possession of the flat, furnishing and fittings in good conditions and after deducting dues, if any, the plaintiff company, in my view, could have insisted on simultaneously refund of the security deposit while handing over possession of the tenanted premises to the defendant, though it could not have insisted on the security being refunded to it before handing over possession to the defendant. In fact, the evidence on record does not indicate even that the plaintiff company was insisting on refund of the security simultaneous with handing over possession to the defendants.

It transpired during arguments that rent upto September, 1999 stands paid to the defendants. In view of the above discussion, I hold that the plaintiff company was not required to pay rent after September, 1999.

Electricity & Water Charges

The defendants in CS(OS) No.2569/2000 have claimed a sum of Rs.1,05,114/- towards electricity and water charges upto February, 2001. The defendants, however, have not told the Court how they arrived at the aforesaid amount of Rs.1,05,114/-. Clause 4 of the lease deed provided that lessee shall pay charges for consumption of electricity and water, as per actual bills of the authorities concerned. No bills of electricity and water charges for the period upto 31st August, 1999 have been proved by the defendants in the Court. In fact, neither the written statement nor

the evidence produced by the defendants gives precise amount of electricity and water charges with respect to electricity and water consumed in the tenanted premises upto 31st August, 1999. In the absence of evidence from the defendants quantifying the amount of electricity and water charges in respect of electricity and water consumed upto 31st August, 1999, the Court is not in a position to direct payment of any specified amount by the tenant in this regard.

Maintenance Charges, Ground Rent & Insurance

34. The defendants in CS(OS) No.2569/2000 have also claimed a sum of Rs.48,984/- alleged to have been paid to the Capital Maintenance Society towards maintenance charges. In CS(OS) No.524/2004, the landlords, who are plaintiffs in the suit have claimed a sum of Rs.1,17,909/- towards maintenance charges for the period from 1st August, 2001 to 30th April, 2004 and Rs.9250/- towards ground rent and insurance for the period from 1st April, 2001 to 30th April, 2004. The maintenance charges have been claimed at the rate of Rs.3573/- per month whereas ground rent and insurance appears to have been claimed at the rate of Rs.250/- per month. The counter claim does not indicate either the rate at which maintenance charges have been claimed nor does it disclose the period to which these charges pertain. Moreover a perusal of Exhibits D-6 and D-7, which are the confirmation of deposits, would show that the plaintiff company has paid maintenance charges upto 31st March, 2002. A perusal of the lease deed dated 18th April, 1995 would show that the tenant was liable to pay all proportionate society dues and charges including charges for common maintenance, service, capital assets, replacement fund, ground rent, fire fighting fund etc. as per the bills received from the maintenance society. The defendants have not produced any evidence to prove that maintenance charges, ground rent and insurance have been paid by them to the maintenance society. The defendants are entitled to claim these amounts from the plaintiff company only after they have paid them to the maintenance society. Since no such proof has been produced by them, no amount can be awarded to them towards maintenance charges, ground rent and insurance.

Increase in House Tax

35. The defendants in CS(OS) No.2569/2000 have, as a part of their counter claim, demanded a sum of Rs.12,09,381/- towards increase

in property tax for the years 1995-96 to 2000-01. In CS(OS) No.524/2004, they have claimed a sum of Rs.12,94,092/- towards increase in property tax for the years 2000-01 to 2003-04. Thus, the alleged increased in the property tax for the year 2000-01 has been claimed in the counter claim as well as in the independent suit filed by them. Admittedly, the increase in property tax was effected vide assessment order dated 26th March, 1999, which is Exhibit DW1/4. Vide this order, the ratable value was increased to Rs.14,26,776/- less 10% for the year 1995-96 and the same ratable value was adopted for the years 1996-97 to 1999-2000. The notice of demand issued by the NDMC to the defendants are Exhibit DW1/5 and DW1/6. Admittedly, the aforesaid assessment order have been set aside in an appeal filed by the defendants. This fact has been expressly admitted by DW-2 P.S. Mangla in his cross-examination. He admitted that the assessment order was set aside and appeal filed by the NDMC in the High Court was also turned down. He has further admitted ˇthat after setting aside of assessment order, no revision has since been done. Since the increase in ratable value of the tenanted premises and consequent increase in the demand of property tax has been set aside and no fresh assessment order has thereafter been passed, the defendants cannot claim any amount from the plaintiff towards increase in property tax so long as a fresh assessment order is not passed and fresh demand is not raised accordingly.

During the course of arguments, it was contended by the learned counsel for the defendants that the defendants had made a part payment to the NDMC in compliance of the interim order passed by the Court. Even if that be so, the defendants cannot claim any amount from the plaintiff towards increase in property tax till a fresh assessment order is passed and a fresh demand is raised against them. Of course, as and when a fresh assessment order is passed and a demand is raised accordingly, the defendants would be entitled to recover the increase in demand to the extent it pertains to the period for which the plaintiff company is held liable to pay rent/damages for use and occupation to them, from the plaintiff.

Mesne Profits & Hire Charges

36. A perusal of the proceedings dated 7th May, 2001 and 11th July, 2001 passed in CS(OS) No.2569/2000 would show that on 7th May, 2001, learned counsel for the defendants stated that he was ready

to take back possession of the premises even on that day without prejudice to the rights and contentions of the parties. The proceedings also show that there was no response from the plaintiff to the above referred offer made by the defendants through their counsel. However, on 6th April, 2004, the learned counsel for the plaintiff stated that the plaintiff was inclined to deposit the keys of the premises in the Court. The keys were accordingly deposited in the Court on 28th May, 2004 and were directed to be kept in safe custody. A perusal of the order passed by this Court on 16th September, 2004 shows that on that day the learned counsel for the plaintiff objected to handing over possession to the defendants in CS(OS) No.524/2004 despite the fact that the keys were in possession of the Court in CS(OS) No. 2569/2000. In the face of the objection of plaintiff Tata Finance Limited, the Court directed that the prima facie they would become liable for payment of damages upto the date when possession would be handed back to the landlord though a final decision on this question would have to be passed in Suit No.524/2004. A perusal of the order dated 11th May, 2005 shows that on that day, after some arguments, it was agreed between the parties that without prejudice to their rights and contentions, keys of the suit property be delivered to the defendants in CS(OS) No.2569/2000 so as to enable them to utilize the premises or give it on rent. It was further agreed that they would not sell or transfer the suit property pending final disposal of the suit.

37. It would, thus, be seen that not only did the plaintiff fail to accept the offer made by the learned counsel for the defendants on 7th May, 2001 to take back possession of the suit premises without prejudice to rights and claims of the parties, it went to the extent of opposing the request made by the defendants for handing over the keys of the premises to them despite the fact that the keys had already been deposited in the Court. The defendants, therefore, were deprived of use of the tenanted premises for the period from 7th May, 2001 to 11th May, 2005 solely on account of total untenable attitude adopted by the plaintiff company. Since the plaintiff company had already shifted from the tenanted premises and had also offered possession of the same to the defendants, there was no justification for not accepting the offer made by the defendants on 7th May, 2001 and then oppose the request to deliver the keys of the tenanted premises to them. Had the plaintiff accepted the fair offer made by the learned counsel for the defendants/landlords in the Court on 7th May, 20091, the defendants would have been able to utilize the tenanted premises

or let it out to another tenant. I, therefore, have no hesitation in holding that the plaintiff in CS(OS) No.2569/2000 is liable to pay damages for use and occupation, maintenance charges, ground rent and insurance for the aforesaid period. The plaintiff company is also liable to pay the electricity and water charges, if any, paid/payable by the defendants to the NDMC for the aforesaid period.

As regards electricity and water charges, as noted earlier, since no evidence has been led by the defendants to prove what were the charges demanded by the NDMC and paid by them for the aforesaid period, it is not possible for the Court to direct payment of any specific amount or allow its adjustment to the defendants. No payment or adjustment towards maintenance charges, ground rent and insurance can be allowed to the landlords, as they have failed to prove the payments, if any, made by them in this regard.

ISSUE Nos. 4, 5, 8 and 9 & 11

38. In view of my findings on issue Nos. 6, 7 and 10, defendant Nos. 2 and 3 in CS(OS) No.2569/2000, who are also plaintiff Nos. 1 and 2 in CS(OS) No.524/2004 are entitled to recover damages for use and occupation as well as hire charges for furnishings and fixtures from the plaintiff in CS(OS) No.2569/2000 for the period from 7th May, 2001 to 11th May, 2005. The plaintiff in CS(OS) No.2569/2000 had admittedly deposited a sum of Rs.25,82,400/- with the defendants in that suit towards security, which was to be refunded on expiry of the lease or vacation of the premises by the lessee, whichever be earlier, against handing over peaceful possession of the tenanted premises along with furnishings and fittings in good condition and after deducting dues, if any. The amount of damages for use and occupation including charges for furnishings and fixtures at the agreed rate of Rs.1,34,500/- per month for the period from 7th May, 2001 to 6th May, 2002, comes to Rs.16,14,000/-. The amount of mesne profit and hire charges for the period from 7th May, 2002 to 6th May, 2003 comes to Rs. 16,14,000/-. The amount of mesne profit and hire charges for the period from 7th May, 2003 to 6th May, 2004 comes to Rs. 16,14,000/-. The amount of mesne profit and hire charges for the period from 7th May, 2004 to 11th May 2005 comes to Rs. 16,31,932/-.

39. In **Ramnik Vallabhdas Madhvani and others v. Taraben**

Pravinlal Madhvani, (2004) 1 SCC 497, Supreme Court, with respect to calculation of interest on mesne profits, inter alia, observed as under:-

> "9. A mistake has been committed by the High Court in calculation of interest on mesne profits. Interest has to be calculated on yearly basis because the amount of mesne profits on which interest is to be awarded has to be arrived at on year-to-year basis. Mesne profits for the first year would be from 5-5-1969 to 4-5-1970, for the second year it will be from 5-5-1970 to 4-5-1971 and so on. It keeps adding on from year to year. The total amount of mesne profits found due by the High Court on the basis of the Commissioner's report comes to Rs.38,41,920. This amount is the total of mesne profits calculated on yearly basis. Interest cannot be allowed on the whole amount from the beginning. Interest had to be worked out on amounts falling due towards mesne profits on yearly basis i.e. on the amount of mesne profits which could be taken to be due to the plaintiff at the end of each successive year."

40. The learned counsel for the landlords pressed for payment of interest while computing mesne profits. In **Mahant Narayana Dasjee Varu and Others v. Board of Trustees, Tirumalai Tirupathi Devasthanam,** AIR 1965 SC 1231, Supreme Court while dealing with computation of interest on mesne profits, inter alia, held as under:-

> "Under Section 2(12) of the Civil Procedure Code which contains the definition of "mesne profits", interest is an integral part of mesne profits and has, therefore, to be allowed in the computation of mesne profits itself. That proceeds on the theory that the person in wrongful possession appropriating income from the property himself gets the benefit of the interest on such income."

However, since no mesne profits/damages for use and occupation are being awarded to the landlords for pre-suit period, and pendente lite and future interest to be awarded under Section 34 of the CPC is in the discretion of the Court, these judgments do not apply to the facts of this case.

41. Since the security deposit was lying with the defendants and it became payable on the date constructive possession was delivered to the

defendants, the plaintiff in CS(OS) No.2569/2000 is entitled to interest on the aforesaid amount in terms of Section 3 of the Interest Act, which to the extent it is relevant, provides that in any proceedings for ˇthe recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings.

Since the security was refundable to plaintiff in CS(OS) No.2569/2000 under the written agreement Exhibit P-11, the aforesaid provisions of Interest Act are applicable and the plaintiffs in CS(OS) No.2569/2000 is awarded interest on the security deposit for the period from 1st October, 1999 till the date of filing of the suit.

Exhibit P-8 is the notice/letter written by the plaintiff company to the defendants seeking refund of the security deposit along with interest at the rate of 24% per annum. In the facts and circumstances of the case, I feel that interest on security deposit should be awarded at the rate of 6% per annum. The amount of interest, on the security deposit, at the rate of 6% per annum for the period from 1st October, 1999 till 15th November, 2000, the date of filing of the suit, comes to Rs.1,74,312/-.

42. After adjusting the amount of security deposit and interest thereon till the date of filing of the suit from the amount of damages and hire charges for furnishings and fittings to which the defendants in CS(OS) No.2569/2000 are held entitled for use and occupation of the suit premises by the plaintiff in the aforesaid suit, defendant Nos. 2 and 3 in CS(OS) No.2569/2000 are entitled to recover the balance amount of Rs.37,17,221/-from the plaintiff in CS(OS) No.2569/2000. The issues are decided accordingly.

ORDER

A decree for Rs.37,17,221/- with proporationate costs is hereby passed in favour of defendant Nos. 2 and 3 in CS(OS) No.2569/2000, who are also plaintiff Nos. 1 and 2 in CS(OS) No.524/2004 and against

the plaintiff company in CS(OS) No.2569/2000, which is also defendant in CS(OS) No.524/2004. The amount of security deposit gets adjusted in rent and hire charges of about 20 months. I do not propose to award pendente lite interest to the plaintiff company in CS(OS) No.2569/2000 on the security deposit and on the amount of mesne profits, to the defendants in the aforesaid suit, for the period upto 11th May, 2005 when the plaintiff in the suit agreed that the keys of the tenanted premises may be delivered to the defendants in that suit, so as to balance their respective claim of interest for the aforesaid period. In the facts and circumstances of the case, I award interest to defendants 2 and 3 in CS(OS) No. 2569/2000 on the aforesaid amount of Rs.37,17,221/-, at the rate of 6% per annum, with effect from 12th May, 2005 till realization of the decretal amount.

ILR (2011) III DELHI 722
CRL. A.

RAM SARAN @ BALLI ....APPELLANT

VERSUS

STATE ....RESPONDENT

(S. RAVINDRA BHAT & G.P. MITTAL, JJ.)

CRL. A. 19/1998 DATE OF DECISION: 21.03.2011.

Indian Penal Code, 1860—Section 302—Case of the prosecution that appellant and deceased were neighbours—On the night of the incident, deceased disturbed by high volume of sound of tape-recorder played by appellant—Deceased woke up and objected to the high volume of music—Appellant slapped deceased—Deceased along with sons PW2 and PW3 went to Police Station to lodge report against appellant, on way, appellant armed with knife attacked deceased—

PW2 and PW3 (sons of deceased) removed their father to health centre where he expired—Trial Court convicted appellant u/s 302—Held, testimony of two eye-winesses is consistent on the manner of inflicting injuries on the person of deceased—Evidence proved that three injuries mentioned in post mortem report on the body of deceased were inflicted by the appellant with a knife—First injury inflicted on the back, second on the shoulder and third on the leg—Neither of the injuries individually or taken together were opined to be sufficient to cause death in the ordinary course of nature—Appellant had intention of causing of such bodily injury as was likely to cause death—Not prosecution case that there was any previous enmity between appellant and deceased—Considering that injuries were not inflicted on the vital parts of the body, it cannot be said that appellant had taken undue advantage or acted in a cruel manner—Appellant convicted u/s 304 Part I instead of Section 302.

A perusal of the testimony of two eye witnesses shows that the first injury was inflicted at the back, another injury on the shoulder and the third one on the leg. A perusal of the postmortem report and the testimony of PW-6 reveals that there was no injury on the leg. Perhaps injury No.2 "on the left inguinal placed obliquely" was presumed by PWs 2 and 3 to be on the left leg of the deceased. No injury was inflicted either on the neck or on the chest or even in the abdomen. PW-6 Dr. L.K. Baruwa after describing the injuries has stated that death was "due to hemorrhagic shock resulting from the injuries". Admittedly, neither any particular injury nor all the three injuries taken together were opined to be sufficient to cause death in the ordinary course of nature. Thus, in our opinion, the Appellant can be saddled with the intention of causing such bodily injury as is likely to cause death. **(Para 37)**

The cause of quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number

of wounds caused during the occurrence is also not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. **(Para 40)**

Important Issue Involved: Where injuries were not inflicted on any vital part of the body and were not opined to be sufficient to cause death in the ordinary course of nature it cannot be said that the accused had taken undue advantage or acted in a cruel manner with in the meaning of Exception 4 to Section 300 IPC.

[Ad Ch]

APPEARANCES:

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

FOR THE RESPONDENT : Mr. Lovkesh Sawhney, APP for the State.

CASES REFERRED TO:

1. *Bhagwati Prasad* vs. *State of M.P.*, 2010 (1) SCC 697.
2. *Dharindhar* vs. *State of U.P. & Ors*, 2010 (7) SCC 759.
3. *Ram Bharosey* vs. *State of U.P.* (2010) 1 SCC 722.
4. *Shaikh Azim* vs. *State of Maharashtra*, 2008 (11) SCC 695.
5. *Smt. Sandhya Jadhav* vs. *State of Maharashtra*, (2006) 4 SCC 653.
6. *State of A.P.* vs. *S. Rayappa & Ors.*, 2006 (4) SCC 512.
7. *Prakash Chand* vs. *State of H.P.*, 2004 (11) SCC 381.
8. *Ruli Ram & Anr.* vs. *State of Haryana* (2002) 7 SCC 691.
9. *State of Rajasthan* vs. *Teja Singh*, 2001 (3) SCC 147.
10. *State of H.P.* vs. *Lekh Raj*, 2000 (1) SCC 247.

11. *Surinder Kumar* vs. *Union Territory, Chandigarh,* (1989) 2 SCC 217.

12. *State of A.P.* vs. *Rayavarapu Punnayya* (1976) 4 SCC 382.

13. *Rajwant* vs. *State of Kerala,* AIR 1966 SC 1874.

14. *Virsa Singh* vs. *State of Punjab,* AIR 1958 SC 465.

RESULT: Appeal partly allowed.

G.P. MITTAL, J.

1. Appellant Ram Saran @ Balli impugns the judgment dated 31.07.1997 and the order on sentence dated 04.08.1997, whereby he was convicted for the offence punishable under Section 302 of the Indian Penal Code ("IPC") and was sentenced to undergo imprisonment for life and to pay fine of Rs. 500/-. In default of payment of fine, the Appellant was sentenced to undergo further Rigorous Imprisonment for one month.

2. The gravamen of the charge against the Appellant is that on 01.01.1995 at about 10.30 P.M. near Holy Cross School, Opposite Petrol Pump, Nangloi Road, Najafgarh, he had inflicted stab injuries on the person of Jaggu Ram (the deceased) with the intention of causing his death.

3. According to the prosecution version, the Appellant and the deceased were neighbours. On 01.01.1995 at about 10:20 P.M., the deceased felt disturbed by the high volume of the sound of a tape recorder, played by the Appellant Ram Saran oblivious of the fact that it was going to be his last sleep. The deceased woke up and objected to the Appellant playing the tape recorder at a high volume as it disturbed his sleep. The Appellant did not take it kindly; rather he took offence to it and slapped the deceased. The deceased felt humiliated and, therefore, accompanied by his sons PW-2 Hari Kishan and PW-3 Prem proceeded to the Police Station to lodge a report against the Appellant.

4. At about 10:30 P.M. they reached near Holy Cross School (close to the Petrol Pump). The Appellant appeared from behind, armed with a knife. He (the Appellant) attacked the deceased with the said knife on his back, left shoulder and the leg and then escaped. The deceased fell

down. PWs 2 and 3 removed their father (the deceased) to the nearby Primary Health Centre (PHC), Najafgarh for immediate medical attention. PW-8 Dr. Rajeev Sodhi found the patient (the deceased) "unconscious; gasping in state of shock with cold skin; cyanosis; the patient was put on dopamine drips and cardiopulmonary resuscitation attempted; intra nasal oxygen; high pressure was started; intra thoracic needle inserted at second intercostals space left side." But, in spite of these measures, the patient did not respond to the treatment and expired at 11:00 P.M.

5. PW-10 Inspector Jagmal Singh (IO) reached PHC, Najafgarh and found that Jaggu Ram had been declared dead by the doctor. He met Hari Kishan and Prem, sons of Jaggu Ram.

6. The IO recorded statement Ex.PW-2/A of PW-2 Hari Kishan regarding the incident and sent the rukka to the Police Station for registration of the case. He reached the spot; prepared rough sketch Ex.PW-10/A at the instance of PW-2 Hari Kishan; seized blood stained earth, control earth; conducted inquest proceedings; got the autopsy conducted on the dead body and completed other formalities during investigation of the case.

7. The Appellant pleaded not guilty to the charge under Section 302 IPC framed against him.

8. The prosecution, in order to prove its case, examined 11 witnesses including PW-2 Hari Kishan and PW-3 Prem, sons of the deceased and eye witnesses of the occurrence, PW-6 Dr. L.K. Barua, who conducted autopsy on the dead body, PW-8 Dr. Rajeev Sodhi, who had, in vain, tried to revive the deceased and PW-10 Inspector Jagmal Singh, IO of the case.

9. On close of the prosecution evidence, the Appellant was examined under Section 313 Cr.P.C. in order to provide him an opportunity to explain the incriminating evidence appearing in prosecution case.

10. The Appellant's case is of simple denial of the prosecution version. He took the plea that he had been falsely implicated in the case in connivance with the complainant. He did not cite any reason for his false implication. He declined to produce any evidence in defence.

11. By the impugned judgment, the Trial Court repelled the contention

raised on behalf of the Appellant that PWs 2 and 3 (sons of the deceased) were not eye witnesses of the occurrence or that their testimony should not be believed being relatives of the deceased. The Trial Court found the testimony of the two eye witnesses to be reliable and credible. The Trial Court held the case of the prosecution had been established. Thus, the Trial Court convicted and sentenced the Appellant as indicated earlier.

12. We have heard Mr. K.L.Chaudhary learned counsel for the Appellant, Mr. Lovkesh Sawhney, learned Additional Public Prosecutor (APP) for the State and have perused the record.

13. It is argued by the learned counsel for the Appellant that the presence of PWs 2 and 3 at the spot at the time of occurrence is doubtful. PW-2 in his statement Ex.PW-2/A made to the police on the basis of which the FIR was registered, had stated about infliction of just one injury whereas as per Post Mortem Report Ex.PW-6/A there were as many as three injuries on the person of the deceased. It is urged that as per PWs 2 and 3 they had carried their deceased father to PHC Najafgarh in their arms and their clothes were blood stained. If this were true, their blood stained clothes ought to have been seized by the IO. The non seizure of their clothes belies their presence at the time of the occurrence. In support of the contention, reliance is placed on **'State of Rajasthan v. Teja Singh',** 2001 (3) SCC 147.

14. It is pleaded that as per PW-8, the patient was brought to PHC Najafgarh by a police personnel Hari Kishan. If, PWs 2 and 3 had accompanied the deceased to the hospital, their presence would have been recorded. This also shows that PWs 2 and 3 had not witnessed the occurrence.

15. It is further contended that the incident had taken place in the street, allegedly near a Petrol Pump. However, no public person was examined in support of the prosecution version. It is urged that it would be highly unsafe to rely upon the testimonies of the relatives who are interested witnesses.

16. It is true that in the first statement Ex.PW-2/A Hari Kishan (PW-2) has mentioned that Ram Saran came from behind and inflicted a knife blow at the back of his father. However, it has to be kept in mind that the incident had taken place at about 10:30 P.M. during winter (on

the night of 01.01.1995). The deceased was immediately rushed by his two sons to PHC Najafgarh where despite the necessary medical aid the deceased could not be revived. The incident happened unexpectedly. PWs 2 and 3 who are the sons of the deceased must have been taken by surprise by the turn of events. They were shocked and somehow wanted to save the life of their father; without waiting for any conveyance they lifted their father and took him to the PHC Najafgarh which was at a distance of half a kilometre. One can well imagine the state of mind of the two sons carrying their seriously injured father to a nearby Health Centre/Hospital in their arms just praying that he would somehow survive.

17. The statement Ex.PW-2/A was recorded immediately after his (PW-2's) father's death. He, therefore, could be expected to give all the details at that time. Moreover, the witnesses PWs 2 and 3 were not confronted with their previous statements. Had it been so, they might have come forward with some explanation for stating one injury being inflicted to the deceased in Ex.PW-2/A.

18. The contention of the learned counsel for the Appellant that the deceased was removed to PHC Najafgarh, by police personnel Hari Kishan, in our opinion, is misconceived. It is true that PW-8 Dr. Rajeev Sodhi, who had medically examined the deceased at PHC Najafgarh, deposed that one police personnel had brought the patient Jaggu Ram, aged 45 years to the PHC. However, a perusal of the MLC Ex.PW-8/B shows that Jaggu Ram was *"brought by Hari Kishan"*. It is nowhere stated in the MLC that any police personnel was present or had brought Jaggu Ram to PHC. It is further recorded on Ex.PW-8/B *"Alleged h/o being stabbed on the back as stated by relatives"*. From Ex.PW-8/B it is clear that Jaggu Ram was brought by Hari Kishan and that the history of being stabbed was given by the relatives of Jaggu Ram. It seems that Dr. Rajeev Sodhi (PW-8) somehow mixed up the information sent to the police after five minutes of the arrival of Jaggu Ram with the initial words, "brought by Hari Kishan".

19. This view is also fortified by cross-examination of Dr. Rajeev Sodhi when he stated that *"I do not remember if the police personnel Hari Kishan who brought Jaggu Ram injured to PHC was in police uniform or not"*. *He also admitted that "I did not mention the belt number of the Constable Hari Kishan who had brought the patient in*

PHC." It is unfortunate that the learned APP examining the witness also lost track of what was actually recorded in the MLC Ex.PW-8/B and did not seek any clarification from PW-8 Dr. Rajeev Sodhi.

20. Even if, it is assumed that Jaggu Ram was brought to PHC Najafgarh by a police personnel, the same is immaterial in view of the fact that the presence of the relatives is recorded.

21. As per the prosecution case, the deceased had suffered three injuries and blood had fallen at the spot. Blood stained earth and control earth were also lifted from the spot. There is no gainsaying that if the deceased was removed to PHC Najafgarh by PWs 2 and 3 in their arms, as is the prosecution case, their clothes were bound to be bloodstained. Admittedly, their clothes were not seized by the IO.

22. It is true that seizure of blood stained clothes was an important aspect of the investigation; the same however, does not affect the prosecution case because the factum of PWs 2 and 3 carrying their deceased father to PHC is established by the MLC Ex.PW-8/B. **'State of Rajasthan v. Teja Singh',** relied upon by the learned counsel for the Appellant is not relevant in this case and is distinguishable because there was no other evidence in that case, to establish the presence of the eye witness who had allegedly carried the injured to the hospital. Statement of one of the eye witnesses was recorded after five days of the incident though he was available in the village. The other eye witness had not even mentioned the name of the assailants to DW-1 Ram Pratap. It was in such circumstances that the Supreme Court held that the High Court was justified in not placing any reliance on the evidence of three eye witnesses without any independent corroboration.

23. It is argued that the prosecution has examined two eye witnesses in this case. Both these witnesses i.e. PWs 2 and 3 are sons of the deceased. They are interested witnesses. It would be unsafe to rely upon their testimony without corroboration from any independent witness in a serious offence like the present one.

24. As stated earlier, the incident had taken place on a wintery night at 10:30 P.M.. Normally, people are in-doors on chilly nights at this hour. It is therefore, reasonable to presume that no public person had seen the incident.

25. In **'State of A.P. v. S. Rayappa & Ors.',** 2006 (4) SCC 512, it was observed that merely because the witnesses were related to the deceased, they cannot be called interested witnesses and on that ground, their testimonies cannot be discarded. It was held as under:-

> "7……..The relative witness is not necessarily an interested witness. On the other hand, being a close relation to the deceased they will try to prosecute the real culprit by stating the truth. There is no reason as to why a close relative will implicate and depose falsely against somebody and screen the real culprit to escape unpunished. The only requirement is that the testimony of the relative witnesses should be examined cautiously……."

26. Similarly, in **'Dharindhar v. State of U.P. & Ors',** 2010 (7) SCC 759, the Supreme Court observed that a relation witness cannot be said to be an interested witness because he has no axe to grind against an accused. It would be appropriate to extract the observations of the Supreme Court hereunder:-

> "12. There is no hard-and-fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the court. It will always depend upon the facts and circumstances of a given case".

While referring **Ram Bharosey v. State of U.P.** (2010) 1 SCC 722, the Supreme Court further observed in Para 13:-

> "13. …… that a close relative of the deceased does not, per se, become an interested witness. An interested witness is one who is interested in securing the conviction of a person out of vengeance or enmity or due to disputes and deposes before the court only with that intention and not to further the cause of justice……..."

27. It is canvassed by the learned counsel for the Appellant that according to prosecution version while proceeding to the Police Station for making a complaint against the Appellant the deceased was accompanied by his two sons PWs 2 and 3. Admittedly, the Appellant was all alone. It is urged that it is highly improbable that PWs 2 and 3 would neither intervene nor try to apprehend the culprit.

28. As per prosecution version, the incident had taken place very swiftly. The dispute was on a small issue of playing the tape recorder by the Appellant at high volume. The injuries were sustained by the deceased before PWs 2 and 3 could react. Once their father had sustained injuries, they must be interested only in saving their life than in apprehending the Appellant or any such thing. Thus, there is nothing unnatural in PWs 2 and 3s. conduct in removing their father to a nearby hospital than indulging in anything else. Moreover, the Appellant was armed with a knife whereas the deceased and PWs 2 and 3 were empty handed. The natural conduct of the PWs 2 and 3 would be not try to apprehend the Appellant, to avoid any further injury to their father or to themselves.

29. It is contended on behalf of the Appellant that there is contradiction in the statements of PWs 2,3,5 and 7 in the manner the dead body was removed to the Mortuary. PW-2 testified that from the hospital (PHC Najafgarh) they accompanied the dead body of their father to Mortuary, Subzi Mandi in a government vehicle. SI Tirath Ram and Constable M.L. Meena also accompanied them in the Jeep to the Mortuary. PW-3, on the other hand, stated that he and his brother Hari Kishan went to the Mortuary from the hospital in a three wheeler scooter. Later, he stated that one Police Gypsy had brought them to the mortuary. PW-7 deposed that he did not know who had paid fare for the Tata vehicle in which they had gone to the Mortuary. Again PW-5 stated that the dead body was taken to the Mortuary, Subzi Mandi in a Police Gypsy. In our view, this discrepancy in the evidence of the two eye witnesses and police witnesses cannot be said to be material. It is not in dispute that Jaggu Ram had been declared dead on 01.01.1995 at 11:00 P.M. in PHC Najafgarh because of the injuries inflicted with a sharp object. It is also not disputed that the dead body was removed to the Mortuary, Subzi Mandi where postmortem examination was conducted by PW-6 Dr. L.K. Barua on 02.01.1995. Thus, if two sons of the deceased or the two police officials were at variance on the time or on the vehicle in which the dead body was carried, the same is immaterial. Rather, this shows that some variations are bound to occur in the testimony of truthful witnesses.

30. In **'State of H.P. v. Lekh Raj',** 2000 (1) SCC 247, the term 'discrepancy, was distinguished from contradiction. It was held that minor discrepancies or variations in evidence will not make the prosecution

case doubtful. In the normal course of human conduct some minor discrepancies are bound to occur which render credence to their depositions.

31. In a latest report in **'Bhagwati Prasad v. State of M.P.',** 2010 (1) SCC 697, the Supreme Court emphasized that much importance cannot be given to minor discrepancies in the statement of witnesses.

32. In our view, the testimony of two eye witnesses is consistent and trustworthy on the manner of inflicting injuries on the person of deceased Jaggu Ram. PW-2 categorically stated that the Appellant stabbed his father with a knife on his (deceased) back. He also stabbed his father on the left shoulder and the left leg. To the same effect is the testimony of PW-3 Prem. Thus, it is established beyond doubt that the three injuries mentioned in Post Mortem Report Ex.PW-6/A were inflicted by the Appellant with a knife on the person of deceased Jaggu Ram.

33. Thus, we are of the view that the conclusion reached by the Trial Court that the injuries on the person of deceased Jaggu Ram were caused by the Appellant are based on proper appreciation of the evidence and is unassailable.

34. It is argued by the learned counsel for the Appellant that as per prosecution version, the quarrel had started as the deceased had taken offence to the playing of the tape recorder on a high volume by the Appellant. When the deceased made a grievance about the same, the Appellant slapped him. The deceased, therefore, wanted to make a complaint against the Appellant to the police and, therefore, proceeded to the Police Station along with PWs 2 and 3. The learned counsel for the Appellant argues that this further escalated the quarrel between the two. According to the learned counsel for the Appellant, there was no pre-meditation and the injuries were inflicted as a result of a sudden fight. The injuries were not inflicted on a vital part of the body. The doctor has not opined any particular injury or all the three injuries taken together to be sufficient to cause death in the ordinary course of nature. Rather, cause of death was opined to be "*due to hemorrhagic shock resulted from the injuries*". It is submitted that even if the prosecution case is accepted as it is, the case of the Appellant would be covered under Exception IV to Section 300 of the Code and he would be guilty of committing culpable homicide not amounting to murder.

35. In the scheme of the Penal Code, culpable homicide is genus and murder is species. All murders are culpable homicide but not vice versa. It is the knowledge or intention with which the act is done that makes difference in arriving at a conclusion whether the offence is culpable homicide or murder. The Supreme Court very aptly drew the distinction between culpable homicide and murder in **'State of A.P. v. Rayavarapu Punnayya'** (1976) 4 SCC 382, which was relied in a number of later judgments. It would be apt to extract the relevant paragraphs of the report in **'Ruli Ram & Anr. v. State of Haryana'** (2002) 7 SCC 691 as under:-

> "9. The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the key words used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points distinction between the two offences.

Section 299	**Section 300**
A person commits culpable homicide if the act by which the death is caused is done -	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done-
INTENTION	
(a) with the intention of causing death; or (b) with the intention of causing such bodily injury as is likely to cause death; or	(1) with the intention of causing death; or (2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or (3) with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
KNOWLEGE	
(c) with the knowledge that the act is likely to cause death.	(4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

10. Clause (b) of Section 299 corresponds with Clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under Clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the "intention to cause death" is not an essential requirement of Clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of Clause (2) is borne out by illustration (b) appended to Section 300.

12. For cases to fall within Clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. **Rajwant v. State of Kerala,** AIR 1966 SC 1874 is an apt illustration of this point.

13. In **Virsa Singh v. State of Punjab,** AIR 1958 SC 465,

Vivian Bose, J. speaking for the Court, explained the meaning and scope of Clause (3). It was observed that the prosecution must prove the following acts before it can bring a case under Section 300, "thirdly". First, it must establish quite objectively, that a bodily injury is present; secondly, the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeded further, and fourthly, it must be proved that the injury of the type just described made up the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender".

36. Thus, it is to be seen that where an act is done with the intention of causing such bodily injury as is likely to cause death, it would be culpable homicide, but where the offender knows:-

(1) That his act is likely to cause death of a person to whom the harm is caused, or

(2) Where the bodily injury is caused to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, the act would amount to murder.

37. A perusal of the testimony of two eye witnesses shows that the first injury was inflicted at the back, another injury on the shoulder and the third one on the leg. A perusal of the postmortem report and the testimony of PW-6 reveals that there was no injury on the leg. Perhaps injury No.2 "on the left inguinal placed obliquely" was presumed by PWs 2 and 3 to be on the left leg of the deceased. No injury was inflicted either on the neck or on the chest or even in the abdomen. PW-6 Dr. L.K. Baruwa after describing the injuries has stated that death was "due to hemorrhagic shock resulting from the injuries". Admittedly, neither any particular injury nor all the three injuries taken together were opined to be sufficient to cause death in the ordinary course of nature. Thus, in our opinion, the Appellant can be saddled with the intention of causing

such bodily injury as is likely to cause death.

38. Even otherwise, we are of the view that the Appellant's case is covered under Exception IV to Section 300 of the Code.

39. To invoke Exception IV to Section 300 of the Code, the accused has to show that "(i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner."

40. The cause of quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is also not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner.

41. In **'Smt. Sandhya Jadhav v. State of Maharashtra,** (2006) 4 SCC 653, the Court held as under:

"9. ……. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is

not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

42. In **'Surinder Kumar v. Union Territory, Chandigarh,** (1989) 2 SCC 217; it was observed that, *"where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly."*

43. In **Surinder Kumar** (supra) there was a heated argument between the parties followed by utterance of filthy abuses. The appellant/ accused got enraged, picked up a knife from the kitchen and gave one blow on the neck of the witness and three knife blows, one on the shoulder, the second one on the elbow and the third one on the chest of the deceased. The Supreme Court convicted the appellant under Section 304 of IPC.

44. In **Prakash Chand v. State of H.P.,** 2004 (11) SCC 381, there was a quarrel between the deceased and the accused when the accused's dogs entered the deceased's kitchen. Consequent to the verbal altercation that ensued, the accused went to his room, took out his gun and fired a shot at the deceased, as a result of which pellets pierced the chest of the deceased, resulting in his death. It was held by the Supreme Court *that proper conviction of the accused would be under Section 304 Part I of IPC and not under Section 302 thereof.*

45. In **Shaikh Azim v. State of Maharashtra,** 2008 (11) SCC 695, the deceased and his son were present at their house alongwith other family members. They noticed some filth thrown in the backyard of their house from the side of the house of the accused and expressed their displeasure in this regard. The family members of the accused also abused them. One of the accused holding a stick, the other holding an iron rod and the third accused holding the stick, came out of their house

and gave blows on the head of the deceased. When his son rushed to his rescue, the accused also gave injuries to him with iron rod and sticks. The deceased succumbed to the injuries caused to him. It was held that the appropriate conviction of the appellant/accused would be under Section 304 Part I of the IPC.

46. It is not the prosecution case that there was any previous enmity between the Appellant and the deceased or between the two families. There was an altercation between the Appellant and the deceased. The Appellant perhaps thought that the deceased had no right to object to his playing the tape recorder at his will and, therefore, slapped the deceased. It was at this moment that the Appellant followed the deceased, unbeknown and caused injuries on the person of deceased. Of course, three injuries were inflicted on the person of the deceased. Yet, considering that the injuries were not inflicted on the vital parts of the body, it cannot be said that the Appellant had taken undue advantage or had acted in a cruel manner.

47. In view of the foregoing discussion, we are of the view that the Appellant is liable to be convicted under Section 304, Part-I IPC instead of Section 302 IPC.

48. In the circumstances, of the case, the punishment of imprisonment for life is also altered to the Rigorous Imprisonment for seven years. Thus, the Appellant Ram Saran @ Balli is sentenced to undergo Rigorous Imprisonment for seven years and to pay fine of Rs. 500/- or in default of payment of fine to undergo Simple Imprisonment for one month.

49. Appellant is directed to surrender before the Trial Court on 6th April, 2011 to serve the remaining sentence. A copy of the order be sent to the Trial Court for information and necessary action.

ILR (2011) III DELHI 739
W.P. (C)

POONAM SHARMA ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(GITA MITTAL & J.R. MIDHA, JJ.)

W.P. (C) NO. : 3837/1990 DATE OF DECISION: 23.03.2011

Constitution of India, 1950—Article 226—Central Reserve Police Force Act, 1949—Section 11—Petition assailing the order dated 17.04.1990, whereby she was removed from service after departmental inquiry and the appellate order dated 03.08.1990, whereby her appeal against the removed order had been dismissed—Petitioner joined the Central Reserve Police Force as Mahila Sub-Inspector in 1986—In October 1987, petitioner sought permission from the department to appear in the Combined States Service Examination, 1987—Permission granted—Petitioner was granted one day casual leave for 08.02.1988 to appear in the aforesaid examination—On 08.02.1988, Kumari Mamta Sabharwal, reportedly a friend and neighbour of the petitioner was caught impersonating the petitioner and writing her answer sheet in the examination—Kumari Mamta Sabharwal gave a handwritten statement admitting that she was impersonating as the petitioner thereby defrauding the examination authorities on the request/advice of petitioner—Inquiry conducted—Petitioner held guilty and order passed—Petition—Held—Failure to maintain integrity and honesty in public examination would be covered within the meaning of expression "other misconduct" as defined under Section 11 (1) of the CRPF Act, 1949—The petitioner has not ceased to be

a member of the force on 8th February, 1988 when she was appearing in the Combined State Service Examination, 1987—The petitioner though not on duty, did not cease to be a member of the force—The petitioner is a member of the disciplined force—It needs no elaboration that integrity and dignity of the service with which she is employed, is required to be observed at all times—The petitioner who was the sub-inspector, was taking the examination as an in service candidate—Causing any person to impersonate the service personnel in an examination with dishonest intention is reprehensible and certainly misconduct of the highest level—The challenge is solely premised on the plea that the acts attributed to the petitioner are not relatable to her service—This submission is wholly misplaced. Held: No legally tenable grounds of judicial review.

So far as the afore-noticed para 23 of the Government of India decisions is concerned, the same merely sets out some instances of conduct which may amount to misconduct. Section 11 of the CRPF Act, 1949 does not describe or exhaustively enumerate acts which would be covered within the definition of "misconduct". In this background, the construction of conduct and actions which would be covered within the meaning of expression "other misconduct" in Section 11(1) of the CRPF Act, 1949 would take colour from the actions detailed in Rule 3(1) and 23 of the CCS (Conduct) Rules as well as para 23 of the Government of India decisions. Failure to maintain integrity and honesty in a public examination would be covered within the meaning of expression "other misconduct" as defined under Section 11(1) of the CRPF Act, 1949. **(Para 19)**

The petitioner had not ceased to be a member of the force on 8th February, 1988 when she was appearing in the Combined State Service Examination, 1987. The petitioner though not in duty, did not cease to be a member of the force. The petitioner is a member of the disciplined force. It

needs no elaboration that integrity and dignity of the service with which she is employed, is required to be observed at all times. The petitioner who was the sub-inspector, was taking the examination as an in service candidate. Causing any person to impersonate the service personnel in an examination with dishonest intention is reprehensible and certainly misconduct of the highest level. **(Para 21)**

The challenge is solely premised on the plea that the acts attributed to the petitioner are not relatable to her service. This submission is wholly misplaced. In view of the discussion hereinabove, we find no legally tenable grounds of judicial review. **(Para 26)**

Important Issue Involved: Failure to maintain integrity and honesty in examination amounts to misconduct.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. K.B. Rohatgi, Mr. Mahesh Kasana & Mr. Aparna Rohtagi Sain, Advocate.

FOR THE RESPONDENTS : Mr. Khalid Arshad, Advocate for Mr. Neeraj Choudhary, Standing Counsel.

CASES REFERRED TO:

1. *Ved Prakash* vs. *Union of India & Ors.*, W.P.(C) No.3225/ 2003 decided on 10th March, 2010.
2. *State of Tamil Nadu and Anr.* vs. *R. Sasikumar,* AIR 2008 SC 2827.
3. *Institute of Chartered Financial Analysts of India & Ors.* vs. *Council of the Institute of Chartered Accountants of India & Ors.,* 2007 (12) SCC 210.
4. *Hamza Haji* vs. *State of Kerala and Anr.*, AIR 2006 SC 3028.
5. *Ved Prakash* vs. *Union of India & Ors.*, W.P.(C) No.3225/ 2003.
6. *Baldev Singh Gandhi* vs. *State of Punjab & Ors.,* AIR 2002 SC 1124.
7. *Tara Chand* vs. *UOI & Ors.* 2002 in WP (C) No.5552/ 2000.
8. *S.P. Chengalvaraya Naidu (dead) by L.Rs.* vs. *Jagannath (dead) by L.Rs. and Ors.,* AIR 1994 SC 853.
9. *Probodh Kumar Bhowmick* vs. *University of Calcutta & Ors.,* 1994 (2) Comp. LJ 456 (Cal).
10. *State of Punjab and Ors.* vs. *Ram Sing Ex. Constable,* AIR 1992 SC 2188.
11. *State of Punjab* vs. *Ram Singh* AIR 1992 SC 2188.
12. *Daya Shankar* vs. *High Court of Allahabad* 1987(3) SCC 1.
13. *Galaxo Laboratories (I) Ltd.* vs. *Presiding Officer, Labour Court Meerut & Ors.,* AIR 1984 SC 505.
14. *Ramakant Mishra* vs. *State of U. P.,* reported in 1982 Labour & 1C 1790 at 1792.
15. *Mahendra Singh Dhantwal* vs. *Hindustan Motors Ltd.* reported in (1976) II LLJ 259 (264) SC.
16. *Delhi Cloth and General Mills Co Ltd.* vs. *Its Workmen* reported in (1969) 2 LLJ 755 at 772.
17. *W.M. Agnani* vs. *Badri Das* reported in (1963) 1 LLJ page 684 at 690.
18. *Prahalladpudhi* vs. *Secretary, Department of Water Resources & Ors.,* 107 (1009) CLT 777.

RESULT: Petition dismissed with costs of Rs. 25,000/-.

J.R. MIDHA, J.

1. The petitioner has assailed an order dated 17th April, 1990 whereby she has been removed from service after a departmental enquiry and the appellate order dated 3rd August 1990 whereby her appeal against the removal order has been dismissed. The petitioner has also sought consequential relief of reinstatement in service with consequential benefits.

2. The admitted facts of this case are as under:- 2.1 The petitioner joined Central Reserve Police Force ('CRPF' hereinafter) as Mahila Sub-Inspector in 1986.

2.2 In October, 1987, the petitioner sought permission from the department to appear in the Combined States Service Examination, 1987 which was granted by the competent authority on 14th October, 1987.

2.3 The petitioner applied and was granted one day casual leave for 8th February, 1988 to appear in the aforesaid examination.

2.4 On 8th February, 1988, Kumari Mamta Sabharwal, reportedly a friend and neighbour of the petitioner, was caught impersonating the petitioner and writing her answer sheet in the examination at the Victoria Intermediate College, Agra by the invigilators. Kumari Mamta Sabharwal gave a handwritten statement dated 8th February, 1988 to the supervisor, admitting that she was impersonating as the petitioner and thereby defrauding the examination authorities on the request/advice of the petitioner.

2.5 On 10th April, 1989, the Directorate General, CRPF issued a memorandum to the petitioner proposing to hold an inquiry against the petitioner for misconduct in respect of the following charge:-

"ARTICLE-I

"That No.860881303 Mahila Sub-Inspector Poonam Sharma while posted as Mahila Sub-Inspector in 88(Mahila) Bn., CRPF during the period February, 1988 committed an act of misconduct as a member of the Force in that she connived with Kumari Mamta Sabharwal D/o Shri B.M. Sabharwal resident of No.4, Old Idgah Colony, Agra with dishonest intention and persuaded the latter viz. Kumari Mamta Sabharwal to appear in an examination (Subject – Economics) on 8.2.1988 at Agra in the UP Public Service Commission, Combined State Service Examination, 1987, impersonating as Sub-Inspector Poonam Sharma. Consequently, said Kumari M. Sabharwal did impersonate said Poonam Sharma in the said examination and was caught. Thus, said Mahila Sub-Inspector Poonam Sharma committed an act of misconduct violative of Section 11(1) of the CRPF Act, 1949."

2.6 The statement of charge attached to the memorandum stated as under:-

"STATEMENT OF IMPUTATION OF MISCONDUCT IN SUPPORT OF THE ARTICLES OF CHARGE FRAMED AGAINST No.860881303 MAHILA SUB-INSPECTOR POONAM SHARMA OF 88 (MAHILA) BN. CRPF NEW DELHI – 110072

ARTCLE-I

No.860881303 Mahila Sub-Inspector Poonam Sharma of 88 (Mahila) Bn. Vide her application dated Nil, October, 1987 had sought a 'No Objection Certificate' permitting her to appear in the UP Public Service Commission, Combined State Services Examination-1987 scheduled to be held during January/February, 1988. The 'No Objection Certificate, was issued by the competent Authority i.e. the range DIG on 14.10.1987. Sub-Inspector Poonam Sharma was required to take the examination in eight subjects. On 6.2.1988, the said Sub-Inspector (Mahila) Poonam Sharma applied and obtained 1 day's Casual Leave for 8.2.1988 with permission to suffix 7.2.88 being Sunday. This was to enable her to appear in the examination in the Economics paper. On 8.2.88, Kumari Mamta Sabharwal D/O Shri B.M. Sabharwal, reportedly a friend and neighbour of Mahila SI Poonam Sharma, was caught impersonating Mahila SI Poonam Sharma and writing the answer sheet (paper on Economics) at Victoria Intermediate College, Agra, the Examination Centre, by the invigilators/ supervisors and the Principal of that college. Kumari Mamta Sabharwal in her own statement dated 8.2.88 given in writing to the supervisor, P.C.S. Examination, 1987, Victoria Intermediate College, Agra has admitted that she was impersonating as Mahila SI Poonam Sharma and thereby defrauding the examination authorities on the request/advise of Mahila SI Poonam Sharma. The said Mahila SI Poonam in her application dated 23.9.88 has falsely stated that she appeared in all subjects of the examination. Thus she connived with Kumari Mamta Sabharwal D/O Shri B.M. Sabharwal with dishonest intention and cheated the examination authorities, thereby committing an act of misconduct in her capacity as a member of the Force punishable under

Section 11(1) of CRPF Act, 1949; read with Rule-27 of CRPF Rules, 1955."

2.7 On 22nd May, 1989, Shri Raghubir Singh, Assistant Commandant was appointed as Inquiring Authority to inquire into the charges framed against the petitioner.

2.8 The petitioner pleaded not guilty. On 28th July, 1989, seven witnesses were examined before the Inquiring Authority. The Invigilator posted at Victoria Intermediate College on 8th February, 1988 deposed that upon checking the form of the petitioner and tallying the photograph, he found that the photograph pasted on the form was not tallying with the actual person sitting in the examination hall whereupon he informed the other invigilator, who also checked the photograph. Thereafter Kumari Mamta Sabharwal was taken to the Examination Control. Supervisor at Public Service Examination, Uttar Pradesh who deposed that he received an intimation on 8th February, 1988 at 09:30 hrs that one girl has been caught appearing in the Economics paper for some other candidate whereupon he went to the control room and found that the Invigilators had recorded the statement of Kumari Mamta Sabharwal who was appearing in the examination for the petitioner. Kumari Mamta Sabharwal ˇconfessed that the petitioner was her friend and she had come to appear in place of the petitioner at her instance. The written statement submitted by Kumari Mamta Sabharwal to the Examination Committee was proved in the inquiry. It was further proved that the petitioner wrote her name and other particulars on the answer sheet, she told Mamta Sabharwal to start writing and that she would return to the examination hall in few minutes whereupon Mamta Sabharwal started writing on the answer sheet, she had written only few lines of a question when the invigilators checked the identity cards and interrogated her whereupon she explained the fact that she was not the petitioner and was appearing in the examination on behalf of the petitioner at her instance.

2.9. No evidence was led by the petitioner to rebut the evidence led by the prosecution. However, after the prosecution evidence, the statement of the petitioner was recorded on 8th November, 1989. The petitioner claimed that she herself appeared in the Economics paper of Public Service Commission, Uttar Pradesh on 8th February, 1988 and she does not know any person by the name of Kumari Mamta Sabharwal, she

disputed that any such person has appeared on her behalf in the said examination.

2.10. Vide report dated 23rd November, 1989, the Inquiring Authority held that Article-1 of the charge against the petitioner was fully proved. It was further held that it has been conclusively proved that Kumari Mamta Sabharwal was caught red handed impersonating the petitioner in the examination hall on 8th February, 1988 and she has admitted the same which is supported by the documents on record and the statements of three witnesses who actually caught Kumari Mamta Sabharwal. It was further held that the petitioner has adopted dishonest means with dishonest intention in making Kumari Mamta Sabharwal appear on her behalf in the examination paper with the dishonest intention to qualify the paper/ examination.

2.11. On 17th April, 1990, Deputy Inspector General, CRPF ordered the removal of the petitioner from service in exercise of powers conferred under Section 11(1) of the CRPF Act, 1949 read with Rule 27 of CRPF Rules, 1955. The Disciplinary Authority found that the charge against the petitioner has been proved beyond any doubt; that the petitioner has not produced any witness or document in support of her plea of innocence; that Kumari Mamta Sabharwal was caught in the examination hall and she confessed that she was appearing in the examination on behalf of the petitioner; and the petitioner during cross-examination of the prosecution witnesses as well as her own statement has not been able to come out with any fact or document which could prove her innocence.

2.12 The petitioner filed an appeal against the office order dated 17th April, 1990 before the Inspector General, CRPF which was dismissed vide order dated 3rd August, 1990.

2.13 These orders are assailed before us by way of the present writ petition.

3. It is submitted by Mr. K.B. Rohatagi, learned counsel for the petitioner that Section 11(1) of the CRPF Act provides for punishment for misconduct in the capacity of a personnel as a member of the force. The main ground of challenge of the petitioner is that at the time of appearing in the Combined State Service Examination, 1987 on 8th February, 1988, the petitioner was not acting in her capacity as a member of the force and, therefore, her conduct does not amount to misconduct

under Section 11(1) of CRPF Act, 1949. The learned counsel for the petitioner further submits that the appearance of the petitioner in Combined State Service Examination, 1987 has nothing to do with her discharge of duty under CRPF Act, 1949 and, therefore, Section 11(1) cannot be invoked.

5. Mr. Khalid Arshad, learned counsel for the respondents in reply submits that the petitioner was acting in her capacity as a member of the force at the time of appearing in Combined State Service Examination, 1987 on 8th February, 1988 and, therefore, she has committed misconduct within the meaning of Section 11(1) of the CRPF Act, 1949. It is submitted that a member on leave continues to be a member of the force and the misconduct committed during that period would amount to misconduct as a member of the force within the meaning of Section 11(1) of the CRPF Act, 1949. The learned counsel for the respondents further submits that misconduct under Section 11(1) of the CRPF Act has to be read with Rule 102 of the CRPF Rules, 1955, Rules 3(1) and 23 of the CCS (Conduct) Rules and para 23 of Government of˘ Indian decisions under CCS(Conduct) Rules and that her conduct would be squarely covered within the meaning of such misconduct which invites disciplinary action.

6. Before examining the rival contentions we may usefully extract the relevant statutory provisions and rules relied upon by the parties.

6.1 Section 11(1) of CRPF Act, 1949 is reproduced hereunder:-

> **"Section 11. Minor punishments.-** (1) The Commandant or any other authority or officer as may be prescribed, may, subject to any rules made under this Act, award in lieu of, or in addition to, suspension or dismissal any one or more of the following punishments to any member of the force whom he considers to be guilty of disobedience, neglect of duty, or remissness in the discharge of any duty or of other misconduct in his capacity as a member of the force, that is to say:-
>
> (a) reduction in rank;
>
> (b) fine of any amount not exceeding one month's pay and allowances;
>
> (c) confinement to quarters, lines or camp for a term not exceeding one month;
>
> (d) confinement in the quarter-guard for not more than twenty-eight days with or without punishment drill or extra guard, fatigue or other duty; and
>
> (e) removal from any office of distinction or special emolument in the Force."

6.2 Rule 102 of the CRPF Rules, 1995 may also be considered in extenso and reads thus:-

> **"Rule 102 of CRPF Rules.**
>
> **Other conditions of service.-** The conditions of service of members of the Force in respect of matters for which no provision is made in these rules shall be the same as are for the time being applicable to other officers of the Government of India of corresponding status."

6.3 It is important to consider Rule 3(1) and Rule 23 of CCS (Conduct) Rules, 1964 which are as follows:-

> **"3. GENERAL.-**(1) Every Government servant shall at all times-
>
> (i) maintain absolute integrity;
>
> (ii) maintain devotion to duty; and
>
> (iii) do nothing which is unbecoming of a Government servant."
>
> x x x
>
> **23. INTERPRETATION.-**If any question arises relating to the interpretation of these rules, it shall be referred to the Government whose decision thereon shall be final."

6.4 Mr. Arshad, learned counsel for the respondent has also drawn our attention to Para 23 of Government of India decisions which elucidates as follows:-

> "23. Acts and conducts which amount to misconduct.- The act or conduct of a servant may amount to misconduct:-
>
> (1) if the act or conduct is prejudicial or likely to be prejudicial to the interests of the master or to the reputation of the master:

(2) if the act or conduct is inconsistent or incompatible with the due or peaceful discharge of his duty to his mater;

(3) if the act or conduct of a servant makes it unsafe for the employer to retain him in service;

(4) if the act or conduct of the servant is so grossly immoral that all reasonable men will say that the employee cannot be trusted;

(5) if the act or conduct of the employee is such that the master cannot rely on the faithfulness of his employee;

(6) if the act or conduct of the employee is such as to open before him temptations for not discharging his duties properly;

(7) if the servant is abusive or if he disturbs the peace at the place of his employment;

(8) if he is insulting and insubordinate to such a degree as to be incompatible with the continuance of the relation of master an servant;

(9) if the servant is habitually negligent in respect of the duties for which he is engaged;

(10) if the neglect of the servant though insolated, tends to cause serious consequences.

The following acts and omissions amount to misconduct:-

(1) Wilful insubordination or disobedience, whether alone or in combination with others, to any lawful and reasonable order of a superior.

(2) Infidelity, unfaithfulness, dishonesty, untrustworthiness, theft and fraud or dishonesty in connection with the employer's business or property.

(3) Strike, picketing, gherao – Striking work or inciting others to strike work in contravention of the provisions of any law, or rule having the force of law.

(4) Gross moral misconduct – Acts subversive of discipline –

Riotous or disorderly behavior during working hours at the establishment or any act subversive of discipline.

(5) Riotous and disorderly behavior during and after the factory hours or in business premises.

(6) Habitual late attendance.

(7) Negligence or neglect of work or duty amounting to misconduct – Habitual negligence or neglect of work.

(8) Habitual absence without permission and over-staying leave.

(9) Conviction by a Criminal Court."

7. Learned counsel for the petitioner does not dispute that Rule 102 of CRPF Rules, Rules 3(1) and 23 of CCS (Conduct) Rules and para 23 of Government of India decisions under CCS(Conduct) Rules are applicable to the petitioner and that the respondents could have charged the petitioner for its breach. It is urged that since the respondents have not specifically invoked/charged the said Rules, the petitioner cannot be punished for the breach of the said Rules.

8. Learned counsel for the petitioner refers to and relies upon the judgments in the cases of **Ved Prakash Vs. Union of India & Ors.,** W.P.(C) No.3225/2003 decided on 10th March, 2010; **Tara Chand Vs. Union of India & Ors.,** W.P.(C) No.5552/2000 decided on 27th August, 2002; **Galaxo Laboratories (I) Ltd. Vs. Presiding Officer, Labour Court Meerut & Ors.,** AIR 1984 SC 505; **Institute of Chartered Financial Analysts of India & Ors. Vs. Council of the Institute of Chartered Accountants of India & Ors.,** 2007 (12) SCC 210; and **Prahalladpudhi Vs. Secretary, Department of Water Resources & Ors.,** 107 (1009) CLT 777 to submit that looked at from any angle, the petitioner cannot be found guilty of misconduct.

9. The cases of **Tara Chand Vs. Union of India & Ors.,** W.P.(C) No.5552/2000 and **Ved Prakash Vs. Union of India & Ors.,** W.P.(C) No.3225/2003 relate to dismissal from service for submitting a matriculate certificate granted by an unrecognized institution which was challenged before this Court. This Court held that no education qualification had been prescribed for the purposes of recruitment and therefore, production of an educational certificate was immaterial to the recruitment and the

petitioners had not committed any misconduct. The judgments of **Galaxo Laboratories (I) Ltd.** (supra) and Institute of Chartered Financial Analysts (supra) deal with the rules of strict interpretation. The case of **Prahalladpudhi** (supra) relates to a PIL filed by a stranger in a service matter which was dismissed and the court has not given any finding with respect to the scope of misconduct. The aforesaid cases turned on their peculiar facts and render little assistance to the petitioner.

10. Learned counsel for the respondents refers to and relies upon the judgments in the cases of **Daya Shankar vs. High Court of Allahabad** – 1987(3) SCC 1; **State of Punjab vs. Ram Singh** – AIR 1992 SC 2188; and M.M. Malhotra vs. Union of India – 2005 (8) SCC 351.

11. The case of **Daya Shankar** (supra) relates to a member of Uttar Pradesh State Judicial Service who was found using unfair means in the LLM Examination. The Hon'ble Supreme Court held that the conduct of the petitioner was unworthy of a judicial officer and his dismissal from service was upheld by the Hon'ble Supreme Court. It was held as under:-

> "11. In our opinion the conclusion reached by the Inquiry Officer that the petitioner used unfair means is fully justified. No amount of denial could take him away from the hard facts revealed. The conduct of the petitioner is undoubtedly unworthy of judicial officer. Judicial Officers cannot have two standards, one in the Court and another outside the Court. They must have only one standard or rectitude, honesty and integrity. They cannot act even remotely unworthy of the office they occupy."

12. In **State of Punjab vs. Ram Singh** (supra) relates to a gun man who was found heavily drunk and roaming at the bus stand wearing the service revolver and was dismissed on the ground of misconduct. The Hon'ble Supreme Court held that the police service is a disciplined service and it requires to maintain strict discipline. Laxity in this behalf erodes discipline in service causing serious effect on the maintenance of law and order. The Hon'ble Supreme Court upheld the dismissal of the petitioner therein. The findings of the court are as under:-

> "Thus it could be seen that the word 'misconduct' though not

> capable of precise definition, its reflection receive its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful bahaviour, wilful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject-matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires to maintain strict discipline. Laxity in this behalf erodes discipline in the service causing serious effect in the maintenance of law and order."

13. The case of **M.M. Malhotra** (supra) relates to a pilot officer with Indian Air Force. A complaint was lodged by his wife regarding his illicit relations with another woman whereupon the Court of Inquiry was initiated against him and the order of compulsory retirement was passed which was upheld by the High Court. The Hon'ble Supreme Court held as under:-

> "14. The Scheme of the disciplinary rules in general is to identify the conduct which is made punishable and then to provide for the various punishments which may be imposed for the acts which are inconsistent with such conduct. For example, the Central Civil Services (Conduct) Rules, 1964 contain provisions which pertain to the standards of conduct which the Government servant (within the meaning of those rules) are to follow whereas the Central Civil Services (Classification, Control and Appeal) Rules, 1965 provide the punishment or penalties which may be imposed for misconduct. The conduct rules and the rules for punishment may be provided in separate rules or combined into one. Moreover, there are a host of departmental instructions which elucidate, amplify and provide guidelines regarding the conduct of the employees."
>
> "15. The range of activities which may amount to acts which are

inconsistent with the interest of public service and not befitting the status, position and dignity of a public servant are so varied that it would be impossible for the employer to exhaustively enumerate such acts and treat the categories of misconduct as closed. It has, therefore, to be noted that the word 'misconduct' is not capable of precise definition. But at the same time though incapable of precise definition, the word 'misconduct' on reflection receives its connotation from the context, the delinquency in performance and its effect on the discipline and the nature of the duty. The act complained of must bear a forbidden quality or character and its ambit has to be construed with reference to the subject-matter and the context wherein the term occurs, having regard to the scope of the statute and the public purpose it seeks to serve."

x x x

"19. It may be generally stated that the conduct rules of the Government and public sector corporations constitute a code of permissible acts and behavior of their servants.

The scheme of the Conduct Rules, almost invariably, is to first of all enunciate a general rule of conduct and behavior followed by specific prohibitions and restrictions. For example, Rule 3 of the Central Civil Services (Conduct) Rules, 1964 which occurs under the heading 'General' provides that every Government servant shall at all times:

(i) maintain absolute integrity;

(ii) maintain devotion to duty; and

(iii) do nothing which is unbecoming of a Government servant."

14. Coming to the facts of this case, Kumari Mamta Sabharwal has impersonated as the petitioner in the Public Service Examination, Uttar Pradesh 1987 on 8th February, 1988. Kumari Mamta Sabharwal was caught red handed by the invigilators and she admitted in writing before the invigilators and later on also appeared in the witness box before the Inquiring Authority and confessed that she impersonated as the petitioner on her request.

14.1 Along with their counter affidavit, the respondents have filed the copy of answer sheet as Annexure-A to show that there were two sets of handwritings in the answer sheet which substantiated the charge against the petitioner.

14.2 It has been further placed before us that the petitioner was debarred for five years from taking any future examinations with effect from 16th July, 1988 by Public Service Commission, Uttar Pradesh. The petitioner has not challenged this order and this order was duly implemented.

14.3 For the purposes of the present case, the relevant portion of the said order dated 3rd November, 1990 deserves to be considered and is reproduced hereinbelow:-

"Sub- Disqualifying the candidate from the Combined State Services Exam.1987 and debarring from all the future examinations and recruitments/interviews to be conducted by the Lok Seva Ayog, Uttar Pradesh and also from examinations held prior to this examination and final selection/recommendations still pending.

Sir,

I am directed to say that the Uttar Pradesh Public Service Commission have disqualified the following candidate whose particulars are given below from Combined State Service Exam, 1987 and have also debarred from all the future examination recruitments and interviews to be conducted by them and also examinations held prior to this examination and final selection/ recommendations still pending. Full particulars of candidates are given below:-

S. No.	Name of the cand-idate	Date of birth	Qualifi-cations	Father's Name	Last known Address	Cause of debarring	Period of debar
1.	Km. Poonam Sharma Roll No.24632	20.5.65	B.A.	Sri M.K. Sharma	Poonam Sharma C/o Sri M.K. Sharma	In Combined State Services Examination, 1987, she committed an offence by making Km. Mamta Sabarwal	Five Years w.e.f. 16.7.88

172/D1	to appear in her place
Basant Lane, New Delhi	in the first session 28.2.88 at Victoria Inter College Agra Centre, but it was detected by the invigilator and centre Supervisor during checking of candidates with their photographs thus she did not comply with the instructions printed on the Admission Certificates.

14.4 The petitioner has been debarred by Public Service Commission, Uttar Pradesh for five years which order has become final having not been challenged by the petitioner at any stage. This order is premised on the very grounds and facts on which the disciplinary proceedings were conducted against the petitioner. The order and allegations have not been assailed by the petitioner.

14.5 In this background, we hold that the petitioner has sought to challenge the removal order on a hyper-technical ground that Rule 102 of CRPF Rules, 1955, Rules 3(1) and 23 of CCS (Conduct) Rules and para 23 of the Government of India decisions have not been specifically invoked/charged by the respondents.

15. We find that Section 11 of the CRPF Act, 1949 refers to disobedience, neglect of duty or remissness in the discharge of any duty or `other misconduct. in his capacity as a member of the Force.

16. The question which requires to be answered is as to whether the petitioner in these facts could be held as guilty of misconduct and therefore punished. It therefore, becomes necessary to consider the definition of as to what would constitute misconduct. In this regard, reference can be made to the pronouncement of the Division Bench of this court dated 27th August, 2002 in WP (C) No.5552/2000 entitled **Tara Chand vs. UOI & Ors.** This judgment was also rendered in the context of the CRPF Act. The court noticed that misconduct not having been defined in the CRPF Act must carry its ordinary meaning. The Division Bench placed reliance on several judicial precedents and legal

texts and observed as follows :-

"14. In **Probodh Kumar Bhowmick vs. University of Calcutta & Ors.,** 1994 (2) Comp. LJ 456 (Cal) it was observed:

14. 'Misconduct', inter alia, envisages breach of discipline, although it would not be possible to lay down exhaustively as to what would constitute conduct and indiscipline, which, however, is wide enough to include wrongful omission or commission whether done or omitted to be done intentionally or unintentionally. It means, "improper behaviour; intentional wrong doing on deliberate violation of a rule of standard or behaviour":

> "Misconduct is a transgression of some established and definite rule of action, where no discretion is left except what necessity may demand; it is a violation of definite law, a forbidden act. It differs from carelessness. Misconduct even if it is an offence under the Indian Penal Code is equally a misconduct."

15. Even in Industrial laws, acts of misconduct specified in standing order framed under Industrial Employment (Standing Order) Act, 1946 is not treated to be exhaustive. Various misconducts specified in Clause 14(3) of Model Standing Order are merely illustrative.

16. In (5) **Mahendra Singh Dhantwal v. Hindustan Motors Ltd.** reported in (1976) II LLJ 259 (264) SC, a three Judge Bench of the Supreme Court observed "standing orders of a company only describe certain cases of misconduct and the same cannot be exhaustive of all the species of misconduct which a workman may commit. Even though a given conduct may not come within the specific terms of misconduct described in the standing order, it may still be a misconduct in the special facts of a case, which it may not be possible to condone and for which the employer may take appropriate action".

17. Even in the absence of rules specifying misconduct, it would be open to the employee to consider reasonably what conduct can be properly treated as misconduct.

See (6) **W.M. Agnani v. Badri Das** reported in (1963) 1 LLJ

page 684 at 690.

18. In (7) **Delhi Cloth and General Mills Co Ltd. v. Its Workmen** reported in (1969) 2 LLJ 755 at 772 at Shah, J. states "misconduct spreads over a wide and hazy spectrum of industrial activity; the most seriously subversive conducts rendering an employee wholly unfit for employment to mere technical default covered thereby".

19. To some extent, it is a civil crime, which is visited with civil and pecuniary consequences See (8) **Ramakant Mishra v. State of U. P.,** reported in 1982 Labour & 1C 1790 at 1792.

20. The Supreme Court in (9) **State of Punjab and Ors. v. Ram Sing Ex. Constable,** AIR 1992 SC 2188 upon which Mr. Mukherjee himself has placed reliance upon held:-

"5. Misconduct has been defined in Black's Law Dictionary, Sixth Edition at Page 999 thus:

> "A Transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behaviour, wilful in character, improper or wrong behaviour, it synonyms are misdemeanor, misdeed, misbehaviour, delinquency, impropriety, mismanagement, offense, but not negligence or carelessness.

Misconduct in offence has been defined as:

> "Any unlawful behaviour by a public officer in relation to the duties of his office, wilful in character. Term embraces acts which the office holder had no right to perform, acts performed improperly and failure to act in the face of an affirmative duty to act."

21. P. Ramanath Aiyar's Law Lexicon, Reprint Edition 1987 at Page 821 defines 'misconduct' thus:

> "The term misconduct implies a wrongful intention, and not a mere error of judgment, Misconduct is not necessarily the same thing as conduct involving moral turpitude. The word misconduct is a relative term, and has to be construed with reference to the subject-matter and the context

> wherein the term occurs, having regard to the scope of the Act or statute which is being construed. Misconduct literally means wrong conduct or improper conduct. In usual parlance, misconduct means a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand and carelessness, negligence and unskilfulness are transgressions of some established, but indefinite, rule of action, where some discretion is necessarily left to the actor. Misconduct is a violation of definite law; carelessness or abuse of discretion under an indefinite law. Misconduct is a forbidden act; carelessness, a forbidden quality of an act and is necessarily indefinite. Misconduct in office may be defined as unlawful behaviour or neglect by a public official by which the rights of a party have been affected."

6. This it could be seen that the word 'misconduct' though not capable of precise of definition, on reflection receives its conotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, wilful in character; forbidden act a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character……"

15. This aspect of the matter has recently been considered by the Apex Court in **Baldev Singh Gandhi vs. State of Punjab & Ors.,** AIR 2002 SC 1124 in the following terms :

> "9. 'Misconduct' has not been defined in the Act. The word 'misconduct' is antithesis of the word 'conduct'. Thus, ordinarily the expression 'misconduct' means wrong or improper conduct, unlawful behavior, misfeasance, wrong conduct, misdemeanour etc. There being different meaning of the expression 'misconduct', we, therefore, have to construe the expression 'misconduct' with

reference to the subject and the context wherein the said expression occurs. Regard being had to the aims and objects of the statute.....".

17. The meaning of the word misconduct also arose in **State of Punjab & Ors. vs. Ram Singh Ex-Constable,** AIR 1992 SC 2188 wherein the Hon'ble Supreme Court considered the meaning of the word misconduct. In this case, the Hon'ble Supreme Court held that mere error of judgment, carelessness or negligence in performance of duty would stand excluded from the realm of misconduct.

18. In the instant case, the concluded conduct attributed to the petitioner cannot be described as mere negligence in performance of his duty or error or judgment or carelessness.

19. So far as the afore-noticed para 23 of the Government of India decisions is concerned, the same merely sets out some instances of conduct which may amount to misconduct. Section 11 of the CRPF Act, 1949 does not describe or exhaustively enumerate acts which would be covered within the definition of "misconduct". In this background, the construction of conduct and actions which would be covered within the meaning of expression "other misconduct" in Section 11(1) of the CRPF Act, 1949 would take colour from the actions detailed in Rule 3(1) and 23 of the CCS (Conduct) Rules as well as para 23 of the Government of India decisions. Failure to maintain integrity and honesty in a public examination would be covered within the meaning of expression "other misconduct" as defined under Section 11(1) of the CRPF Act, 1949.

20. Perusal of the record placed before us and the report of the inquiry officer would show that the petitioner had been given a No Objection Certificate by respondents to appear in the UP Public Service Commission. So far as the act of fraud and impersonation is concerned, the respondents have examined Shri R.D. Sharma as PW-4 who was the Principal at the concerned examination centre. In addition, Shri B.S. Paliwal and Shri Mohd. Mansoor Khan were examined as PW-5 and PW-6 who were invigilators and posted at the petitioner's examination centre at the Victoria Intermediate College, Agra on 8th February, 1988. All these witnesses had described the dishonest acts attributed to the petitioner and her impersonation by Kumari Mamta Sabharwal, at the Victoria Intermediate College on 8th February, 1988. The impersonator Kumari

Mamta Sabharwal also appeared in the witness box as PW-7 and disclosed her association with the petitioner when she deposed that the petitioner's father was her neighbour. She had given the details of the manner in which the impersonation was effected. She had stated that she had visited the examination hall with the petitioner on 8th February, 1988 and that the petitioner had written only her name and particulars in answer sheet in her own writing. Thereafter, she had told Kumari Mamta Sabharwal to start writing and she would return to the examination hall in few minutes. Unfortunately, shortly after PW-7 started writing on the answer sheet, the invigilator had checked the identity card and discovered the impersonation. She had given the details of what had transpired after the same was discovered and had proved the statement which she had given in writing. The petitioner has not been able to assail or cast any doubt over this entire testimony.

21. The petitioner had not ceased to be a member of the force on 8th February, 1988 when she was appearing in the Combined State Service Examination, 1987. The petitioner though not in duty, did not cease to be a member of the force. The petitioner is a member of the disciplined force. It needs no elaboration that integrity and dignity of the service with which she is employed, is required to be observed at all times. The petitioner who was the sub-inspector, was taking the examination as an in service candidate. Causing any person to impersonate the service personnel in an examination with dishonest intention is reprehensible and certainly misconduct of the highest level.

22. In this background, it has to be held that the respondents have authoritatively established the charges against the petitioner.

23. It is trite that the challenge to the disciplinary ground is on well settled grounds alone.

24. Even if there is some evidence on record, which implicates the petitioner for the offence alleged in the charge sheet, the writ Court would have no jurisdiction to sit as if in appeal over the order of imposition of punishment.

25. No procedural infirmity or illegality has been pointed out. The petitioner does not urge infraction of any rules or procedures or of substantive law. The petitioner also does not contend violation of any of the principles of natural justice. The orders of the disciplinary authorities

and the higher authorities are reasoned and reflect application of mind.

26. The challenge is solely premised on the plea that the acts attributed to the petitioner are not relatable to her service. This submission is wholly misplaced. In view of the discussion hereinabove, we find no legally tenable grounds of judicial review.

27. The instant case certainly does not raise any such grounds. The petitioner does not lay a challenge to the proceedings and orders against her on any such grounds.

28. Even it were assumed that there is any technical flaw in the matter, the interference in the writ jurisdiction is not warranted in view of the well settled law that the writ jurisdiction cannot be invoked in favour of a person who has not approached the Court with clean hands having indulged in cheating and impersonation in the examination.

29. This case is squarely covered by the judgments of the Hon'ble Supreme Court in the case of **Daya Shankar** (supra), **Ram Singh** (supra) and **M.M. Malhotra** (supra). The CRPF is a disciplined force and it requires to maintain strict discipline. Any laxity in this regard would erode the discipline in the service and cause serious effect in the maintenance of law and order. 30. The petitioner has not approached the court with clean hands. The petitioner connived with Kumari Mamta Sabharwal who impersonated as the petitioner and appeared in Public Service Examination, Uttar Pradesh 1987 on 8th February, 1988 and was caught red handed. The petitioner's case is based on falsehood and is liable to be thrown out in terms of the judgments of the Hon'ble Supreme Court in the case of **S.P. Chengalvaraya Naidu (dead) by L.Rs. vs. Jagannath (dead) by L.Rs. and Ors.,** AIR 1994 SC 853; **State of Tamil Nadu and Anr. vs. R. Sasikumar,** AIR 2008 SC 2827; and **Hamza Haji vs. State of Kerala and Anr.,** AIR 2006 SC 3028.

Conclusion

In view of the above, we find the challenge by the petitioner wholly misconceived and legally untenable. This writ petition is accordingly dismissed with costs which are assessed to be Rs. 25,000/-.

ILR (2011) III DELHI 762
RFA

PROMOD TANDON ....APPELLANT

VERSUS

ANIL TANDON ....RESPONDENT

(G.S. SISTANI, J.)

RFA NO. : 350/2010 DATE OF DECISION: 05.04.2011

Limitation Act, 1963—Section 18, Contract Act, 1872—Section 25—Aggrieved appellant with dismissal of his suit being barred by limitation filed appeal urging communication dated 25.09.2004 between parties extended period of limitation by virtue of Section 18 of Limitation Act and Section 25 of Contract Act—As per Respondent suit barred by limitation as partial amount sent by Respondent with covering letter dated 21.05.1998 as well as communication dated 25.09.2004, did not extend period of limitation as alleged acknowledgment was beyond period of limitation since suit was filed on 08.04.2008—Held:- A plain reading of Clauses (3) of Section 25 of the Indian Contract Act makes it clear that a promise to pay a time barred debt is a condition precedent for application of the Section—Communication dated 25.09.2004 falls short of ingredients of Section 25(3) of the Act as Respondent clearly stated that he does not wish to make any meaningless commitments at that stage nor he stated that he would pay suit amount in future.

It has been argued by counsel for the appellant that the communication dated 25.09.2004 resulted in a contract to repay the loan amount as per Section 25(3) of the Contract Act. Section 25(3) of the Contract Act, 1872, reads as under:

"25 (3) It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits." **(Para 12)**

A plain reading of Clause (3) of Section 25 of the Indian Contract Act makes it clear that a promise to pay a time barred debt is a condition precedent for application of the Section. From a careful perusal of the communication dated 25.09.2004, it cannot be inferred that there was any promise made by the respondent to the appellant that he would pay the suit amount so as to make the communication a contract between the parties. In fact, in the said communication, the respondent has clearly stated that he does not wish to make any meaningless commitments at that stage nor has ˇhe stated that he would pay the suit amount in future. Thus, the communication dated 25.09.2004 falls short of the ingredients of Section 25(3) of the Contract Act, 1872. **(Para 13)**

Important Issue Involved: A plain reading of Clause (3) of Section 25 of the Indian Contract Act makes it clear that a promise to pay a time barred debt is a condition precedent for application of the Section.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Elgin Matt John, Advocate.

FOR THE RESPONDENT : Mr. Anil Sharma, Advocate.

CASE REFERRED TO:

1. *Sampuran Singh* vs. *Niranjan Singh*, reported at AIR 1999 Supreme Court 1047.

RESULT: Appeal dismissed.

G.S. SISTANI, J. (ORAL)

1. With the consent of counsel for the parties, present appeal is set down for final hearing and disposal. Learned counsel for the parties submit that trial court record would not be necessary at the time of hearing of the appeal, as copies of all the relevant pleadings and documents sought to be relied upon by them are available.

2. Present appeal is directed against the judgment and decree dated 12.4.2010 passed by the learned Additional District Judge, Delhi, in Suit No.160/2008 dismissing the suit of the appellant as barred by limitation.

3. The necessary facts, to be noticed for disposal of the present appeal, are that the appellant (plaintiff before the trial court) had filed a suit for recovery in the sum of Rs.3,53,600/-along with pendente lite and future interest @ 12%, per annum, against the respondent, who happens to be his real brother. As per the plaint, the appellant had lent a sum of 3150 Pound, approximately, Rs. 2,60,000/-, to the respondent on 25.5.1998 by means of a bank draft in favour of M/s Creative Cottons (India) Ltd. The appellant vide notice dated 30.1.2008 called upon the respondent to repay the amount, which was given as a loan. Since, despite service of notice, the respondent has failed to repay the loan, the appellant was compelled to file a suit before the trial court. Issues were framed on 12.3.2009 and the suit of the appellant was dismissed on the ground that the suit is barred by limitation.

4. Learned counsel for the appellant submits that learned trial court has failed to consider the error in calculating the period of limitation from the year 1998, when the amount of 3150 Pounds, was lent. Counsel further submits that the trial court has erred in holding the transaction between the two brothers to be a commercial transaction and further failed to appreciate the fact that the amount was lent by the appellant to the respondent on the insistence of the mother of the parties. Counsel also submits that trial court has failed to take into account the communication dated 25.9.2004 in the right prospective and that the said communication resulted in a contract to repay the amount lend under Section 25(3) of the Contract Act, 1982.

5. The main thrust of the argument of learned counsel for the appellant is that the communication dated 25.9.2004 extends the period of limitation, for which the learned counsel has relied upon Section 18 of the Limitation Act read with Section 25 (3) of the Contract Act and

further submits that the communication dated 25.9.2004 is to be read harmoniously with the communication sent by the appellant to the respondent on 10.7.2004. Counsel next submits that respondent had agreed to repay the amount after June, 2005.

6. At the outset, learned counsel for the respondent contends that there is no infirmity in the judgment of the trial court and that the suit is barred by limitation since the amount was sent to the respondent as a gift lent in the year 1998 but the suit has been filed in the year 2008.

7. Learned counsel for the respondent submits that appellant had sent a sum of 3150 Pound by a covering letter dated 21.5.1998, Ex.PW-1/2, which letter makes it evident that the suit amount was paid to the respondent but in the name of M/s Creative Cottons (India) Ltd. Counsel further submits that appellant has failed to implead M/s Creative Cottons (India) Ltd., as a party and, thus, there is no privity of contract between the appellant and the respondent. Counsel nexts submits that there is no acknowledgement of debt by the respondent, at any point of time, much less during the period of limitation. It is further submitted that appellant has wrongly placed reliance on Section 18 of the Limitation Act read with Section 25 (3) of the Contract Act, as the basic requirement of Section 18 of the Limitation Act is that the acknowledgement of debt should be within the period of limitation and not thereafter. In support of his submission, learned counsel for the respondent has relied upon **Sampuran Singh v. Niranjan Singh,** reported at AIR 1999 Supreme Court 1047, and more particularly at para 9, which is reproduced below:

> "9.In his endeavour, learned counsel for the appellants, referred to Section 18 of the Limitation Act to hold that the acknowledgement by the original mortgagees to the respondents, through the said registered document dated 11th January 1960, the period of limitation is revive which would only start from that date of acknowledgement hence the suit filed in the year 1980 would be within limitation. The said submission is without any force. Section 18, sub-section (1), itself starts with the words "Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made...". Thus, the acknowledgement, if any, has to be

> prior to the expiration of the prescribed period for filing the suit, in other words, if the limitation has already expired, it would not revive under this Section. It is only during subsistence of a period of limitation, if any, such document is executed, the limitation would be revived afresh from the said date of acknowledgement. In the present case, admittedly the oral mortgage deed is in March 1893. If the period of limitation for filing suit for redemption is 60 years then limitation for filing a suit would expire in the year 1953. Thus, by the execution of this document dated 11th January 1960 it cannot be held by virtue of Section 18 that the period of limitation is revived afresh from this date.

8. I have heard counsel for the parties and also carefully perused the judgment passed by learned trial court and also the copies of the documents, which have been placed on record. It is not in dispute that an amount of 3150 Pounds, was sent by the appellant to the respondent, which is exhibited as Ex.PW-1/2.

9. The trial court has decided the issue of limitation in the following manner.

> **"ISSUE NO: 3**
>
> **3. Whether the suit is within limitation? OPP**
>
> 13. The onus of proof of this issue lies upon the plaintiff and in support of his contentions the plaintiff has relied upon the various letters written by the parties to each other. The perusal of the record shows that, admittedly, the amount of pounds 3150 was given by the plaintiff to the defendant in May, 1998 and till the year 2004 there was no correspondence between the parties and there was no demand by the plaintiff for payment of the said amount to the plaintiff. It appears that some dispute has arisen between the parties in the year 2004, after the sad demise of their mother on 25.6.2004 and thereafter the plaintiff has made the demand for repayment of the said amount given by him to the defendant in the year 1998. In the considered opinion of this Court, as per the provisions of Section 18 of the Limitation Act, the period of limitation gets extended only if the acknowledgment is made by the defendant, for his liability, only during the period

of limitation and no subsequent acknowledgment by the defendant extends the period of limitation for filing the suit for recovery. The alleged loan was advanced on 21.5.1998 and the present suit has been instituted on 8.4.08 and, therefore, the same is hopelessly time barred. Accordingly this issue is decided in favour of the defendant and against the plaintiff."

10. A bare reading of this communication would show that in fact a draft was sent by the appellant not in the name of the respondent but in favour of M/s Creative Cotton (India) Limited. There is also no explanation as to why the company was not made a party to the suit. A strong reliance has been placed on the communication dated 25.9.2004, but a complete and careful reading of this communication would show that at no point of time the respondent acknowledged the debt and in fact the stand of the respondent in the reply is that appellant had remitted 3150 Pounds six years ago, as a gift to the appellant. Relevant portion of this communication is reproduced as under:

"……..

In legalistic terms, you are forcefully seeking immediate return of a gift of money given by you to your brother six years ago and at a time when you know fully well that the person concerned is presently facing tough financial difficulties. It is quite possible that you may now prefer to take a position that this amount was not intended to be a gift but a loan. Dear brother, in such a case, before this matter can be seen from the legal perspective, a few 'true facts' need to be established. If it was a loan, who had requested for it, what were the terms, what was the tenure, what were the repayment terms, and if there was a default, what was the correspondence exchanged during the long six years. This is an exercise in futility. The position is that you wish me to refund your gift of 3150. This is NOT a legal matter. This is a matter between two brothers and will be resolved with brotherly understanding. As I have responded to you during our 7th July 2004 telephonic conversation, let me get out of the present jam with the monthly deferred repayment schedule of the debt funds undertaken for investment in our company plant. In any case, this schedule will be over by June 05. I wish to first get out of this jam and only then make any commitment in this regard. I

do not wish to make any meaningless commitments at this stage when under a cloud.

I am sure what is bothering both of us will be sorted out with complete satisfaction to all very soon. I am sure our dear mother.s holy spirit will help and guide us in this regard."

11. In this communication, on which strong reliance has been placed by counsel for the appellant, the respondent has clearly stated that he has been forced to return the gift money, which was given six years ago, and further this demand would be an exercise in futility. Besides the respondent has expressed his financial inability to repay the amount and has made clear that till he is able to get out of the financial crunch, he would not be in a position to make any commitment. The aforesaid communication cannot be treated as an acknowledgement. Even otherwise, this communication pertains to September, 2004, is beyond the period of limitation.

12. It has been argued by counsel for the appellant that the communication dated 25.09.2004 resulted in a contract to repay the loan amount as per Section 25(3) of the Contract Act. Section 25(3) of the Contract Act, 1872, reads as under:

"25 (3) It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits."

13. A plain reading of Clause (3) of Section 25 of the Indian Contract Act makes it clear that a promise to pay a time barred debt is a condition precedent for application of the Section. From a careful perusal of the communication dated 25.09.2004, it cannot be inferred that there was any promise made by the respondent to the appellant that he would pay the suit amount so as to make the communication a contract between the parties. In fact, in the said communication, the respondent has clearly stated that he does not wish to make any meaningless commitments at that stage nor has he stated that he would pay the suit amount in future. Thus, the communication dated 25.09.2004 falls short of the ingredients of Section 25(3) of the Contract Act, 1872.

14. In view of above, I find no infirmity in the judgment and decree passed by learned trial court. There is no merit in the present appeal. Accordingly, the appeal stands dismissed, leaving the parties to bear their own cost.

ILR (2011) III DELHI 769
WRIT PETITION

D.K. SHARMA **....PETITIONER**

VERSUS

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

(SANJIV KHANNA & MANMOHAN, JJ.)

WRIT PETITION NO. : 2231/2011 **DATE OF DECISION: 08.04.2011**

Constitution of India, 1950—Article 217(2)(b)—Appointment and conditions of office of Judge of High Court—Petition filed against recommendation of collegium recommending appointment of Respondent No.3 as Judge of High Court—Petitioner contended that Respondent No.3 not practicing advocate at time of recommendation—Petitioner appointed as member of Income Tax Appellate Tribunal—Non-fulfillment of qualification laid down in Article 217(2)(b) alleged—Hence present petition. Held- Article 217(2) postulates two sources for elevation as Judges of High Court—Judicial office for at least ten years or has been advocate for at least ten years—Two sources independent and separate—Expression "has for at least ten years been an advocate" does not mean appointee must be advocate on date of recommendation or at time of appointment—Past experience as Advocate not obliterated upon appointment as Member of Tribunal—Advocate with 10 years practice—Appointed as member of Tribunal—Will be forced to resign and formally renew his license to get over objection—Eligibility and "suitability"—Difference explained—Eligibility does not make individual suitable for post—Petition lacking merits—Hence, dismissed.

The expression "has for at least ten years been an advocate" does not mean and convey that the person to be appointed should be an Advocate in praesenti i.e. on the date when his name is recommended for appointment by the High Court collegium or at the time of appointment. It is not possible to accept the contention of the petitioner that the past experience of a person as an Advocate gets obliterated or washed away when an Advocate is appointed as a member of a Tribunal. The aforesaid negative covenant or condition cannot be either expressly or impliedly read into Article 217(2)(b) of the Constitution. The words "has" and "been" used in Article 217(2)(b) do not connote that a person should be a practicing Advocate on the date when his name is recommended for appointment as a High Court Judge. **(Para 5)**

Important Issue Involved: Article 217(2) Postulates two sources for elevation as Judges of High Court—Judicial office for at least ten years or been advocate for at least ten years Two sources one independent and separate. Expression "has for at least ten years been an advocate", does not mean appointee must be advocate on date of recommendation or at time of appointment. Past experience as Advocate not obliterated upon appointment as Member of Tribunal.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Ashok Gurnani, Advocate with

petitioner in person.

FOR THE RESPONDENTS : None.

CASES REFERRED TO:

1. *S.D. Joshi and Another* vs. *High Court of Judicature at Bombay and Others* 2011 (1) SCC 252.
2. *Centre for PIL* vs. *Union of India*, 2011(3) SCALE 148.
3. *Mahesh Chander Gupta* vs. *Union of India* (2009) 8 SCC 273.
4. *Supreme Court Advocates-on-Record Association & Others* vs. *Union of India*, 1993 (4) SCC 441.
5. *Shri Kumar Padam Prasad* vs. *Union of India and Others* (1992) 2 SCC 428.
6. *Narain Singh* vs. *High Court of Judicature at Allahabad*, (1985) 1 SCC 225.
7. *Chandra Mohan* vs. *State of U.P.*, AIR 1966 SC 1987.
8. *Rameshwar Dayal* vs. *State of Punjab* AIR 1961 SC 816.

RESULT: Petition dismissed.

SANJIV KHANNA, J.:

1. Mr. D.K. Sharma, a practicing Advocate of this Court, has filed the present writ petition, inter alia, praying for following reliefs:-

"(a) allow the present petition;

(b) qash (sic) the recommendation of collegium of this Hon'ble Court recommending the appointment and elevation of Respondent No.3 as a Judge/Additional Judge of this Hon'ble Court.

(c) restrain/prohibit the Respondent No.1 & 2 from acting on the basis of such recommendation for appointing and elevating ˇthe respondent No.3 as an Additional Judge or a Judge of this Hon'ble Court.

(d) a declaration that Explanation [(a)] and [(aa)] inserted to Article 217 of The Constitution of India by the Forty Second Amendment Act, 1976 and by the Forty Forth Amendment Act, 1978 are ultra vires of The Constitution of India and of the powers of the Parliament to amend The Constitution and be declared accordingly.

(e) pass any other or further order in favour of the Petitioner and against the Respondent."

2. The contentions of the petitioner are as under:-

(i) The respondent No.3, Mr. R.V.Easwar, does not meet the eligibility criteria stipulated in Article 217(2) (a) of the Constitution of India as he has not held and is not holding a judicial office as elucidated and explained by the Supreme Court in **S.D. Joshi and Another Vs. High Court of Judicature at Bombay and Others** 2011 (1) SCC 252 and other cases.

(ii) The respondent No.3 does not meet the eligibility criteria stipulated in Article 217(2)(b) of the Constitution of India as presently he is not a practicing Advocate and in 1991 he was appointed as a member of the Income Tax Appellate Tribunal (for short, the Tribunal) and is presently it's President. Under Article 217(2)(b) only Advocates, who are actually practicing in praesenti, are eligible and can be considered for appointment as High Court judges.

(iii) The Respondent No.3 is not eligible to be appointed as a District Judge under Article 233(2) as he is a member of the Tribunal and, therefore, he is not also eligible to be appointed as a Judge of the High Court.

(iv) The Respondent No.3 is not suitable to be appointed as a Judge of the High Court and the collegium of the High Court could not have examined the question of suitability as after 2008 he has not been a member of any bench of the Tribunal at Delhi.

(v) Explanation (a) and (aa) to Article 217(2) of the Constitution added by 42nd Amendment Act, 1976 and 44th Amendment Act, 1978 are unconstitutional as they violate the basic structure of the Constitution, namely, separation of powers and independence of judiciary.

3. Article 217(2) of the Constitution including the explanation (a) and (aa) read as under:-

"Article 217. Appointment and conditions of the office of a

Judge of a High Court :

(2) A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and—

(a) has for at least ten years held a judicial office in the territory of India; or

(b) has for at least ten years been an advocate of a High Court or of two or more such Courts in succession;

Explanation.—For the purposes of this clause—

(a) in computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an advocate of a High Court or has held the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law;

(aa) in computing the period during which a person has been an advocate of a High Court, there shall be included any period during which the person [has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate;

4. Article 217(2) postulates two sources for elevation as Judges of the High Court. The first source is a person who has held a judicial office for at least 10 years in the territory of India and the second source is a person who has for at least ten years been an Advocate of a High Court or of two or more such Courts in succession. The two sources are independent and separate. Qualification prescribed, either in clauses (a) or (b) to Article 217(2) has to be satisfied in alternative for a person to be eligible for being appointed as a Judge of the High Court.

5. The expression "has for at least ten years been an advocate" does not mean and convey that the person to be appointed should be an Advocate in praesenti i.e. on the date when his name is recommended for appointment by the High Court collegium or at the time of appointment. It is not possible to accept the contention of the petitioner that the past experience of a person as an Advocate gets obliterated or washed away when an Advocate is appointed as a member of a Tribunal. The aforesaid

negative covenant or condition cannot be either expressly or impliedly read into Article 217(2)(b) of the Constitution. The words "has" and "been" used in Article 217(2)(b) do not connote that a person should be a practicing Advocate on the date when his name is recommended for appointment as a High Court Judge.

6. The view, we have taken is in consonance and as per the ratio in **Mahesh Chander Gupta Vs. Union of India** (2009) 8 SCC 273, wherein it has been held:-

> **"48**. Commenting on Explanation II, H.M. Seervai in Constitutional Law of India, 1st Edn., p. 1012, has this to say:
>
> "The qualification for appointment as a Judge of the Supreme Court is the holding of a Judge's office for at least five years in a High Court or in two or more High Courts in succession; or at least ten years' standing as an advocate of a High Court or two or more High Courts in succession; or distinction achieved as a jurist [Article 124(3)]. In computing the period during which a person has been an advocate, any period during which he has held judicial office not inferior to that of a District Judge after he became an advocate, is to be included [Article 124(3) Explanation II]. It is clear that the Explanation is not attracted if a person has been an advocate for ten years before accepting any judicial appointment, for that by itself is a sufficient qualification for appointment as a Judge of the Supreme Court."
>
> **49.** In our view, Explanation (aa) appended to Article 217(2) is so appended so as to compute the period during which a person has been an advocate, (sic by including) any period during which he has held the office of a member of a tribunal after he became an advocate. As stated by the learned author, quoted above, if a person has been an advocate for ten years before becoming a member of the tribunal, Explanation (aa) would not be attracted because being an advocate for ten years per se would constitute sufficient qualification for appointment as a Judge of the High Court."
>
> (emphasis supplied)

7. The aforesaid observations by the Supreme Court adumbrate that

the explanation (aa) appended to Article 217(2) need not be made applicable or would not be attracted, if the person otherwise has been an Advocate for 10 years. This by itself would constitute sufficient qualification and make a person eligible for appointment as a Judge of the High Court under Article 217(2)(b).

8. The Supreme Court in the said case had also examined the question whether requirement of Article 217(2)(b) can be equated with "actual practice" or only requires "entitlement to practice". Referring to an earlier decision in **Lily Isabel Thomas, Re** AIR 1964 SC 855, it has been observed in **Mahesh Chander Gupta** (supra) as follows:-

> "51. In Lily Isabel Thomas, Re this Court equated "right to practise" with "entitlement to practise" (see para 11). In our view, Article 217(2)(b), therefore, prescribes a qualification for being appointed a Judge of the High Court. The concept of "actual practise" will fall under Article 217(1) whereas the concept of right to practise or entitlement to practise will fall under Article 217(2)(b). The former will come in the category of "suitability", the latter will come in the category of "eligibility"."

9. The Supreme Court elaborately dealt with the aforesaid contention and has held that "entitlement to practice" is sufficient to meet the requirements of Article 217(2)(b). The Supreme Court has made specific reference to the difference in language of clauses 1 and 2 to Article 217. It has been held that Article 217(1) has a clause relating to "suitability" or "merits", whereas Article 217(2) has a clause relating to "eligibility requirements or qualification" and does not deal with "suitability" or "merits". The provisions of the Advocates Act, 1961, etc. entitle a person to practice in any High Court and for this purpose mere enrollment is sufficient.

10. Faced with the above difficulty, learned counsel for the petitioner submitted that the views expressed by H.M. Seervai are incorrect and contrary to the Constitutional provisions and philosophy. He submits that the commentary does not take notice of Article 233 (2) of the Constitution and in fact the opinion expressed negates the basic structure of the Constitution which provides for independence of judiciary and separation between Legislature, Executive and Judiciary.

11. The aforesaid contention cannot be accepted in view of the ratio decendi in the case of **Mahesh Chander Gupta** (supra). This Court is bound by the said ratio. That apart, the contention of the petitioner that respondent No.3 has ceased to be impartial and independent because he has been acting as a member of the Tribunal, does not appeal to us; (we are not dealing with a case where a person, who was earlier an Advocate, and was appointed to a post under the Union or a State. We express no opinion in this regard). Advocates do get appointed as members of tribunals, but this does not mean that they become disqualified and cannot be appointed as Judges of the High Court, if they meet the eligibility criteria set forth in Article 217(2)(b) of the Act. The submission will be counterproductive and would prevent good Advocates from accepting appointments in tribunals. For example, appointment to the Central Administrative Tribunal is only for a period of five years which can be extended by another period of five years and not beyond.

12. Reference to Article 233 is misconceived. Article 233 of the Constitution relates to appointment of a person as a District Judge. Article 233 reads as under:-

> "233. Appointment of district judges.—(1) Appointments of persons to be, and the posting and promotion of, District Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.
>
> (2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a District Judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment."

13. It has been held by the Supreme Court in **Chandra Mohan v. State of U.P.,** AIR 1966 SC 1987 and **Narain Singh v. High Court of Judicature at Allahabad,** (1985) 1 SCC 225, that "service" in Article 233(2) means judicial service. This is obvious as Article 233(1) relates to promotion of persons who are already in judicial service, while Article 233(2) provides that a person not already in judicial service is eligible for appointment if he has practiced for not less than 7 years as an Advocate and is recommended for the said purpose by the High Court.

14. The Supreme Court, in **Rameshwar Dayal versus State of Punjab** AIR 1961 SC 816, has held that Article 233 is a self- contained provision regarding appointment of District Judges and the qualification laid down in clause 2 of Article 233 is that the person concerned should be an advocate/pleader of seven years' standing. It was observed as under:-

> "12. Learned counsel for the appellant has also drawn our attention to Explanation I to clause (3) of Article 124 of the Constitution relating to the qualifications for appointment as a Judge of the Supreme Court and to the explanation to clause (2) of Article 217 relating to the qualifications for appointment as a Judge of a High Court, and has submitted that where the Constitution makers thought it necessary they specifically provided for counting the period in a High Court which was formerly in India. Articles 124 and 217 are differently worded and refer to an additional qualification of citizenship which is not a requirement of Article 233, and we do not think that clause (2) of Article 233 can be interpreted in the light of explanations added to Articles 124 and 217. Article 233 is a self contained provision regarding the appointment of District Judges. As to a person who is already in the service of the Union or of the State, no special qualifications are laid down and under clause (1) the Governor can appoint such a person as a district judge in consultation with the relevant High Court. As to a person not already in service, a qualification is laid down in clause (2) and all that is required is that he should be an advocate or pleader of seven years' standing. The clause does not say how that standing must be reckoned and if an Advocate of the Punjab High Court is entitled to count the period of his practice in the Lahore High Court for determining his standing at the Bar, we see nothing in Article 233 which must lead to the exclusion of that period for determining his eligibility for appointment as district judge."
>
> (emphasis supplied)

15. Difference in language of Article 233(2) and Article 217 (2) is apparent. It will not be proper to read the negative covenant in Article 233(2) into Article 217(2)(b), when it is not specifically incorporated.

The Constitution has prescribed different eligibility conditions under the two Articles and they apply accordingly. Eligibility conditions mentioned in Article 233(2) cannot be deemed to be incorporated in Article 217(2)(b) without there being any specific provision. The two Articles operate in their own field. It may be noted that Article 124, which regulates appointment of the Judges of the Supreme Court, refers to a third source/ category; eminent jurists who are eligible. Eminent jurists are not a category or a source mentioned in Article 217(2). Thus, there is some difference in the eligibility norms prescribed under Articles 124, 217 and 233 of the Constitution.

16. The contention of the petitioner that once an Advocate is appointed as a member of a tribunal or becomes a judicial officer, he cannot be appointed under clause (2)(b) of Article 217, has to be rejected. The aforesaid contention is contrary to the ratio in **Mahesh Chander Gupta** (supra). It also does not appeal to logic. An Advocate with 10 years' practice, who is appointed as a member of a tribunal or a judicial officer will only have to resign and formally renew his license of practice to get over the said objection. The contention of the petitioner that this will give unfettered power to appoint the otherwise junior judicial officers or junior members of the tribunal as High Court judges, does not appeal to us. The contention overlooks the difference between the "eligibility" and "suitability". A person with 10 years' experience as an Advocate is eligible but this does not make him suitable for appointment as a Judge of the High Court. In **Shri Kumar Padam Prasad Vs. Union of India and Others** (1992) 2 SCC 428, the Supreme Court observed that the High Court Judges can be appointed from two sources, from members of the Bar and from amongst the persons who have held judicial office of not less than 10 years. Thus, even a subordinate judicial officer manning a court inferior to the District Judge can be appointed as a Judge of the High Court, (see paragraph 22 at page 445).

17. In **Mahesh Chander Gupta** (supra), challenge was made to appointment of Dr. Satish Chandra as an Additional Judge of the High Court. The said respondent had not practiced as an Advocate for 10 years. He had also not held any judicial office in a judicial service. The Supreme Court held that the said respondent satisfied the qualifications prescribed under Article 217(2)(b) read with explanation (aa) as he had worked as a member of the Tribunal for a period of 11 years and before

that he was an Advocate of the High Court. The Supreme Court also noticed and rejected the contention in the said case that the respondent was appointed a Service Judge, in other words he was appointed under Article 217(2) (a). Rejecting the said argument it has been held as follows:-

> "**79.** This argument advanced on behalf of the original petitioner is misconceived. The very purpose for enactment of Articles 217(2)(a) and 217(2)(b) is to provide for a mix of those from the Bar and those from service who have the past experience of working as judicial officers/officers in tribunals. This was the object behind a policy decision taken in the Chief Justices' Conference of 2002. The object of adding Explanation (aa) is to complement Explanation (a) appended to Article 217(2) and, together, they have liberalised the source of recruitment for appointment to the High Court. Therefore, for eligibility purposes clause (aa) of the Explanation read with sub-clause (b) of clause (2) of Article 217 would apply to Members of ITAT, in the matter of computation of the prescribed period for an advocate to be eligible for being appointed as a High Court Judge. This aspect of "eligibility" has nothing to do with "suitability"."

18. Earlier also we had an instance, when a member of the Tribunal was appointed as a Judge of this High Court and then as a judge of the Supreme Court. Therefore, there are precedents. Officers of the District Judiciary have in the past gone on deputation as judicial members of the Tribunal.

19. Reliance placed by the learned counsel for the petitioner on **S.D. Joshi** (supra) is misconceived. The three issues raised and decided in the said case have been set out in paragraph 1 and read as under:-

> "(a) What is the scope of the expression 'judicial office' appearing in Article 217(2)(a) of the Constitution?
>
> (b) Whether a 'Family Court' has the trappings of a Court and the Family Court Judges, being the Presiding Officers of such Courts, on the claimed parity of jurisdiction and functions, would be deemed to be the members of the Higher Judicial Services of the State?
>
> (c) If answer to the above question is in affirmative, then whether Family Court Judges are eligible and entitled to be considered for elevation as Judge of the High Court in terms of Article 217 of the Constitution of India?"

20. The question before the Supreme Court was whether the Presiding Officers of the family courts are deemed to be members of the higher judicial services of the State and accordingly on seniority-cum-merit, whether they are entitled to be considered for elevation to the High Court under Article 217(2)(a). It is in this context that the Supreme Court has held that the Presiding Officers of the family courts are not judicial officers as they are not members of the judicial service. They cannot be appointed on the basis of their service as the Presiding Officers of the family court as judges of the High Court under Article 217(2)(a). The Supreme Court was not examining the Article 217(2)(b) and the effect thereof. As noticed above, the two Articles operate in their own field and provide for different sources for elevation as a judge to the High Court.

21. In the present case, the petitioner has not alleged or stated that the respondent No.3 has not been an Advocate for 10 years. As per Section 252(2) of the Income Tax Act, 1961, a person who is an Advocate for 10 years can be appointed as a judicial member of the tribunal. It is stated in the petition that the respondent No.3 was practicing as an Advocate prior to 1991, when he was appointed as a member of the Tribunal. Since then he has worked as a member of the Tribunal.

22. In view of the aforesaid findings, we are not required to examine other contentions raised by the petitioner including challenge to the explanations (a) and (aa) to Article 217(2) inserted by 42nd Amendment Act, 1976 and 44th Amendment Act, 1978. The question of constitutional vires is left open and need not be decided in the present case as the respondent No.3 is otherwise eligible under Article 217(2)(b) without applying and taking benefit of Explanation (aa) thereto. Explanation (a) is not applicable.

23. Learned counsel for the petitioner has submitted that the collegium did not have the occasion to consider and form an opinion about the "suitability" of the respondent No.3. In this regard, reference has been made in the grounds and reliance is placed on paragraph 33 of **Centre for PIL Vs. Union of India,** 2011(3) SCALE 148. The said contention

has to be rejected for various reasons. Firstly, the question of "suitability" is still to be examined by the collegium of the Supreme Court. Secondly, the contention raised is merely an assumption without any basis. In the petition itself it is mentioned that the respondent No.3 was a member of the Tribunal in Delhi from 2004 to 2008. The orders of the Tribunal are made subject matter of challenge in reference/appeal in the Delhi High Court. Judgments before 2004 and after 2008, authored by the respondent No.3 were/are always available for examination by the Collegium and by other Judges to form an opinion about "suitability". Lastly, it has been repeatedly held by the Supreme Court that the question of "suitability" or "merits" cannot be made subject matter of judicial review in a writ petition; at least not after the judgment of the Supreme Court in **Supreme Court Advocates-on-Record Association & Others Vs. Union of India,** 1993 (4) SCC 441. In the said case the Supreme Court gave various directions with regard to the procedure to be adopted for appointment of Judges of the High Courts and the Supreme Court and in the light of the said directions on the question of justice-ability, it has been held as follows:-

> "**480.** The primacy of the judiciary in the matter of appointments and its determinative nature in transfers introduces the judicial element in the process, and is itself a sufficient justification for the absence of the need for further judicial review of those decisions, which is ordinarily needed as a check against possible executive or bias, even subconsciously, of any individual. The judicial element excess or arbitrariness. Plurality of judges in the formation of the opinion of the Chief Justice of India, as indicated, is another inbuilt check against the likelihood of arbitrariness being predominant in the case of appointments, and decisive in transfers, as indicated, the need for further judicial review, as in other executive actions, is eliminated. The reduction of the area of discretion to the minimum, the element of plurality of judges in formation of the opinion of the Chief Justice of India, effective consultation in writing, and prevailing norms to regulate the area of discretion are sufficient checks against arbitrariness.
>
> **481.** These guidelines in the form of norms are not to be construed as conferring any justiciable right in the transferred Judge. Apart from the constitutional requirement of a transfer being made only on the recommendation of the Chief Justice of India, the issue of transfer is not justiciable on any other ground, including the reasons for the transfer or their sufficiency. The opinion of the Chief Justice of India formed in the manner indicated is sufficient safeguard and protection against any arbitrariness or bias, as well as any erosion of the independence of the judiciary."

24. Following the said judgment in the case of Mahesh Chander Gupta (supra) it has been observed:-

> "**77.** As stated above, in the present case, the matter has arisen from the writ of quo warranto and not from the writ of certiorari. The biodata of Respondent 3 was placed before the Collegiums. Whether Respondent 3 was "suitable" to be appointed a High Court Judge or whether he satisfied the fitness test as enumerated hereinabove is beyond justiciability as far as the present proceedings are concerned. We have decided this matter strictly on the basis of the constitutional scheme in the matter of appointments of High Court Judges as laid down in Supreme Court Advocates-on-Record Assn. and in Special Reference No. 1 of 1998, Re. Essentially, having worked as a member of the Tribunal for 11 years, Respondent 3 satisfies the "eligibility qualification" in Article 217(2)(b) read with Explanation (aa)."

25. In view of the aforesaid, we do not find any merit in the writ petition and the same is dismissed. There will be no order as to costs.

ILR (2011) III DELHI 783
RFA

SHAILENDRA NATH ENDLAY & ANR. ....APPELLANTS

VERSUS

KULDIP GANDOTRA ....RESPONDENT

(VIKRAMAJIT SEN & SIDDHARTH MRIDUL, JJ.)

RFA (OS) NO. : 88-89/2006, DATE OF DECISION: 13.05.2011
CM NO. : 13368/2006,
18516/2010 & 2081/2011

Indian Evidence Act, 1872—Sections 91&92—Suit filed for specific performance—Parties entered into agreement to sell for sale of a DDA flat eligible for conversion on charges as per policy—At the time of agreement property in possession of tenant—Agreed sale was to be completed on vacation of property by tenant—Vacation of Flats responsibility of Plaintiff (Respondent)—Vacant possession was to be handed over by 30th June, 2004—Plaintiff (Appellant) also undertook to get the flat converted freehold in the agreement (clause 4)—Fee/charges for conversion to be borne by Defendant (Appellant)—Suit decreed in favour of Plaintiff (respondent) inter-alia directing the Defendant (Appellant) to get the Flat converted to freehold and then get the sale deed executed—Submitted on behalf of Defendant (Appellant) on the basis of pleadings and oral testimony, Plaintiff (Respondent) responsible for conversion of property to freehold as per oral agreement—Also submitted Appellant being an old lady was not in position to run around to secure the necessary permission for conversion—Held by Appellate Court, provisions of Evidence Act exclude any oral agreement or statement for purpose of contradicting varying or subtracting from its terms after the document has been produced to prove the its terms—Appeal dismissed.

From the above discussion it is clear that the obligation of getting the said flat converted into freehold was on the Appellants and not on the Respondent. Insofar as, the Respondent was concerned his obligations under the said agreement to sell dated 31st March, 2004 were to make payment of the advance amount of `1lakh; to make the payment for conversion charges and fee; and to pay the balance amount of Rs. 31.5 lakhs as also the stamp duty and registration fee necessary for the execution and registration of the Sale Deed. The first two acts were admittedly done by him and the occasion did not arise for him to perform the last because the Appellants ˇfailed to get the suit property converted from leasehold to freehold. On the other hand, the Appellants were required to vacate the tenant from the said flat which they did; and get the said flat converted from leasehold to freehold prior to the execution of the Sale Deed and hand over the physical possession to the Respondent at the time of Registration, which acts the Appellants failed to perform. As regards the contention raised on behalf of the Appellants, that it was orally agreed between the parties that the Respondent would be responsible for getting the said flat converted into freehold, is concerned the said assertion is devoid of merit. It is a well settled principle of interpretation that Evidence Act forbids proving the contents of a writing other than by the writing itself. This doctrine described by the Supreme Court as “best evidence rule” is in reality a doctrine of substantive law, namely, that in case of a written contract all proceedings and contemporaneous oral expressions of the thing are merged in the writing and displaced by it. In other words, when persons express their agreement in writing, it is for the express purpose of getting rid of any indefiniteness and to put their ideas in such shape that there can be no misunderstanding, which so often occurs when reliance is

placed upon oral statements. Written contracts presume deliberation on the part of the contracting parties and it is natural they should be treated with careful consideration by the courts and with a disinclination to disturb the conditions of matters as embodied in them by the act of the parties. The Supreme Court in **Roop Kumar** (supra) has observed:

> "17. It is likewise a general and most inflexible rule that wherever written instrument are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than parol evidence. It is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence. (See Starkie on Evidence, p. 648.)" **(Para 9)**

Thus, it is seen that the provisions of the Evidence Act come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradiction, varying, adding or subtracting from its terms, after the document has been produced to prove its terms.**(Para 10)**

Important Issue Involved: It is a matter of substantive Law that in case of a written contract, an oral agreement or statement for the purpose of contradiction, varying, adding or subtracting from its terms, is excluded.

[La Ga]

APPEARANCES:

FOR THE APPELLANTS : Mr. Sudhir Nandrajog, Senior Advocate with Mr. Jainendra Maldahiyar, Advocate.

FOR THE RESPONDENT : Mr. Kailash Vasdev, Senior Advocate with Ms. Shraddha Bhargava and Ms. Richa Kapoor, Advocates.

CASE REFERRED TO:

1. *Roop Kumar* vs. *Mohan Thedani*, (2003) 6 SCC 595.

SIDDHARTH MRIDUL, J.

1. The present Appeal is instituted against the judgment and decree dated 4th July, 2006 passed by the learned Single Judge in CS(OS) No.901/2004, whereby the suit for specific performance of the agreement to sell dated 31st March, 2004 (hereinafter 'the said agreement to sell') in respect of flat bearing No.C-9/9551, Vasant Kunj, New Delhi-110070 (hereinafter 'the said flat'), was decreed in favour of the Respondent and against the Appellants.

2. The facts as are necessary for disposal of the present Appeal are as follows:

(a) The parties to the present Appeal entered into the said agreement to sell in respect of the said flat (Ex.P-1). As per the said agreement to sell dated 31st March, 2004, the Respondent was the Vendee whereas the Appellants herein were the Vendors. The said agreement to sell dated 31st March, 2004 was entered into, on behalf of the Appellant No.1, by the Appellant No.2, who held a General Power of Attorney in her favour. The Appellant No.1 had acquired the said flat on allotment from the Delhi Development Authority (DDA) and the same was a leasehold property. The said flat was eligible for conversion into freehold on payment of prescribed charges as per the policy of DDA.

(b) At the time the parties entered into the said agreement to sell dated 31st March, 2004, the said flat was in occupation of a tenant, who had been inducted by the Appellant No.1. At the time of the said agreement to sell dated 31st March, 2004, it was agreed that the sale would be

completed after the property was got vacated from the tenant and that the vacant possession of the said flat would be handed over to the Respondent by the Appellants.

(c) The salient and important terms of the said agreement to sell dated 31st March, 2004 were that the sale consideration was fixed at Rs. 32,50,000/- out of which a sum of Rs. 1,00,000/- had been paid to the Appellant No.1 through the Appellant No.2 at the time of entering into the said agreement to sell. The balance sale price of Rs.31,50,000/- was payable at the time of registration of the Sale Deed. Vacant possession of the said flat was to be delivered by the Appellant No.1 and 2 at the time of registration of the Sale Deed. The date of vacation of the said flat by the tenant was indicated as 30th June, 2004. The said flat was to be got vacated by the Appellants. The learned Single Judge held that the Appellants had also undertaken the obligation of getting the said flat converted into freehold as per the prevalent policy. However, the necessary fees/charges for said conversion were to be borne by the Respondent.

(d) Thereafter according to the Appellants they got the said flat vacated from the tenant on 15th May, 2004 and informed the Respondent accordingly, telephonically as well as personally. This was vehemently denied by the Respondent. The Respondent states that he deposited a sum of Rs. 80,000/- or so on account of conversion fee/ charges in May, 2004 at the behest and instance of the Appellants. However, the Appellants did not take all the necessary steps to get the said flat converted into freehold. Consequently, the Respondent wrote a letter dated 9th July, 2004(Ex.D-2) calling upon the Appellants to get the said flat converted into freehold before 15th July, 2004, the time stipulated in the said agreement to sell dated 31st March, 2004. The Respondent further informed the Appellants vide the said letter dated 9th July, 2011 that he was ready with the balance consideration amount which payable to the Appellants at the time of execution of the

Sale Deed. In response thereto the Appellants sent a legal notice dated 13th July, 2004 (Ex.P-2) to the Respondent requiring him to make payment of the balance sale consideration on or before the 15th July, 2004 and intimating him that in case the Respondent failed to do so, the advance of Rs. 1,00,000/- would be forfeited by the Appellants. In the said legal notice dated 13th July, 2004 the Appellants also stated that as per the terms and conditions of the agreement it was the liability and responsibility of the Respondent to get the flat converted into freehold. This was followed by the notice dated 21st July, 2004 (Ex.D-3) issued by the Respondent's advocate to the Appellants, advocate and a notice dated 27th July, 2004 (Ex.P-3) sent on behalf of the Appellants to the Respondent. As per the last notice dated 27th July, 2004 the Appellants alleged that time was of the essence of the contract and that the Respondent was required to make payment of the balance sale consideration by 15th July, 2004 and that the Respondent having failed to make the said payment the amount of Rs. 1,00,000/- stood forfeited by the Appellants and the said agreement to sell dated 31st March, 2004 stood cancelled.

(e) Immediately thereafter, the Respondent filed the Civil Suit bearing CS(OS) No.901/2004 on 10th August, 2004. The Respondent stated that he had kept a sum of Rs.33,00,000/ - since April, 2004 in the form of Fixed Deposit Receipts encashable at any time in order to fulfill his obligation under the said agreement to sell dated 31st March, 2004. The said Fixed Deposit Receipts for the balance consideration were deposited by the Respondent in Court as indicated in the order dated 29th September, 2004 passed by the learned Single Judge.

(f) On completion of the pleadings the following issues were cast in the said suit:

"1. Whether proper Court fee has not been paid? OPD.

2. Whether the time was the essence of the contract and the plaintiff failed to perform his part under the agreement?

OPD.

3. Whether the plaintiff is entitled to a decree for specific performance on the grounds pleaded in the plaint? OPD.

4. Whether in the alternative, the plaintiff is entitled to refund of the amount alongwith damages and interest as prayed? OPP

5. Relief."

(g) The following documents filed on behalf of the Respondent were exhibited:-

"(i) Original agreement to sell dated 31.03.2004(Exhibit-P-1).

(ii) A copy of notice dated 13.07.2004 sent on behalf of the defendant No.2 to the plaintiff(Exhibit-P-2).

(iii) A copy of notice dated 27.07.2004 sent on behalf of the defendants to the plaintiff(Exhibit-P-3).

(iv) A copy of the Challan dated 24.05.2004 depositing a sum of Rs.11075(Exhibit-P-4).

(v) Acknowledgement receipt of DDA dated 11.06.2004(Exhibit-P-5).

(vi) Conveyance Deed (draft of) to be issued on conversion of lease hold into free hold(Exhibit-P-6).

(vii) Letter from DDA regarding stamping of Conveyance Deed dated 29.04.2004(Exhibit-P-7).

(viii) Copy of Special Power of Attorney dated 10.05.2004(Exhibit-P-8).

(ix) Copy of Challan No.8083 in respect of cash Rs.66060/- paid on 25.05.2004 (Exhibit-P-9).

(x) Copy of Challan 80834 dated 25.05.2004 for a sum of Rs.20(Exhibit-P-10)."

(h) The Appellants, inter alia, filed the following documents:

"(i) Copy of General Power of Attorney dated 25.08.1982 executed by the defendant No.1 in favour of, inter alia, defendant No.2 (Exhibit-D-1).

(ii) Original Possession Slip issued by Mr. Ravi Kapila dated 15.05.2004 (Exhibit-DW-1/5).

(iii) Original Possession Slip Issued by Viney Lata Chandra dated 15.05.2004(Exhibit-DW-1/6).

(iv) Original letter dated 09.07.2004 sent by the plaintiff to the defendants (Exhibit-D-2).

(v) Original notice dated 21.07.2004 issued by the plaintiff's advocate to the defendants, advocate (Exhibit-D-3)."

(i) With regard to Issue No.1 the learned Single Judge found that the same was not pressed by the learned Counsel for the Appellants and as such decided the same in favour of the Respondent.

(j) With regard to Issue No.2 the learned Single Judge found that the Respondent was required to do three things, namely, (a) to make the payment of the advance amount of Rs. 1,00,000/-, which he did; (b) to make the payment for conversion charges and fee, which also he did; and (c) to make the payment for the balance amount of Rs. 31.5 lakhs as also the stamp duty and registration fee necessary for the execution and registration of the Sale Deed, which occasion did not arise because the Appellants had not got the said flat converted from leasehold to freehold, but which the Respondent was ready and willing to do as it came in evidence that he had funds for the same. As regards the Appellants they were required to:- (a) evict the tenant from the said flat; (b) to get ˇthe said flat converted from leasehold to freehold; and (c) to execute the Sale Deed and hand over the vacant physical possession of the same to the Respondent at the time of registration. The Appellants fulfilled the obligations referred to in (a) above, but did not fulfill the obligation of having the said flat converted from leasehold to freehold, which obligation was cast upon the Appellants. Therefore, there was no failure on behalf of the Respondent to meet his commitment under the said agreement, and that by not fulfilling their obligations it was indeed unfair on the part

of the Appellants to insist upon the Respondent to make the balance payment by 15th July, 2004 on the premise that time was of the essence of the contract. Therefore, the learned Single Judge came to the conclusion that in view of the unfulfilled obligations of the Appellants it could not be said that the time was of the essence of the contract. As regards the question of the Respondent having failed to perform his part of the agreement, it was held that the Respondent did all it could do and the Respondent was ready and willing to perform his obligation of making the balance payment of Rs. 31.5 lakhs provided the flat was converted from leasehold to freehold by the Appellants. Therefore, the Issue No.2 was decided in favour of the Respondent and against the Appellants.

(k) With regard to Issue No.3, the learned Single Judge found that the Respondent had been able to prove the existence of the said agreement to sell dated 31st March, 2004. He had further proved that the payments, with regard to fees and charges for conversion of the property, an obligation cast upon him, were made by him. The advance amount of Rs. 1,00,000/- was paid to the Appellants and the only thing remaining to be done was to pay the balance amount of Rs. 31.5 lakhs to the Appellants on their fulfilling their obligations of evicting the tenant from the said flat and getting the same converted from leasehold to freehold. The Respondent had also demonstrated that he had the funds available and was ready and willing to go through with the contract at all relevant times. Therefore, the learned Single Judge decided Issue No.3 in favour of the Respondent and against the Appellants.

(l) With regard to Issue No.4 the learned Single Judge held that in view of the decision in favour of the Respondent under Issue No.2 and 3, this issue did not fall for consideration. Accordingly, with regard to Issue No.5 the learned Single Judge decreed the suit for specific performance in favour of the Respondent and against the Appellants and directed the Appellants to carry out

conversion of the said flat from leasehold to freehold and thereafter execute the Sale Deed and hand over the vacant physical possession to the Respondent in terms of the said agreement.

(m) Aggrieved by the said judgment and decree as aforesaid the Appellants have preferred the present Regular First Appeal.

3. During the pendency of the present Appeal, the Appellants were directed to hand over possession of the demised premises to the Respondent and the latter was permitted to retain possession thereof as a Receiver of this Court to abide by any decision that may be passed at the final determination of the Appeal. The Respondent was also directed to be liable to pay the Society dues and electricity and water charges as well as House Tax. In an Appeal against the said order dated 8th September, 2010, the Hon'ble Supreme Court was pleased to pass the following orders:-

"We have heard learned counsel for the parties.

In the peculiar facts and circumstances of the case, we request the High Court to dispose of R.F.A.(OS) No.88-89/2006 as expeditiously as possible, in any event, within six months from the date of communication of this order. During the interregnum period, the respondent may occupy the premises on or after 1st November, 2010. The respondent undertakes to pay Rs.18,000/- per month to the petitioner before 10th of every month. This interim order is subject to the final order passed by the High Court in R.F.A.(OS) No.88-89/2006.

With these observations, this Special Leave Petition is disposed of."

4. On behalf of the Appellants, predicated on the pleadings filed by them in the Suit and the oral testimony of Appellant No.2, it was urged that it was the responsibility of the Respondent to get the subject property converted from leasehold to freehold. According to the Appellant, for such conversion requisite permission was to be obtained from the DDA after filing of necessary charges and documents and the entire responsibility thereof was that of the Respondent as per the oral agreement

between the parties, inasmuch as, the Appellant No.2, who was the General Power of Attorney holder of the Appellant No.1, being an old lady of seventy years, would be unable to run around securing the said permission and completing the formalities required to effect such permission.

5. On the other hand, it was urged on behalf of the Respondent that the burden of conversion of the suit property was the responsibility of the Appellants although the necessary cost to be incurred for such conversion were to be borne by the Respondent. In this behalf, attention of this Court was drawn to Clause 4 of the said agreement to sell dated 31st March, 2004. It was, therefore, urged that the said Clause 4 of the said agreement to sell dated 31st March, 2004 was clear and unequivocally written clause of the contract which made it incumbent upon the Appellants to effect conversion of the flat from leasehold to freehold and no oral evidence contrary to the said specific term of the contract was admissible.

6. In the circumstances, the main controversy in the present Appeal revolves around Clause 4 of the said agreement to sell entered into between the parties. In this behalf, it was necessary to consider the nature and scope of Section 91 and 92 of the Indian Evidence Act, 1872. The scope and ambit of the said Sections 91 and 92 of the Evidence Act, 1872 came up for consideration before the Supreme Court in **Roop Kumar-vs.- Mohan Thedani,** (2003) 6 SCC 595. The Supreme Court held as follows:

> "13. Section 91 relates to evidence of terms of contract, grants and other disposition of properties reduced to form of document. This section merely forbids proving the contents of a writing otherwise than by the writing itself; it is covered by the ordinary rule of law of evidence, applicable not merely to solemn writings of the sort named but to others known some times as the "best evidence rule". It is in reality declaring a doctrine of the substantive law, namely, in the case of a written contract, that all proceedings and contemporaneous oral expressions of the thing are merged in the writing or displaced by it. (See Thayer's Preliminary Law on Evidence, p. 397 and p. 398; Phipson Evidence, 7th Edn., p. 546; Wigmore's Evidence, p. 2406.) It has been best described by Wigmore stating that the rule is no

> sense a rule of evidence but a rule of substantive law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved. It does not concern a probative mental process - the process of believing one fact on the faith of another. What the rule does is to declare that certain kinds of facts are legally ineffective in the substantive law; and this of course (like any other ruling of substantive law) results in forbidding the fact to be proved at all. But this prohibition of proving it is merely that dramatic aspect of the process of applying the rule of substantive law. When a thing is not to be proved at all the rule of prohibition does not become a rule of evidence merely because it comes into play when the counsel offers to "prove" it or "give evidence" of it; otherwise any rule of law whatever might reduced to a rule of evidence. It would become the legitimate progeny of the law of evidence. For the purpose of specific varieties of jural effects - sale, contract etc. there are specific requirements varying according to the subject. On contrary there are also certain fundamental elements common to all and capable of being generalised. Every jural act may have the following four elements:
>
> (a) the en-action or creation of the act;
>
> (b) its integration or embodiment in a single memorial when desired;
>
> (c) its solemnization or fulfilment of the prescribed forms, if any; and
>
> (d) the interpretation or application of the act to the external objects affected by it.
>
> 14. The first and fourth are necessarily involved in every jural act, and second and third may or may not become practically important, but are always possible elements.
>
> 15. The enaction or creation of an act is concerned with the question whether any jural act of the alleged tenor has been consummated; or, if consummated, whether the circumstances attending its creation authorise its avoidance or annulment. The integration of the act consists in embodying it in a single utterance or memorial - commonly, of course, a written one. This process

of integration may be required by law, or it may be adopted voluntarily by the actor or actors and in the latter case, either wholly or partially. Thus, the question in its usual form is whether the particular document was intended by the parties to cover certain subjects of transaction between them and, therefore, to deprive of legal effect all other utterances.

16. The practical consequence of integration is that its scattered parts, in their former and inchoate shape, have no longer any jural effect; they are replaced by a single embodiment of the act. In other words, when a jural act is embodied in a single memorial all other utterances of the parties on the topic are legally immaterial for the purpose of determining what are the terms of their act. This rule is based upon an assumed intention on the part of the contracting parties, evidenced by the existence of the written contract, to place themselves above the uncertainties of oral evidence and on a disinclination of the Courts to defeat this object. When persons express their agreements in writing, it is for the express purpose of getting rid of any indefiniteness and to put their ideas in such shape that there can be no misunderstanding, which so often occurs when reliance is placed upon oral statements. Written contracts presume deliberation on the part of the contracting parties and it is natural they should be treated with careful consideration by the courts and with a disinclination to disturb the conditions of matters as embodied in them by the act of the parties. (See McKelvey's Evidence, p. 294.) As observed in Greenlear's Evidence, p. 563, one of the most common and important of the concrete rules presumed under the general notion that the best evidence must be produced and that one with which the phrase "best evidence" is now exclusively associated is the rule that when the contents of a writing are to be proved, the writing itself must be produced before the Court or its absence accounted for before testimony to its contents is admitted.

17. It is likewise a general and most inflexible rule that wherever written instrument are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being

used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than parol evidence. It is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence. (See Starkie on Evidence, p. 648.)

18. In Section 92 the legislature has prevented oral evidence being adduced for the purpose of varying the contract as between the parties to the contract; but, no such limitations are imposed under Section 91. Having regard to the jural position of Sections 91 and 92 and the deliberate omission from Section 91 of such words of limitation, it must be taken note of that even a third party if he wants to establish a particular contract between certain others, either when such contract has been reduced to in a document or where under the law such contract has to be in writing, can only prove such contract by the production of such writing.

19. Sections 91 and 92 apply only when the document on the face of it contains or appears to contain all the terms of the contract. Section 91 is concerned solely with the mode of proof of a document with limitation imposed by Section 92 relates only to the parties to the document. If after the document has been produced to prove its terms under Section 91, provisions of Section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradicting, varying, adding or subtracting from its terms. Sections 91 and 92 in effect supplement each other. Section 91 would be inoperative without the aid of Section 92, and similarly Section 92 would be inoperative without the aid of Section 91.

……..

21. The grounds of exclusion of extrinsic evidence are (1) to admit inferior evidence when law requires superior would amount to nullifying the law, and (ii) when parties have deliberately put their agreement into writing, it is conclusively presumed, between

themselves and their privies, that they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith and treacherous memory."

7. In the present case, it is an admitted position that the parties entered into an agreement to sell dated 31st March, 2004 Exhibit P-1. It is also observed that Clause 4 of the said agreement to sell dated 31st March, 2004 reads as under:-

"4. That after getting the property converted into freehold the VENDOR will sign and execute proper Sale Deed in favour of the VENDEE or his nominee(s) and will get same registered with sub-registrar, New Delhi however the expenses for conversion of flat into free hold will be borne by vendee."

8. From a plain reading of Clause 4, it is apparent that the Appellant (Vendor) after getting the property converted into freehold was required to sign and execute proper Sale Deed in favour of the Respondent (Vendee) and was required to get the same registered with the sub-Registrar, New Delhi, however, subject to the expenses for conversion of flat into freehold being borne by the Respondent (Vendee). As was correctly observed by the learned Single Judge all the obligations preceding the word "however" were cast upon the Appellant (Vendor) and the obligations as regards the expenses which follow the word "however" was cast upon the Respondent (Vendee). Further, it is an admitted position that the Respondent had paid the requisite fee of Rs.41,275/- and Rs. 24,765/- being the stamp duty and transfer duty respectively to fulfill his obligations as stipulated in the Clause 4 of the said agreement to sell. It is also noted that the Respondent has further paid a sum of Rs. 11,075/- as service charges to the DDA. Furthermore, by his letter dated 9th July 2004 (Ex. D-2) the Respondent had requested the Appellants to take necessary steps to adhere to the time stipulated in the said agreement to sell i.e. 15th July, 2004. It was also indicated in this letter that the Respondent was ready with the balance consideration amount which was payable to the Appellants at the time of execution of the Sale Deed before the sub-Registrar to meet the time stipulated in the said agreement to sell. The Respondent has been able to demonstrate that he was ready with the balance amount of Rs. 31.5 lakhs as was further demonstrated by his depositing Fixed Deposit Receipts maintained in this behalf with the Registry of this Court. This clearly

indicates that not only was the Respondent ready and willing on the due date of performance, but his readiness and willingness continued at the time of institution of the Suit as well. Thus, it is seen that as provided by the said Clause 4 the obligation of getting the said flat converted from leasehold to freehold was on the Appellant (Vendor) but the expenses for such conversion were to be borne by the Respondent (Vendee). In this behalf, it is seen that the learned Single Judge came to the conclusion that when the plain meaning of the said clause is clear, then the assistance of extrinsic evidence could not be availed of.

9. From the above discussion it is clear that the obligation of getting the said flat converted into freehold was on the Appellants and not on the Respondent. Insofar as, the Respondent was concerned his obligations under the said agreement to sell dated 31st March, 2004 were to make payment of the advance amount of `1lakh; to make the payment for conversion charges and fee; and to pay the balance amount of Rs. 31.5 lakhs as also the stamp duty and registration fee necessary for the execution and registration of the Sale Deed. The first two acts were admittedly done by him and the occasion did not arise for him to perform the last because the Appellants ˇfailed to get the suit property converted from leasehold to freehold. On the other hand, the Appellants were required to vacate the tenant from the said flat which they did; and get the said flat converted from leasehold to freehold prior to the execution of the Sale Deed and hand over the physical possession to the Respondent at the time of Registration, which acts the Appellants failed to perform. As regards the contention raised on behalf of the Appellants, that it was orally agreed between the parties that the Respondent would be responsible for getting the said flat converted into freehold, is concerned the said assertion is devoid of merit. It is a well settled principle of interpretation that Evidence Act forbids proving the contents of a writing other than by the writing itself. This doctrine described by the Supreme Court as "best evidence rule" is in reality a doctrine of substantive law, namely, that in case of a written contract all proceedings and contemporaneous oral expressions of the thing are merged in the writing and displaced by it. In other words, when persons express their agreement in writing, it is for the express purpose of getting rid of any indefiniteness and to put their ideas in such shape that there can be no misunderstanding, which so often occurs when reliance is placed upon oral statements. Written contracts presume deliberation on the part of the contracting parties and

it is natural they should be treated with careful consideration by the courts and with a disinclination to disturb the conditions of matters as embodied in them by the act of the parties. The Supreme Court in **Roop Kumar** (supra) has observed:

> "17. It is likewise a general and most inflexible rule that wherever written instrument are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than parol evidence. It is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence. (See Starkie on Evidence, p. 648.)"

10. Thus, it is seen that the provisions of the Evidence Act come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradiction, varying, adding or subtracting from its terms, after the document has been produced to prove its terms.

11. In the circumstances, the present Appeal is devoid of merit and is hereby dismissed. The Appellants shall carry out the conversion of the said flat from leasehold to freehold within a period of two months and shall thereafter execute and register the Sale Deed within ten days. Since the Respondent is already in possession as a Receiver of the said flat, the payment of the balance amount by the Respondent shall take place simultaneously with the execution of the Sale Deed. The Respondent is permitted to utilize the Fixed Deposit Receipts deposited with the Court for the purposes of making the payment of the balance consideration amount. The Respondent shall be entitled to refund of Rs. 18,000/- per month paid to the Appellants towards the occupation charges of the said flat from 1st November, 2010 and may adjust the said amount whilst paying the balance consideration towards the purchase of the said flat. No order as to costs.

ILR (2011) III DELHI 800
CRL. A.

SMT. GUDDO @ SONIA ....APPELLANT

VERSUS

STATE ....RESPONDENT

(BADAR DURREZ AHMED & MANMOHAN SINGH, JJ.)

CRL. A. NO. : 621/2009 & CRL. A. NO. : 39/2010 **DATE OF DECISION: 09.05.2011**

Indian Penal Code, 1860—Section 302 and 120 B—Appellants preferred appeal against judgment and order on sentence convicting them under Section 302 and 120 B and directing them to undergo rigorous imprisonment for life and to pay fine of Rs.2,000/- each, in case of default to undergo simple imprisonment for two months each under both offences and both offences were directed to run concurrently—Appellants challenged judgments on grounds that no evidence pertaining to conspiracy of murder of deceased established and prosecution failed to prove motive to commit offences—Circumstances led by prosecution do not establish guilt thus, appellants entitled to be acquitted—Held:- Well known rule governing circumstantial evidence is that:- (a) circumstances from which inference of guilt of accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with principal fact sought to be inferred from those circumstance; (b) circumstances should be of a determinative tendency unerringly pointing towards guilt of accused; and (c) circumstances, taken collectively, are incapable of leading to any conclusion on a reasonable hypothesis, other than that of guilt of

accused—There are two riders to aforesaid principle namely, (i) there should be no missing links but it is only that every of links must appear on surface of evidence, since some of these links can only be inferred from proved facts and (ii) it cannot be said that prosecution must meet each and every hypothesis put forward by accused however far-fetched and fanciful it may be—Prosecution proved case under section 302 and 120 B against both appellants.

In the decision reported as **Rakesh Kumar v. State** : 183 (2009) DLT 658, a Division Bench of this Court held that circumstantial evidence in order to furnish a basis for conviction requires a high degree of probability, that is, so sufficiently high that a prudent man considering all the facts, feels justified in holding that the accused has committed the crime with which he is charged. **(Para 26)**

Important Issue Involved: Well known rule governing circumstantial evidence is that:- (a) circumstances from which inference of guilt of accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with principal fact sought to be inferred from those circumstance: (b) circumstances should be of a determinative tendency unerringly pointing towards guilt of accused; and (c) circumstances, taken collectively, are incapable of leading to any conclusion on a reasonable hypothesis, other than that guilt of accused—There are two riders to aforesaid principal namely, (i) there should be no missing links but it is only that every of links must appear on surface of evidence, since some of these links can only be inferred from proved facts and (ii) it cannot be said that prosecution must meet each and every hypothesis put forward by accused however far-fetched and fanciful it may be.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Ashwani Vij Mr. A.J. Bhambhani with Ms. Nisha Bhambhani, Ms. Sonia Raina and Mr. Victor A.

FOR THE RESPONDENT : Ms. Richa Kapoor, Addl. Standing Counsel.

CASES REFERRED TO:

1. *Rakesh Kumar* vs. *State :* 183 (2009) DLT 658.
2. *Ujjagar Singh* vs. *State of Punjab :* (2007) 14 SCALE 428.
3. *State of Mahasrashtra* vs. *Suresh :* (2000) 1 SCC 471.
4. *State of UP* vs. *Babu Ram :* (2000) 4 SCC 515.

RESULT: Appeals dismissed.

MANMOHAN SINGH, J.

1. These two appeals are directed against the judgment dated 24.07.2009 and order on sentence dated 29.07.2009 delivered by the Addl. Sessions Judge, Delhi in Sessions Case No. 172/2008 whereby both the appellants were directed to undergo rigorous imprisonment for life and further sentenced to pay a fine of Rs. 2,000/- each under Section 302 IPC and in caseof default in payment of fine to further undergo simple imprisonment for two months each for committing the murder of Manoj Kumar (hereinafter referred to as the deceased) husband of Smt. Guddo @ Sonia who is the appellant in Criminal Appeal No. 621/2009. The appellants were further directed to undergo rigorous imprisonment for life and to pay a fine of Rs. 2,000/- each under Section 120 B IPC and in case of default of payment of fine, to further undergo simple imprisonment for two months each. Both the sentences were directed to run concurrently.

2. The case of the prosecution was that a DD No. 6 A was received at PS Uttam Nagar that one person was lying in an injured condition at Gali No.2, Vikas Nagar. On receipt of the said DD No. 6A, ASI Raj Kumar along with WSI Indrawati Rathore, ASI Mamor Khan and Inspector Ishwar Singh reached the spot i.e. House No. R-45, R-

Block , Vikas Nagar where complainant Guddo @ Sonia was present and she told the police officials that her husband Manoj Kumar was lying dead inside her house.

3. Thereafter, the statement of Guddo @ Sonia was recorded by the police wherein she stated that she was residing at the aforesaid address along with her children and husband. Her husband used to do repair work of old sewing machines and on 23.09.2004 at around 7.30 am, she had gone to leave her younger daughter Jyoti to the school, when she came back her husband was doing some repair work and he told her to call Rakesh Baba from Tillang Pur, Kotla Village as he had some urgent work with him. Thereafter, she went to the house of aforesaid Rakesh Baba by locking the door of their house. After reaching there she told him that her husband was calling him. She along with Rakesh Baba returned to their house at 9.40 am. When she opened the door of her house and went inside, she raised an alarm that 'BABA MERE PATI KO BACHAO'. Thereafter, the said Rakesh Baba went inside the house along with her and both of them saw that Manoj Kumar, husband of the complainant, was lying dead in a pool of blood on the floor inside the room. Then Rakesh Baba told her that they should inform the police but she stated that police should not be informed. But in the meantime somebody informed the police.

4. The police reached there and prepared ruqqa on the statement of the complainant. On the basis of the said ruqqa an FIR No. 826/2004 under Section 302 IPC was registered. The dead body was sent for postmortem at DDU Hospital. Rakesh Baba and Nisha, the elder daughter of the deceased were interrogated. However, their statements were different from that of the complainant Guddo @ Sonia and therefore a suspicion was raised towards her.

5. Guddo @ Sonia was again interrogated on 24.09.2004 and Rakesh Baba and Baby Nisha were also interrogated again. Thereafter, Guddo @ Sonia was arrested and made a disclosure statement.

6. Pursuant to the disclosure statement, appellant Guddo @ Sonia got recovered one pocha and towel, stained with blood, from the parchatti of her house, which were seized. And also pursuant to her disclosure statement, the other appellant Satpal was apprehended at G.T. Karnal Road bypass between 8/8.30 p.m. and arrested. He made a disclosure

statement and got recovered an iron pipe from Sinola picket, near Najafgarh drain which was seized by the police. The blood stained clothes, which he was wearing, were also seized.

7. We have heard learned counsel for the parties and have carefully and meticulously gone through the trial court record. In the present case there is no eye witness or direct evidence. The case of the prosecution is based upon the circumstantial evidence, inter alia, comprising of the testimony of PW-5 Nisha, daughter of Guddo @ Sonia and PW-2 Rakesh Baba.

8. The following circumstances were alleged by the prosecution against the appellants:

1. Appellant Satpal was a tenant in the house of the deceased Manoj and appellant Guddo @ Sonia.
2. Appellant Satpal was seen in the lap of appellant Guddo @ Sonia and was having illicit relations with her.
3. Deceased Manoj was last seen by PW-5 Nisha at 7.15 a.m. in the company of appellant Satpal and appellant Guddo @ Sonia before she left for school while taking breakfast, when the appellant Satpal was sitting on the chair, whereas deceased Manoj was sitting on the ground, which shows preferential treatment to the appellant Satpal by appellant Guddo @ Sonia and also provides motive to eliminate deceased Manoj due to their illicit relations.
4. Appellant Guddo @ Sonia went to call PW-2 Rakesh Baba, stating that gundas had come to kill her husband by locking the door of her house.
5. She opened the door with her key and found her husband Manoj dead and appellant Satpal was found nowhere at that time.
6. She told PW-2 Rakesh Baba not to lodge a complaint with the police and later when he inquired about Satpal, she told him that Satpal had left the house at 5.30/6 a.m.
7. The appellant Guddo @ Sonia tried to create a false defence by making a wrong complaint to the police Ex. PW15/A.

8. On interrogation the appellant Guddo @ Sonia made a disclosure statement and got recovered a pocha and towel pursuant to her disclosure statement.

9. Appellant Guddo @ Sonia got Satpal arrested from G.T. Karnal Road, bypass on 24.09.2004.

10. After the interrogation and arrest, appellant Satpal made a disclosure statement to the police which led to the recovery of the weapon of offence i.e. iron pipe, which was hidden by him near Najafgarh drain and also his blood stained clothes, were seized by the police.

11. The postmortem report duly corroborates the injury caused on the body of the deceased Manoj by the said weapon of offence and also the subsequent opinion of the doctor, who had conducted the postmortem and the FSL report corroborates the prosecution story.

9. The prosecution in support of its case has examined 19 witnesses. PW-1 is Ramesh Kumar (uncle of the deceased), PW-2 is the star witness, Rakesh Kumar @ Baba, PW-3 is Hargayan Singh, Pardhan of R-Block, Vikas Nagar, Uttam Nagar, PW-4 is Rajesh Kumar, father of the deceased, PW-5 is Nisha, elder daughter of the deceased and the another star witness, PW-6 is SI Manoj Kumar of the mobile crime team, PW-7 is HC Surender Kumar Tyagi, photographer of the crime team, who has proved the photographs taken by him, which are 19 in number, which are collectively Ex. PW-7/A1 to A19 and the negatives are Ex. PW7/B1 to B19.

10. PW8 is WHC Seema, the duty officer, who had recorded the relevant DD entries and proved the copy of the FIR Ex. PW-8/E, PW-9 is HC Banwari Lal, who was the MHC(M) during the relevant period i.e. between 23.09.2004 and 22.11.2004, with whom various sealed parcels were deposited by the I.O. during the investigation(s) of the case and who had also sent the exhibits of this case to CFSL, Hyderabad for forensic opinion, PW-10 is HC Hattu Ram, who has proved the PCR form by virtue of which the initial call was received at 100 number at police control room. He has proved the PCR form as Ex. PW-10/A, PW-11 is Ct. Manbir, the formal witness, who was working as special messenger at PS Uttam Nagar on 23.09.2004 and who had delivered the

copy of the FIR to the senior officers, PW-12 is Ct. Devender Kumar, who had got the FIR registered on the basis of the ruqqa Ex. PW-8/C, recorded by the I.O. and who had also later on joined the investigation of this case on 24.09.2004 and was present, when accused Guddo @ Sonia was arrested and made her disclosure statement and got the other accused Satpal arrested and was also present when the other appellant Satpal got the iron pipe recovered.

11. PW-13 is Ct. Azad Singh, who took the dead body of the deceased on 23.09.2004 from his house to DDU Hospital mortuary and who on 22.04.2004 deposited various exhibits of this case with CFSL, Hyderabad. PW-14 is SI Mahesh Kumar, the draftsman, who has proved the scaled site plan, prepared by him, which is Ex. PW-14/A. PW-15 is SI Mamor Khan, who took active part in the investigation and in whose presence accused Guddo @ Sonia had made disclosure statement and got one pocha and towel recovered from her house and who was present when she got the other accused Satpal arrested and was also present when the other accused Satpal got the weapon of offence i.e. iron pipe recovered. PW-16 is Inspector Indrawati Rathore, who also took active part in the investigation(s) as was taken by PW-15 SI Mamor Khan, PW-17 is Dr. B.N. Mishra, Medical Officer, DDU Hospital, who has proved the postmortem report of deceased Manoj. He stated that the postmortem was conducted by the Dr. N.M. Naranaware, who had since expired and he has proved the postmortem report prepared by said doctor as Ex. Pw-17/A and the subsequent opinion given by him, regarding the weapon of offence as Ex. PW-17/B.

12. PW-18 is Inspector Bhagwan Singh, who also took active part in the investigation(s), as was taken by PW-15 SI Mamor Khan and PW-16 Indrawati Rathore, PW-19 is ACP Ishwar Singh (retired), the I.O. of the ˇpresent case, who has deposed regarding the entire investigation, as was carried out by him during the course of the present case.

13. The trial court by its judgment found both the appellants guilty for the murder of the deceased Manoj with common intention and passed a sentence of imprisonment for life and further sentences as referred earlier because of the following reasons:

i. Appellant Satpal was residing as a paying guest in the house of the deceased Manoj where he had developed

illicit relations with the wife of the deceased who is another appellant in the case, namely, Guddo @ Sonia. He was seen sitting in the lap of the appellant Guddo @ Sonia by PW-5 Nisha and both the appellants were last seen together with the deceased at 7.15 a.m. on 23.09.2004.

ii. Appellant Guddo @ Sonia went to PW-2 Rakesh Kumar @ Baba with the complaint that he should accompany her to her house as three gundas have come to kill her husband and when PW-2 Rakesh Baba along with appellant Guddo @ Sonia reached the house of the deceased, the entry gate was opened by the appellant Guddo @ Sonia with her own keys and at that time Manoj was found dead by the appellant Guddo @ Sonia who raised an alarm and, thereafter, she made a false complaint/statement to the Police Exhibit PW-15/A in which she concocted a false story and mislead the police.

iii. Further when PW-2 Rakesh Kumar @ Baba enquired about the accused Satpal, she replied that he had already left her house at about 5.30/6 a.m. and did not return to their house on the said date or the next day. Later on as per the disclosure statement of Guddo @ Sonia, accused Satpal was arrested from G.T. Karnal Road bypass on 24.09.2004.

iv. Thereafter, the Police recovered the weapon of offence which was an iron pipe from the bushes near Nazafgarh drain on the pointing out of the accused Satpal. He was also found wearing the blood stained clothes and the blood group on the clothes matched with that of the deceased Manoj as per the opinion of the doctor who conducted the postmortem.

14. For the aforesaid reasons, the trial court came to the conclusion that inference can be drawn against both the appellants to have committed the murder of the deceased Manoj with the common intention/agreement to remove him from their way due to their having illicit relations with each other and, therefore, prosecution was able to prove the case beyond reasonable doubts and also proved the offence of criminal conspiracy as defined under Section 120A IPC punishable under Section 120B IPC

against both the appellants.

15. The case of the prosecution under Section 201 IPC was rejected by the trial court on the findings that the prosecution failed to prove that the appellants had caused disappearance of any evidence i.e., 'Pocha' and 'towel' which were allegedly used to wipe out the blood of the deceased from the floor of the house.

16. The learned counsel appearing on behalf of accused Guddo @ Sonia has argued that there is no evidence pertaining to the conspiracy of murder of deceased and the prosecution has also failed to establish the motive as it is clear from the evidence of PW-3 Hargyan Singh that when he told the deceased that his wife was having illicit relations with Satpal the deceased did not pay heed to it. This shows that the prosecution has failed to establish the motive of the murder. It has also been argued by the learned counsel for the appellant Guddo @ Sonia that PW-5 Nisha was an interested witness in the present case and is a child witness and came to depose before the Court from the custody of her paternal grandfather. PW-5 also made several improvements in her statement before the Court. If PW-5 was a natural witness to the alleged incident then her statement ought to have been recorded on the date of occurrence itself. Therefore, the prosecution has also failed to establish its case beyond reasonable doubts against appellant Guddo @ Sonia.

17. Let us first deal with the submission of the learned counsel appearing on behalf of accused Guddo @ Sonia. Admittedly, PW-5 Nisha who is the daughter of the accused Guddo @ Sonia, has deposed that on the date of occurrence when she left for school at around 7 a.m. accused Satpal was taking his breakfast, which had been cooked by her mother, while sitting on a chair and at the same time her father was also taking breakfast while sitting on the floor. This testimony of PW-5 has remained unrebutted in cross-examination. It is a matter of fact that when she left for school on the date of occurrence she had seen her father in the company of both the appellants while they were taking breakfast. Testimony of PW-2 Rakesh Kumar @ Baba is also relevant and he has deposed that he knew both the accused as well as the deceased husband of accused Guddo @ Sonia. He further deposed that on the date of occurrence i.e., on 23.09.2004 at 9 a.m. appellant Guddo @ Sonia came to his house and requested him to save her husband as

three gundas have come to kill her husband. She told him that she had come to him after locking her husband Manoj in a room however, she stated that she had not seen any of the three gundas. She also made a telephone call from his house. Thereafter she along with Rakesh Baba left for her house on a two-wheeler scooter and Guddo @ Sonia opened the entry gate of her house with the keys which she was having with her and walked into the innermost room of her house and after unlocking the door of the same cried **"MANOJ KO BACHA LO"**. Thereafter, on hearing her cries, some neighbours also came there and thereafter he along with those neighbours saw the dead body of Manoj, which was lying on the floor next to the double-bed in the innermost room of her house.

18. In her statement under Section 313 Cr.P.C., appellant Guddo @ Sonia stated that she had been falsely implicated in this case at the behest of interested witnesses and police officials. According to her- "on 23.09.2004, I left my daughter Nisha to the school at about 7:00 a.m. in the morning and when I came back to home, I saw my husband lying in the pool of blood. I called Rakesh Baba who is a friend of my husband to my home and on my request the police was called and the police took my signature on some blank papers and I was kept in one room of my home and later on in the evening I was taken to the PS and after that I was produced before the court and since then I am in judicial custody".

19. The said statement made by the accused Guddo @ Sonia under Section 313 Cr.P.C. is not in consonance with the evidence of PW-2 Rakesh Kumar @ Baba and that of PW-5 Nisha (her real daughter) as PW-5 Nisha has categorically stated that she had last seen her father in the company of both the accused persons alive while they were having breakfast when she left for school at 7.15 a.m. Similarly, PW-2 Rakesh Baba has deposed that when Guddo @ Sonia came to her house on the date of incident at 9 a.m. she informed that Manoj is in danger as three gundas have come to kill him and she has come to him by locking the door from outside.

20. As per the version of Guddo @ Sonia recorded by the police, her husband was alive when she came to the house of PW-2 Rakesh Kumar @ Baba at 9 a.m. or thereabouts, but was found dead when she returned to her house with PW-2 Rakesh Kumar @ Baba and opened the door with her own keys. It appears that she had given a false version

in her statement under Section 313 Cr.P.C. and tried to create a false defence by making an incorrect complaint exhibit PW-15/A to the police on the basis of which the FIR was lodged in which a different version of her statement has come wherein she has stated that when she returned at 7.30 a.m. to her house after leaving her daughter Jyoti to the school, her husband Manoj was trying to convert the bucket into angithi and her husband told her to call Rakesh Baba from Tilang Pur, Kotla Village.

21. As per her version, after locking the door from outside she went to the village and later on she along with PW-2 Rakesh Baba came back to the house at 9.40 a.m. when she opened the door with her own keys, she found her husband dead. Admittedly there was no other entry gate in the house. It appears that she had tried to create a false story by making a wrong complaint to the police exhibit PW-15/A which goes against her and the same shows the unnatural conduct of the appellant Guddo @ Sonia after the commission of the crime to somehow wriggle out of the same.

22. It is a well established legal principle that in a case based on circumstantial evidence where an accused offers a false explanation in his statement under Section 313 Cr.P.C. in respect of an established fact, the said false denial could supply a missing link in the chain of circumstances appearing against him.

23. From the above discussion, following incriminating circumstances appear against accused Guddo @ Sonia :-

(i) Accused Guddo @ Sonia tried to mislead the investigating agency regarding the murder of her husband, Manoj.

(ii) Accused Guddo @ Sonia did not give any explanation in respect of facts which were within her knowledge.

(iii) The conduct of accused Guddo @ Sonia was most suspicious at the time of the murder of the deceased and after the murder.

(iv) Accused Guddo @ Sonia gave false answers in her statement under Section 313 Cr.P.C.

24. The well known rule governing circumstantial evidence is that :- (a) the circumstances from which the inference of guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be

shown to be closely connected with the principal fact sought to be inferred from those circumstances; (b) the circumstances should be of a determinative tendency unerringly pointing towards the guilt of the accused; and (c) the circumstances, taken collectively, are incapable of leading to any conclusion, on a reasonable hypothesis, other than that of the guilt of the accused.

25. No doubt, the courts have also added two riders to the aforesaid principle namely, (i) there should be no missing links but it is not that every one of the links must appear on the surface of the evidence, since some of these links can only be inferred from the proved facts and (ii) it cannot be said that the prosecution must meet each and every hypothesis put forward by the accused however far-fetched and fanciful it may be.

26. In the decision reported as **Rakesh Kumar v. State** : 183 (2009) DLT 658, a Division Bench of this Court held that circumstantial evidence in order to furnish a basis for conviction requires a high degree of probability, that is, so sufficiently high that a prudent man considering all the facts, feels justified in holding that the accused has committed the crime with which he is charged.

27. In dealing with the argument advanced by the learned counsel for the accused Guddo @ Sonia on the point of motive, the testimonies of PW-1 Ramesh Kumar and PW-4 Rajesh Kumar, father of the deceased, are also relevant. PW-4 Rajesh Kumar in his testimony has deposed that deceased Manoj was his son who married accused Guddo@ Sonia against his wish. He also deposed that he did not attend the said marriage nor he had thereafter seen his son till he was dead. He deposed that he had knowledge that accused Guddo @ Sonia had a daughter from her previous husband as per information received from his deceased son Manoj. He also identified the dead body of deceased Manoj.

28. PW-1 Ramesh Kumar further deposed that accused Satpal was residing in the first floor of the house of his nephew Manoj as a tenant for the last 6-7 months from the date of occurrence. He also deposed that about 5-6 months before the occurrence, deceased Manoj had informed him that his wife Guddo @ Sonia was putting pressure on him for transferring house property bearing no. R-45, Vikas Nagar, Near Uttam Nagar, Delhi where they were residing in her name but deceased Manoj was not willing to do so. He further deposed that when he had gone to

the house of his nephew Manoj about one month before the occurrence, he was not present in the house. His wife Guddo @ Sonia and daughter Nisha (PW-5) were present. He further deposed that PW-5 Nisha told him that accused Satpal, who was a tenant on the first floor, was seen by her in a compromising position with the accused Guddo @ Sonia. Though in cross-examination he was confronted with the statement Ex. PW-1/DA where it was not so recorded. However, he voluntered that he had so stated but police had not recorded the same. If we read the testimony of PW-2 and PW-5 together with the statement of PW-1, it appears to us that the deceased was an obstacle in her love life and she wanted that the deceased should transfer the property in her name but Manoj was not inclined to do so. This provided a motive to the accused Guddo @ Sonia to eliminate the deceased Manoj in order to further her alleged illicit relations with accused Satpal. Further, it is also pertinent to note as to why her own daughter would make a false statement against her.

29. It would be necessary to quote the following observations of Supreme Court in the decision reported as **State of UP v. Babu Ram** : (2000) 4 SCC 515 :-

> "11. We are unable to concur with the legal proposition adumbrated in the impugned judgment that motive may not be very much material in cases depending on direct evidence whereas motive is material only when the case depends upon circumstantial evidence. There is no legal warrant for making such a hiatus in criminal cases as for the motive for committing the crime. Motive is a relevant factor in all criminal cases whether based on the testimony of eye witnesses or circumstantial evidence. The question in this regard is whether the prosecution must fail because it failed to prove the motive or even whether inability to prove motive would weaken the prosecution to any perceptible limit. No doubt, if the prosecution proves the existence of a motive it would be well and good for it, particularly in a case depending on circumstantial evidence, for such motive could then be counted as one of the circumstances. However, it cannot be forgotten that it is generally a difficult area for any prosecution to bring on record what was in the mind of the respondent. Even if the investing officer would have succeeded in knowing it through

interrogations that cannot be put in evidence by them due to the ban imposed by law.

12. In this context we would reiterate what this Court has said about the value of motive evidence and the consequences of prosecution failing to prove it, in **Nathuni Yadav v. State of Bihar** and **State of H. P. v. Jeet Singh**. The following passage can be quoted from the latter decision:

> "33. No doubt it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no criminal offence would have been committed if the prosecution has failed to prove the precise motive of the accused to commit it. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim, the inability to further put on record the manner in which such ire would have swelled up in the mind of the offender to such a degree as to impel him to commit the offence cannot be construed as a fatal weakness of the prosecution. It is almost an impossibility for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended."

30. The following are the observations of Supreme Court in the decision reported as **Ujjagar Singh v State of Punjab** : (2007) 14 SCALE 428:-

> "It is true that in a case relating to circumstantial evidence motive does assume great importance but to say that the absence of motive would dislodge the entire prosecution story is perhaps giving this one factor an importance which is not due and (to use the clichi) the motive is in the mind of the appellant and can seldom be fathomed with any degree of accuracy".

31. In view of the above settled law, we do not find any merit in the argument of the learned counsel that the case set up by the prosecution against the appellant Guddo @ Sonia must fail on account of the alleged failure of the prosecution to prove the motive of appellant Guddo @ Sonia. The present case fits into the situation contemplated in **State of**

H.P. v. Jeet Singh (supra) where it was observed that "when the prosecution succeeded in showing the possibility of some ire for the accused towards the victim, the inability to futher put on record the manner in which such ire would have swelled up in the mind of the offender to such a degree as to impel him to committ the offence cannot be construed as a fatal weakness of the prosecution." This is so, because, in the present case the prosecution has succeeded in demonstrating the possibility of there being a desire to eliminate Manoj on the part of the appellant Guddo @ Sonia so that her path to Satpal was clear.

32. For the aforesaid reasons and incriminating circumstances appearing against accused Guddo @ Sonia, we are of the considered view that accused Guddo @ Sonia is guilty of the murder of the deceased. Thus, the appeal filed by her is liable to be dismissed.

Case of Satpal

33. Apart from the common grounds taken by both the appellants, Satpal in his appeal has also challenged the impugned judgment as well as order on sentence on the following additional grounds:

(a) That the alleged weapon of offence, i.e., iron pipe alleged to have recovered from the appellant is doubtful as there was material contradiction in the prosecution version as PW-3 Hargyan Singh has stated that he was present when the said "saria" was recovered but, PW-6 SI Manoj Kumar deposed that no such "saria" or "iron rod" was ever recovered in his presence whereas PW-16 Inspector Indrawati Rathore says that the above "iron rod" was recovered from Najafgarh drain. As such, the prosecution could not really connect the same to the appellant.

(b) That there is no direct evidence available on record to prove that Satpal was a tenant in the house of the deceased and also there is no direct evidence to prove that the deceased seen ˇthe appellant with his wife Guddo @ Sonia in a compromising condition.

(c) That no public witness was ever called by the prosecution at the time of arrest of the appellant or at the time of his disclosure statement as well as at the time of recovery of weapon of offence.

34. It is a settled law that the circumstances forming the evidence must be conclusively established and even if, when so established they must form such a complete chain that it is not only consistent with the guilt, but inconsistent with any reasonable hypothesis of innocence.

35. It is the admitted case of both the defence and the prosecution that it was the second marriage of Guddo @ Sonia with the deceased Manoj. Regarding the tenancy of Satpal, the prosecution has relied upon the testimony of PW-1 Ramesh Kumar, PW-2 Rakesh Kumar and PW-3 Hargyan Singh and also the testimony of PW-5 Nisha.

36. As far as the case against the accused Satpal is concerned PW-5 Nisha, daughter of the deceased, had last seen both the accused persons together in the morning and she is the witness of last seen evidence of the presence of the deceased in the company of accused Guddo @ Sonia and Satpal. She has also deposed that appellant Satpal was having illicit relations with the appellant Guddo @ Sonia. The learned counsel for the respondent has argued that appellant Satpal got effected the recovery of the weapon of offence and his blood stained clothes after his arrest and the fact of throwing away the weapon of offence was only in the knowledge of the accused.

37. PW-15 SI Mamur Khan, PW-16 Inspector Indrawati Rathor and PW-18 Inspector Bhagwan Singh have deposed regarding the arrest of Satpal from G.T. Karnal Road, Delhi Bypass on 24.09.2004. PW-16 and PW-18 have admitted that no public person was joined in the investigation at the time of arrest of Satpal. After the arrest, he made a disclosure statement Ex.PW-15/G and got recovered the weapon of offence, i.e., iron rod, from inside the bushes of Najafgarh Drain, near Sanola bridge, which he had concealed there. In his statement under Section 313 Cr.P.C., no explanation has been assigned by Satpal as to how the said pipe was got recovered by him, barring his denial. PW-16 and PW-18 have also deposed that at the time of arrest of Satpal from G.T. Karnal Road Bypass, there were blood stains on his clothes and the same were also taken into possession vide memo Ex.PW-15/1 i.e. a pant and shirt, which he was wearing at the time of arrest and the same are Ex.P7 and Ex.P8.

38. In the post-mortem of the deceased (Ex.PW-17/A), the following injuries were found on his body:

"1. One lacerated wound seen behind left ear joint touching the pale of pinna, 2.5 cm from lobate of hte ear left & 2 cms from left mastoid process margins are abraded. K Contused size 2.5 cm x scalp deep.

2. One contusion seen an middle of left ear pinna 3 cms above left ear lobale & 5.5 cm from helix of left ear. Red coloured 0.7 x 0.7 cm.

3. One lacerated wound seen on left parietal occipital region placed vertically oblique, located at 18 cms from root of the nose & 12.5 cm from left ear helix. Margins are contused & abraded size 6 cms x 1 cm scalp deep.

4. One lacerated wound seen on right occipital region horizontally oblique, 9.5 cm from right mastoid & 11.5 cm from injury No.3. Margins are abraded & contused size 5 cm x 1 cm scalp deep.

5. Lacerated wound seen on left occipital area, 7 cm from injury no.3 & 4.8 cm from injury No.4, vertically oblique size 4.1 cm x 1.1 cm x scalp deep margins are abraded & contused."

39. The cause of death had been opined by the doctor "death due to head injury". He had also opined that all the injuries were ante-mortem in nature. In his statement, PW-17 had specifically stated that the post-mortem was conducted by Dr.N.M. Naranaware, who had expired and he was conversant with the handwriting and signatures of Dr. N.M. Naranaware, as he had worked with him during the course of his duties. PW-17 has also stated that he had seen the opinion (Ex.PW-17/B) given by him regarding the weapon of offence and as per the said opinion, the injuries mentioned in the post-mortem (which is proved by PW-17 as secondary evidence) could have been caused from the weapon of offence produced before him, which was got recovered by Satpal from the bushes of Najafgarh Drain, near Sanola bridge, as discussed earlier.

40. The contention of the learned counsel for Statpal is that since no public person was joined at the time of recovery of the weapon of offence, therefore, the said recovery is not believable. It is also stated that there are many contradictions in the recovery of weapon of offence which are available in the testimony of PW-3 Hargyan Singh, who in his

cross-examination, has stated that one Saria was taken by the police from the spot in his presence. Similarly, in the cross-examination of PW-6 SI Manoj Kumar, he stated that he could not tell whether any rod or other article was seized by the investigating officer when he visited the spot on 23.09.2004.

41. We have examined the post-mortem report. It appears to us that all the injuries were consistent to have been caused by a blunt weapon, i.e., iron pipe in this case and the same corroborates the story of the prosecution. The nature of the injury found on the head of the deceased shows that it was sufficient in the ordinary course of nature to cause death, as the same was caused in the present case on the vital part of the body of human being, i.e., head. Even otherwise, there was no suggestion in the cross-examination that the said injuries were not sufficient in the ordinary course of nature to cause death. The time of death also corroborates the prosecution story as per the material placed on record. The DD entry 6A (Ex.PW-8/A), coupled with the statement of PW-2 Rakesh @ Baba, gives indication the proximate time about the death given by the doctor.

42. The submission of the learned counsel for Satpal is without any force, as the prosecution case had never been that any Saria was seized from the accused person from the spot and as far as the statement PW-6 is concerned, in fact, he simply stated that he did not know whether any rod or any other article was seized.

43. In the case of **State of Mahasrashtra vs. Suresh** : (2000) 1 SCC 471, in para 26, the Supreme Court has held as under:

> "26. We too countenance three possibilities when an accused points out the place where a dead body or an incriminating material was concealed without stating that it was conceded by himself. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities the criminal court can presume that it was concealed by the accused himself. This is because accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well justified course to be adopted by the criminal court that the concealment was made by himself. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act."

44. This judgment would apply in the facts and circumstances of the present case, as the accused Satpal in his statement recorded under Section 313 Cr.P.C. failed to give any explanation as to how the said pipe was got recovered by him. Therefore, the presumption regarding the recovery of the weapon clearly goes against Satpal.

45. As far as recovery of a pant and shirt is concerned, as per Ex.PW19/H, the examination report from CFSL, it is proved on record that the said Ex.P7 and P8 were thoroughly examined by the chemical tests and the result was that the blood was detected on Ex.P7 and Ex.P8 i.e. a pant and shirt, which Satpal was wearing at the time of arrest. In fact no suggestion was given in the cross-examination of PW-16 and PW-18 that the said blood stained clothes were not seized from the accused Satpal or that the blood of the deceased was not sprinkled on the said clothes by the Police. Rather, it is clearly mentioned in the result that the blood group B was detected on Ex.P7 and Ex.P8 i.e. Pant and Shirt of Satpal. Further, Satpal, in his statement recorded under Section 313 Cr.P.C., failed to explain anything as to how he was found wearing the blood stained clothes having the blood of the deceased as per the report of CFSL Ex.PW-19/H which corroborates the prosecution story. The same was having blood group B which was also blood group of the gauze piece of the deceased, samples of which were taken from the spot by the investigating officer on 23.09.2004. Hence, it is clear that the blood group of the deceased matched with the blood stains available on Ex.P7 and Ex.P8, i.e., pant and shirt, which he was wearing at the time of arrest. Satpal has failed to give any explanation as to how the said blood stained marks were found on his clothes. Thus, that is a grave incriminating fact regarding the culpability of the accused Satpal.

46. Regarding criminal conspiracy between the accused persons to kill deceased Manoj, it is well settled law that there is no difference between the mode of proof of offence of conspiracy and that of any other offence, it can be established by direct or circumstantial evidence.

In the present case, from the conduct of the accused persons, coupled with the evidence of PW-1 to PW-5, the inference can clearly be drawn regarding the conspiracy to commit the murder of the deceased. From the evidence of PW-1 to PW-5, it has been established by the prosecution that Satpal was residing as a tenant in the house of the deceased and he had developed illicit relations with the wife of the deceased, who is another accused in the present case. PW-5 Nisha, who is the real daughter of Guddo @ Sonia, had seen both Satpal and Guddo @ Sonia together last time with the deceased at 7:15 a.m. on 23.09.2004 when she left for the school.

47. After having considered the evidence recorded in the matter, it is clear that the prosecution has been able to establish that Satpal was residing as a paying guest in the house of deceased Manoj along with Guddo @ Sonia. PW-2 Rakesh Kumar @ Baba knew both the accused persons and also the deceased husband of accused Guddo @ Sonia as both of them used to go to one 'Mazar' situated at Vikas Nagar for offering prayer.

48. Further, when Guddo @ Sonia and Rakesh @ Baba reached the house of the deceased, the door of the entry gate was opened by Guddo @ Sonia with her own keys, at that time Manoj was found dead. When PW-2 Rakesh asked Guddo about the Satpal, she replied that he had already left her house at 5:30/6:00 a.m. and he did not return to the house on the said day or next day. After the disclosure statement, Guddo @ Sonia lead the Policy party and got arrested Satpal at G.T. Karnal Road Bypass at about 8:30 p.m. and Satpal got recovered the weapon of offence and also found wearing the blood stained clothes which was having the blood of the deceased Manoj as the blood stained clothes were matching with the blood group of the deceased. The post-mortem report also opined that the injuries, found on the body of the deceased at the time of conducting the post-mortem, could have been caused by the said weapon. From these circumstances, an inference can easily be drawn that both Guddo @ Sonia and Satpal, with the same object of removing him from their way as the deceased was an obstacle in her love life and Guddo @ Sonia also wanted her husband to transfer the property in her name and the deceased was not inclined to do so, committed the murder of deceased Manoj. We are of the view that the prosecution has been able to prove the case under Section 120A IPC and both are punishable

under Section 120B IPC.

49. For the reasons given in the preceding paragraphs, we maintain conviction of the appellant Satpal under Section 302 IPC and also maintain the convection of both Guddo @ Sonia and Satpal under Section 120B IPC. We agree with the judgment and order on sentence passed by the trial court. The appeal filed by the Satpal is also dismissed.

50. The net result is that both appeals are dismissed.

COMPARATIVE TABLE
ILR (DS) 2011 (III) = OTHER JOURNAL
MAY AND JUNE

Page No.	Journal Name		Page No.	Journal Name	Page No.
1	2011 (176) DLT 753				
31	No Equivalent				
44	2011 (2) AD (Delhi) 384	=	2011 (180) DLT 54		
53	2011 (177) DLT 319	=	2011 (2) AD (Delhi)		
68	2011 (177) DLT 465	=	2011 (122) DRJ 160		
75	2011 (2) AD (Delhi) 341	=	2011 (122) DRJ 77		
75	2011 (179) DLT 12				
92	No Equivalent				
128	2011 (178) DLT 689	=	2011 (2) AD (Delhi) 418		
128	2011 (122) DRJ 34				
151	2011 (179) DLT 641				
160	2011 (179) DLT 118				
165	No Equivalent				
170	2011 (178) DLT 204	=	2011 (3) AD (Delhi)		
206	2011 (4) R.A.J 101	=	2011 (45) PTC 465		
217	No Equivalent				
247	2011 (178) DLT 398				
266	2011 (122) DRJ 371				
272	No Equivalent				
281	2011 (3) AD (Delhi) 435	=	2011 (122) DRJ 573		
281	2011 (179) DLT 685				
293	2011 (123) DRJ 24				
303	No Equivalent				
310	No Equivalent				
318	No Equivalent				
329	2011 (178) DLT 428	=	2011 (123) DRJ 64		
345	2011 (4) AD (Delhi) 674	=	2011 (123) DRJ 388		
345	2011 (3) JCC 1526				
355	2011 (179) DLT 141				
396	2006 (3) R.A.J 239	=	2006 (129) DLT 622		

396	2006 (5) AD (Delhi) 316	=	2006 (2) Arb LR 212
410	2011 (179) DLT 538	=	2011 (123) DRJ 536
410	2011 (5) AD (Delhi) 254		
422	2011 (2) JCC 1233		
447	2011 (4) AD (Delhi) 679	=	2011 Crl J 3094
455	2011 (176) DLT 615	=	2011 (2) AD (Delhi) 32
455	2011 (1) JCC 395		
464	2011 (178) DLT 624	=	2011 (2) AD (Delhi) 18
475	No Equivalent		
491	2011 (177) DLT 497		
495	2011 (179) DLT 545	=	2011 (5) AD (Delhi) 815
502	2011 (179) DLT 631		
510	2011 (178) DLT 186	=	2011 (1) AD (Delhi) 829
525	2011 (3) AD (Delhi) 423		
536	2011 (2) AD (Delhi) 689		
543	No Equivalent		
553	No Equivalent		
558	No Equivalent		
571	2011 (2) JCC 1096	=	2011 (180) DLT 563
586	2011 (2) AD (Delhi) 593	=	2011 (179) DLT 351
595	2011 (3) AD (Delhi) 344	=	2011 (2) JCC 105 (NI)
606	2011 (178) DLT 166	=	2011 (122) DRJ 657
625	No Equivalent		
638	2011 (1) JCC 533	=	2011 (4) AD (Delhi) 439
638	2011 Crl J 2353		
654	No Equivalent		
663	2011 (4) AD (Delhi) 221		
677	No Equivalent		
682	No Equivalent		
722	2011 (2) JCC 1050		
739	No Equivalent		
762	No Equivalent		
769	2011 (179) DLT 405		
783	2011 (5) AD (Delhi) 261	=	2011 (180) DLT 769
800	2011 (6) AD (Delhi) 125		

COMPARATIVE TABLE
OTHER JOURNAL = ILR (DS) 2011 (III)
MAY AND JUNE

Journal Name	Page No.	=	ILR (DS) 2011 (III)	Page No.
2011 (2) AD (Delhi)	384	=	ILR (DS) 2011 (III)	44
2011 (2) AD (Delhi)		=	ILR (DS) 2011 (III)	53
2011 (2) AD (Delhi)	341	=	ILR (DS) 2011 (III)	75
2011 (2) AD (Delhi)	418	=	ILR (DS) 2011 (III)	128
2011 (3) AD (Delhi)		=	ILR (DS) 2011 (III)	170
2011 (3) AD (Delhi)	435	=	ILR (DS) 2011 (III)	281
2011 (4) AD (Delhi)	674	=	ILR (DS) 2011 (III)	345
2006 (5) AD (Delhi)	316	=	ILR (DS) 2011 (III)	396
2011 (5) AD (Delhi)	254	=	ILR (DS) 2011 (III)	410
2011 (4) AD (Delhi)	679	=	ILR (DS) 2011 (III)	447
2011 (2) AD (Delhi)	32	=	ILR (DS) 2011 (III)	455
2011 (2) AD (Delhi)	18	=	ILR (DS) 2011 (III)	464
2011 (5) AD (Delhi)	815	=	ILR (DS) 2011 (III)	495
2011 (1) AD (Delhi)	829	=	ILR (DS) 2011 (III)	510
2011 (3) AD (Delhi)	423	=	ILR (DS) 2011 (III)	525
2011 (2) AD (Delhi)	689	=	ILR (DS) 2011 (III)	536
2011 (2) AD (Delhi)	593	=	ILR (DS) 2011 (III)	586
2011 (3) AD (Delhi)	344	=	ILR (DS) 2011 (III)	595
2011 (4) AD (Delhi)	439	=	ILR (DS) 2011 (III)	638
2011 (4) AD (Delhi)	221	=	ILR (DS) 2011 (III)	663
2011 (5) AD (Delhi)	261	=	ILR (DS) 2011 (III)	783
2011 (6) AD (Delhi)	125	=	ILR (DS) 2011 (III)	800
2006 (2) Arb LR	212	=	ILR (DS) 2011 (III)	396
2011 Crl J	3094	=	ILR (DS) 2011 (III)	447
2011 Crl J	2353	=	ILR (DS) 2011 (III)	638
2011 (176) DLT	753	=	ILR (DS) 2011 (III)	1
2011 (180) DLT	54	=	ILR (DS) 2011 (III)	44
2011 (177) DLT	319	=	ILR (DS) 2011 (III)	53
2011 (177) DLT	465	=	ILR (DS) 2011 (III)	68
2011 (179) DLT	12	=	ILR (DS) 2011 (III)	75
2011 (178) DLT	689	=	ILR (DS) 2011 (III)	128
2011 (179) DLT	641	=	ILR (DS) 2011 (III)	151
2011 (179) DLT	118	=	ILR (DS) 2011 (III)	160
2011 (178) DLT	204	=	ILR (DS) 2011 (III)	170

2011 (178) DLT	398	=	ILR (DS) 2011 (III)	247
2011 (179) DLT	685	=	ILR (DS) 2011 (III)	281
2011 (178) DLT	428	=	ILR (DS) 2011 (III)	329
2011 (179) DLT	141	=	ILR (DS) 2011 (III)	355
2006 (129) DLT	622	=	ILR (DS) 2011 (III)	396
2011 (179) DLT	538	=	ILR (DS) 2011 (III)	410
2011 (176) DLT	615	=	ILR (DS) 2011 (III)	455
2011 (178) DLT	624	=	ILR (DS) 2011 (III)	464
2011 (177) DLT	497	=	ILR (DS) 2011 (III)	491
2011 (179) DLT	545	=	ILR (DS) 2011 (III)	495
2011 (179) DLT	631	=	ILR (DS) 2011 (III)	502
2011 (178) DLT	186	=	ILR (DS) 2011 (III)	510
2011 (180) DLT	563	=	ILR (DS) 2011 (III)	571
2011 (179) DLT	351	=	ILR (DS) 2011 (III)	586
2011 (178) DLT	166	=	ILR (DS) 2011 (III)	606
2011 (179) DLT	405	=	ILR (DS) 2011 (III)	769
2011 (180) DLT	769	=	ILR (DS) 2011 (III)	783
2011 (122) DRJ	160	=	ILR (DS) 2011 (III)	68
2011 (122) DRJ	77	=	ILR (DS) 2011 (III)	75
2011 (122) DRJ	34	=	ILR (DS) 2011 (III)	128
2011 (122) DRJ	371	=	ILR (DS) 2011 (III)	266
2011 (122) DRJ	573	=	ILR (DS) 2011 (III)	281
2011 (123) DRJ	24	=	ILR (DS) 2011 (III)	293
2011 (123) DRJ	64	=	ILR (DS) 2011 (III)	329
2011 (123) DRJ	388	=	ILR (DS) 2011 (III)	345
2011 (123) DRJ	536	=	ILR (DS) 2011 (III)	410
2011 (122) DRJ	657	=	ILR (DS) 2011 (III)	606
2011 (3) JCC	1526	=	ILR (DS) 2011 (III)	345
2011 (2) JCC	1233	=	ILR (DS) 2011 (III)	422
2011 (1) JCC	395	=	ILR (DS) 2011 (III)	455
2011 (2) JCC	1096	=	ILR (DS) 2011 (III)	571
2011 (2) JCC	105 (NI)	=	ILR (DS) 2011 (III)	595
2011 (1) JCC	533	=	ILR (DS) 2011 (III)	638
2011 (2) JCC	1050	=	ILR (DS) 2011 (III)	722
2011 (45) PTC	465	=	ILR (DS) 2011 (III)	206
2011 (4) R.A.J	101	=	ILR (DS) 2011 (III)	206
2006 (3) R.A.J	239	=	ILR (DS) 2011 (III)	396

NOMINAL-INDEX
VOLUME-3
MAY AND JUNE, 2011

Pages

"A"

"B"

"C"

"D"

"G"

"H"

"I"

"J"

"K"

"M"

"N"

"P"

"R"

"S"

"T"

"U"

"V"

SUBJECT-INDEX
VOLUME-3
MAY AND JUNE, 2010

interference by Single Bench—Hence present appeal. Failure to record objection cannot lead to conclusion that any demur thereafter is unjustifiable. If party left with no option but to go along with demands of superior/dominant party—Open for Arbitral Tribunal to go into question whether the accord & satisfaction given by party free of any extraneous circumstances or obtained under force or coercion—If evidence reveals that accord and satisfaction not born out of free will of party, Tribunal obliged to enter reference and decide conclusively on claims despite purported accord and satisfaction. Findings of fects not perverse—No interference warranted—Appeal dismissed.

Bharat Sanchar Nigam Ltd. v. *BWL Ltd.* *396*

CENTRAL RESERVE POLICE FORCE ACT, 1949—Section 11—Petition assailing the order dated 17.04.1990, whereby she was removed from service after departmental inquiry and the appellate order dated 03.08.1990, whereby her appeal against the removed order had been dismissed—Petitioner joined the Central Reserve Police Force as Mahila Sub-Inspector in 1986—In October 1987, petitioner sought permission from the department to appear in the Combined States Service Examination, 1987—Permission granted—Petitioner was granted one day casual leave for 08.02.1988 to appear in the aforesaid examination—On 08.02.1988, Kumari Mamta Sabharwal, reportedly a friend and neighbour of the petitioner was caught impersonating the petitioner and writing her answer sheet in the examination—Kumari Mamta Sabharwal gave a handwritten statement admitting that she was impersonating as the petitioner thereby defrauding the examination authorities on the request/advice of petitioner—Inquiry conducted—Petitioner held guilty and order passed—Petition—Held—Failure to maintain integrity and honesty in public examination would be covered within the meaning of expression “other misconduct” as defined under Section 11

(1) of the CRPF Act, 1949—The petitioner has not ceased to be a member of the force on 8th February, 1988 when she was appearing in the Combined State Service Examination, 1987—The petitioner though not on duty, did not cease to be a member of the force—The petitioner is a member of the disciplined force—It needs no elaboration that integrity and dignity of the service with which she is employed, is required to be observed at all times—The petitioner who was the sub-inspector, was taking the examination as an in service candidate—Causing any person to impersonate the service personnel in an examination with dishonest intention is reprehensible and certainly misconduct of the highest level—The challenge is solely premised on the plea that the acts attributed to the petitioner are not relatable to her service—This submission is wholly misplaced. Held: No legally tenable grounds of judicial review.

Poonam Sharma v. *Union of India & Ors.* *739*

CENTRAL WAKF COUNCIL RULES, 1998—Rule 7 and 13—Petition seeking to quash the order passed by respondent no. 3 dated 10.03.2010, whereby the respondent no. 1 was directed to retire the petitioner from the post of Secretary to Central Wakf Council on 31.03.2010—Order is bad—Terms and conditions of the service of the petitioner shall be determined by the Council and not by the Central Government or the Ministry—Appointment of the petitioner was made under Rule 7—Chairman/Chairperson is appointing authority on the terms and conditions fixed by the Council in accordance with Rule 7—Appointment letter leaves no room for any ambiguity, so far as the appointing authority is concerned; Central Government is appointing authority—Held—Terms of service of petitioner is governed by Rule 7 of Central Wakf Council Rules, 1998 and the Council has its final say in the matter rather than the respondent no.3; the term of retirement of the petitioner fixed by the Council in

exercise of its power under Rule 7 cannot be rendered inoperative due to the impugned order passed by respondent no. 3—Order dated 10.03.2010, quashed being in violation of Rule 7.

Dr. Mohammad Rizwanul Haque v. *Central Wakf Council & Ors.* *1*

CODE OF CIVIL PROCEDURE—Section 39, Rule 1, 2—Time is essence of contract—Interpretation—Defendant being owner of first floor and 2/9th share holder in suit property—Entered into Agreement to Sell with Plaintiff for the said share—Defendant had two daughters and one son—Partition suit pending between them—Case decreed one basis of compromise—Defendant acquired first floor—Each child got 2/9th share each—Understanding arrived at between daughters and Defendant for sale of share—Said sale not materialized—Suit for specific performance against daughters filed—Dismissed—Appeal pending—One daughter entered into agreement to sell her share to outsider—Defendant filed suit against daughter under Section 44, Transfer of Property Act, 1882—Defendant also acquired 2/9th share of son—Entire ground floor in in occupation of Official Liquidator appointed by Company Court—Plaintiffs filed suit for specific performance of Agreement to Sell—Application for permanent injunction also made—Total sum of Rs. 1 crore already paid by Plaintiffs—Application under Order 39 dismissed—Defendant directed to deposit sum of Rs. 7 crore with Registrar General—Defendant restrained from parting with share in suit property—Hence two appeals filed—Plaintiff claiming injunction and Defendant alleging Rs. 7 crore to be excessive.

— Parties specifically agreed that Plaintiff entitled to negotiate with daughters without affecting sale price as soon as possible—Parties further agreed that after purchase of share of daughters, transaction with Defendant to be completed

within three months—Consideration to remain 7 crores irrespective of transaction amount with daughters—Purchase of share of daughters condition precedent for implementation of agreement—Intention of parties to complete transaction within shortest possible period—However no agreement reached between daughters and Plaintiffs—Four year elapsed since original Agreement to Sell.

Smt. Rani Sharma v. *Ms. Sangeeta Rajani & Others*..... *75*

— Rightly held that essence of clause providing for shortest possible time had already elapsed—Period of four years rightly held to be too long—Defendant, *prima facie* entitled to say that sale price had become unrealistic—Defendant rightly unwilling to suffer transaction at earlier price—Factum of increase in price of suit property admitted by both parties.

Smt. Rani Sharma v. *Ms. Sangeeta Rajani & Others*..... *75*

— Restraining Defendant from dealing with suit premises—Reliance placed on ratio of KS Vidyandan—When delay makes specific performance inequitable even where time not essence of contract—Contract to be performed with reasonable time—Reasonable time determined by looking at surrounding circumstances.

Smt. Rani Sharma v. *Ms. Sangeeta Rajani & Others*..... *75*

— Period of four years lapsed—Prices of suit premises have arisen—Co owners have created third party interests in their shares—Completion of original transaction beyond implementation and unenforceable—Defendant cannot be made to suffer the transaction.

Smt. Rani Sharma v. *Ms. Sangeeta Rajani & Others*..... *75*

— Injunction—Rightly not granted—In given circumstances neither prima facie case nor balance of convenience lies in

favour of Plaintiff—Irreparable loss—Defendant offered to deposit sum of Rs. 7 crore—Offer made by Defendant herself—No infirmity in the same.

Smt. Rani Sharma v. *Ms. Sangeeta Rajani & Others*..... *75*

— Money Suit-Loss of profitability due to delay in completion of contract—Plaintiff was awarded a works contract for construction of flats—Plaintiff amongst other claims-claimed loss of profitability due to delay in completion of contract—Defendant contended that while there was delay, plaintiff cannot claim any prejudice—At the time of extension of contract Parties agreed that no damages would be claimed and agreed to a formula which compensated that contractor for extention of time for performance.

J.S. Chaudhary v. *The Vice Chairman, DDA & Anr.* *92*

— Delay was attributable to the defendant—Undertaking furnished for extention of time imposes bar in respect of delay caused by the plaintiff—In works contracts, a contractor is entitled to claim damages for loss of profits on proof of breach of contract by the erring party.

J.S. Chaudhary v. *The Vice Chairman, DDA & Anr.* *92*

— Section 20(C)—Cause of action-in suit for price of goods sold and delivered—Includes place where contract made—Place where contract to be performed—Place where money was payable—Party free to sue at any of the places.

M/s. J.C. Enterprises (Regd) v. *Ranganatha Enterprises* *128*

— Property in lottery tickets handed over by Plaintiff to courier at New Delhi—Property passed over to Defendant the moment goods handed over to courier—Therefore tickets deemed to have been delivered at New Delhi itself—Hence, territorial

jurisdiction established.

M/s. J.C. Enterprises (Regd) v. *Ranganatha Enterprises* *128*

— Order XXXIX, Rule 1 & 2—Suit for permanent injunction, rendition of accounts and damages and delivering up of infringing material—Defendant is alleged to be infringing the trade mark 'TOYOTA' of plaintiff—Defendant no. 3 compromised with plaintiff during pendency—Other defendants proceeded ex parte—Held—The trade mark found being used by defendant no.1 was absolutely identical to the registered trademark of plaintiff company—The Court needs to take note of the fact that a lot of energy and resources are spent in litigation against those who infringe the trademark and copy right of others and try to encash upon the goodwill and reputation of other brands by passing of their goods and/or services as those of that well known brand—If punitive damages are not awarded in such cases, it would only encourage unscrupulous persons who actuated by dishonest intention, use the well-reputed trademark of another person, so as to encash on the good will and reputation which that mark enjoys in the market, with impunity and then avoid payment of damages by remaining absent from the Court, thereby depriving the plaintiff an opportunity to establish actual profit earned by him from use of the infringing mark, which can be computed only on the basis of his account books—This would, therefore, amount to putting premium on dishonesty is and give an unfair advantage to unscrupulous infringer over those who have a bona fide defence to make and therefore come forwarded to contest the suit and place their case before the Court—Defendant No. 1 restrained from manufacturing, selling storing for sale or advertising auto components under the trademark TOYOTA or any other mark identical or similar to the registered trademark TOYOTA of the plaintiff company—Defendant no.1 also directed to pay

punitive damages amounting to Rs. 50,000/- to the plaintiff company.

— Section 96—Order XII Rule 6—Appellant filed a suit for declaration and injunction to protect the possession of property no. 10/7, Yog Maya Mandir, Mehrauli—Possession was inherited by him from his late father Pt. Badlu Ram—Smt. Ram Pyari widow of Shri Trikha gave possession of premises to his father fifty years ago for performing puja and seva—Owner being in adverse possession for the last more than 12 years—Suit contested by defendants—Badlu Ram was permitted to use the said accommodation as a paid employee of Yog Maya Mandir, as Badlu Ram used to serve water to the worshippers and clean the Mandir—The said licence came to an end on the death of Shri Badlu Ram—From the date of death of Shri Badlu Ram, the possession of appellant became illegal—Respondent filed a suit for possession and recovery of mesne profits from the appellant and his brother—Appellant defended the suit—Suit property was gifted to his father by Smt. Ram Pyari, wife of Shri Trikha—The brother of appellant admitted the claim of the respondent—Respondent moved application under Order XII Rule 6—Trial Court decreed the suit of the respondent—Dismissed the suit of appellant—Appeal—Held—The appellant has himself admitted that possession of the property was given to his father by one Smt. Ram Pyari, who was the widow of one of the pujaris of the Temple and it was given while his father was doing puja and seva in the Temple—The said occupation was thus a permissive user—In the written statement in Suit No. 85/03, the appellant has raised the plea of ownership by virtue of gift—The gift of immovable property cannot be proved by oral evidence without a written and registered gift deed—There is not even a whisper that such gift deed was executed or

registered by Smt. Ram Pyari in favour of Badlu Ram or the appellant herein—The appellant who admits permissive possession/occupation in the same breath cannot be allowed to plead adverse possession in the other, and that too without any hostile assertion made by him in denial of the title of the true owner—It is also noted that the defendant no. 2 Sant Lal Kaushik, who is the brother of the appellant, has admitted the case of plaintiff in toto—The appellant sought to brush this aside by asserting active collusion between the respondents and his brother—In the face of the admissions made by the appellant himself which have been culled out from his pleadings and inferred there from, this assertion must fall to the ground—Consequently, judgment of the trial Court affirmed.

— Section 96—State Bank of India Employees Provident Fund Rules—Rules 33 & 359—Payment of Gratuity Act, 1972—Section 7—Respondent filed suit for recovery against appellant bank on ground it failed to pay interest on Provident Fund amount and gratuity amount of her deceased husband employed as officer with appellant bank—Suit decreed—Aggrieved appellant bank urged in appeal, Respondent failed to produce relevant documents for release of terminal dues of her husband due to inter se dispute between legal heirs of deceased which prevented appellant bank from releasing terminal dues—Held:- Rule 359 is a beneficial rule framed for the expeditious settlement of the provident fund dues and pension claims of bank employees and to burden the bank with the interest liability in the event of any delay—Interest is a compensation payable when the money is unnecessarily withheld by one whose obligation was to pay the same at a given time and the same is not paid in breach of legal rights of creditor—The appellant bank cannot be blamed for not making the refund of terminal benefits to the Respondent

which is attributed only to the Respondent.

State Bank of India v. *Smt. Vijay Lakshmi Thakral 329*

—Suit—Order 26 Rule 9—Appointment of Local Commissioner—Delhi High Court Act, 1966—Section 10—Appeal—Maintainability of—Plaintiff filed an application for appointment for Local Commissioner for carrying out measurement of work done by plaintiff—Ld. Single Judge opined—Appropriate course would be to get measurements done on its own level from expert independent body—Local commissioner not required to be appointed—Dismissed the application—Preferred appeal against the order—Respondent contended—Real purpose behind the application to nullify the joint inspection carried out by parties—Court after going through the record, found substance in the arguments—Observed—Plaintiff's refusal to carry out inspection/ measurement by its own engineer indicative of oblique and malafide purpose behind the application for appointment of local co ` mmissioner—Carrying out measurements not only method by which plaintiff could prove the extent of work done by it—Must have possessed sufficient documents of its own showing—Deployment of man power, utilisation of material and resources at site, to be dealt with in detail in arbitration proceedings—Held—The appeal is maintainable against an interlocutory order having traits and traping of finality—Court possesses power for appointment of Local Commissioner but to exercise such power depend on the peculiarity of factual matrix—It can scarcely be claimed that local commissioner should be appointed to nullify the joint measurements in the face of offer of defendant to plaintiff to carry out measurements on its own—Appeal dismissed.

Prashant Projects (P) Ltd. v. *Indian Oil Corpn. Ltd. .. 586*

— Order 9, Rule 13—Petitioner preferred writ petition challenging

order of trial Court dismissing her application seeking condonation of delay in moving application under Order 9, Rule 13—As per petitioner, she came to know of ex-parte judgment and decree dt. 08.01.1997 on 24.12.1999 when she received notice from Court in another case—She handed over notice to her Advocate who did not take steps and expired on 21.01.2000—Thereafter she managed to get back notice and engaged new counsel on 29.01.2000, who inspected records in first week of May, 2000 and she filed applications on 08.05.2000—Thus, she explained sufficient reasons for non filing condonation application within prescribed period which were ignored by trial Court—Respondent contended that besides preferring applications after a lapse of about three years, petitioner also failed to give any reasons for not filing applications between 29.01.2000 till 08.05.2000—There no ground to condone delay—Held:- The legal maxim vigilanibus, non dormentibus, jura subvenient which means that equity aids the vigilant and not the indolent is an undisputed axiom that eternal vigilance is the price of liberty and if one sleeps upon his right, his right will slip away from him—Petitioner failed to explain not taking timely steps to file the applications.

Smt. Vidya Devi v. *Smt. Ramwati Devi 502*

— Section 96—Appeal by insurance company against finance Company on grounds of lack of privity of contract and insurable interest—Respondent financed a vehicle and later took it back on not being paid the installments—Gave it to Respondent No.2 under hire-purchase agreement—Accident resulted in loss of vehicle—Claim for insurance—Appellant contended-lack of privity of contract with them—Respondent was not the owner of the vehicle, having no insurable interest in the vehicle. Held—Contract of insurance entered into by Appellants with Respondent—Name of the loanee in cover note—Only an identification of cover note—No lack of privity

as contended—Respondent had the right to take possession of the vehicle on default in making payment—Had insurable interest.

The New India Assurance Co. Ltd. v. *M/s. T.T. Finance Ltd. & Ors.* *625*

— Section 382—Complaint made by petitioner u/s 138 dismissed by trial Court on ground of lack of territorial jurisdiction—ASJ dismissed criminal revision—Held, the two acts of presentation of cheque and issuance of legal notice from Delhi, so also the fact that loan agreement executed at Delhi and loan disbursed to respondent from account of petitioner in New Delhi vests territorial jurisdiction in Delhi Courts—Magistrate only taking cognizance of an offence must prima facie have territorial jurisdiction to try a case—Respondent after being summoned has a right to take the plea with regard to lack of territorial jurisdiction—Petition allowed—Case remanded back to trial Court with direction to proceed further with complaint.

G.E. Capital Transportation Financial Services Ltd. v. *Lakhmanbhai Govindbhai Karmur Creative Construction & Ors.* *595*

— Section 91, 173, 207, 208, 227, 228—Indian Evidence Act, 1872—Section 3, 45, 124—Constitution of India, 1950—Article 21—Complaint filed against petitioner under Official Secrets Act—Application filed before trial Court for summoning of documents/reports/final reports prepared by erstwhile IO who carried out investigation of case and was of view that closure report be filed—Application dismissed by trial Court as documents sought by petitioner were not meant to be used against him as they were not relied upon by CBI and petitioner was not entitled to production of said documents—Order challenged in High Court—Held- Final report prepared after investigation is opinion rendered by IO—Said opinion can not bind either his Superior Officer or any

other person much less Court—Opinions of IO are not statements of facts and thus not relevant—These opinions can not be used except for limited purpose of confronting IO as no other witness is bound by it—Before a charge sheet is filed, IO is bound to investigate into all aspects of matter and file a report thereon—During pendency of investigation there is no bar, if on being not satisfied by one officer investigation is transferred to another officer by senior officer and a final report is filed on being satisfied by investigation conducted—Accused can not claim indefeasible legal right to claim every document of Police file—No case made out for issuance of a writ.

Ashok Chawla v. *Ram Chander Garvan, Inspector CBI* *638*

COMPANIES ACT, 1956—Section 433, 434—Petitioner a Company registered under the laws of Czech Republic—Owned 100% shares in a Company SP of W, a.s—A Czech Republic Company—Executed a stock purchase and sale Agreement for the sale of 100% equity interest of SP of W, a.s at the purchase price of CZK 230,000,000, with another Company M/s Newco Prague, s.r.o (purchaser) sale price was to be paid in four installements—Respondent a Company registered with Registrar of Companies, Delhi stood as guarantor by a guarantee declaration for the payment of the said unpaid installments—Purchaser made only part payment—Petitioner approached respondent demanding payment of unpaid installments—Subsequently gave statutory winding up notice to the respondent for making payment—Respondent raised objections such as no debt could arise in favour of the petitioner until a decree on the basis of alleged declaration of guarantee is obtained against the respondent; no Power of Attorney executed in favour of Mr. Ravi Chilkuri the executant of guarantee declaration does not bear stamp or seal of respondent Company—Mr. Ravi Chilukuri neither a Director

nor a shareholder at the relevant time; guarantee declaration was null and void as no mandatory permission was obtained under FEMA or FERA and; winding up notice was pre mature as the notice could have been issued only if the payment had not been made within the stipulated time—Held—Question of Mr. Ravi Chilukuri having no Power of Attorney in his favour or guarantee declaration not bearing the stamp/seal of respondent not available as defence to respondent in view of the principle of internal management—Defence also clearly mentioned no criminal proceedings initiated against Mr. Ravi Chilukuri—Since the notice of winding up was issued only after the respondent did not make the payment in terms of declaration, neither winding up notice nor petition for winding up pre mature—If the guarantee declaration was executed in breach of provisions of FEMA or FERA respondent could be prosecuted for the same—It, however, cannot be said that guarantee is null and void or cannot be enforced on this ground—Gurantee declaration is a contract enforceable under law—Not necessary for the petitioner to wait to obtain a decree from Civil Court on the basis of guarantee declaration—Thus, respondent owe debt to petitioner which it defaulted in paying—Defence set up moonshine and sham—Provisional liquidator appointed.

N&S&N Consultants S.R.O v. *SRM Exploration Private Limited* *281*

CONSTITUTION OF INDIA, 1950—Article 226—Wakf Act, 1995—Section 9—Central Wakf Council Rules 1998—Rule 7 and 13—Petitioner seeking to quash the order passed by respondent no. 3 dated 10.03.2010, whereby the respondent no. 1 was directed to retire the petitioner from the post of Secretary to Central Wakf Council on 31.03.2010—Terms and conditions of the service of the petitioner were to be determined by the Council and not by the Central Government

or the Ministry—Rule 7 empowers the Council to fix the terms and conditions of the appointment—Rule 13 has no applicability—Respondent asked that Chair Person is acting only as an Appointing Authority—Central Government actually appointed the Secretary—Rule 13 is applicable to regulate the terms and conditions of services of the petitioner—When Rule 7 is read along with Rule 13, same makes clear that Rule 13 will govern each and every post in the Council, wherein the Central Government and rules applicable to the Central Government employees shall operate—Held—The Rules in Central Wakf Rules, 1998 thus provides for distinct posts which can be categorized under the Rules—The said posts include that of the members, Secretary and Chairperson and recognized posts as against the post which have been created from time to time which is mandated under Rule, 13 (1)—Thus, the Rules relating to the staff of the Council which is created post from time to time cannot be pressed into service so far it relates to recognized post of Secretary (who has separate allocated powers within rules also) which is governed by Rule 7 of the Rules—When there is specific provision enacted under the Rules for carrying out specific purpose, the said provision must be given its effect against the provision which can only be used by way of interpretative tools to render the specific provision ineffective—Applying this rule of construction that in cases of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision, appointment of the Secretary and its terms and conditions of the employment shall be governed by Rule 7 which means the same which has been fixed by the Council a is against Rule 13 which deals with creating posts.

Dr. Mohammad Rizwanul Haque v. *Central Wakf Council & Ors.* *1*

— Article 226—Interference in contractual agreements permissible when instrumentality of State party to contract and acts in an unreasonable and arbitrary manner—Petitioner No.1 engaged in business of design, manufacture, installation and servicing of power generation equipment—Petitioner No.2 director and shareholder of Petitioner No.1—Petitioner No.1 entered into agreement on 27.04.2007 for Onshore Services with Gujarat State Electricity Corporation Ltd ("GSECL") for commissioning of power plant in Surat—GSECL also entered into agreement with Alstom Switzerland Ltd for providing Offshore Equipment and Spare Parts supply on CIF basis pertaining to Surat power plant—Respondent issued marine Policy and Erection All Risk Insurance ("EARI") Policy—Petitioner No.1 paid requisite premium under EARI Policy in six agreed installments—Last installment paid on 08.11.2007—On 06.07.2009, Petitioner No.1 received notice fro Respondent raising demand of Rs.1.50 crores—Comptroller and Auditor General ("CAG") objected to alleged excess discount given by Respondent to Petitioner—Respondent had allegedly allowed discount of more than 51.25% limit prescribed by Insurance Regulatory and Development Authority ("IRDA")—Petitioner claimed that demand for additional premium without legal basis—Respondent contended that CAG demanding immediate compliance and recovery of differential premium amount—Respondent stated that if premium not paid before 30.10.2009, Respondent would be "off cover"—On 24.11.2009, Respondent informed Petitioner that CAG query could not be dropped—Petitioner informed that non-payment of additional premium amount by 10.12.2009 would result in cancellation of EARI Policy—Hence present petition—Petitioner impugned demand for additional premium—Whether demand and letter stating cancellation on non-payment of premium arbitrary—Demand for additional premium not raised immediately upon CAG pointing out excess discount—Action of Respondent in raising demand during period when de-tariff

regime not come into existence—Petitioner must be aware of statutory regime and statutory constraints of Respondent—Not possible to conclude that demand for additional premium unreasonable or arbitrary—Petition dismissed.

Alstom Projects India Ltd. & Anr. v. *Oriental Insurance Company Limited* *410*

— Article 226—Wakf Act, 1995—Section 9—Central Wakf Council Rules 1998—Rule 7 and 13—Petition seeking to quash the order passed by respondent no. 3 dated 10.03.2010, whereby the respondent no. 1 was directed to retire the petitioner from the post of Secretary to Central Wakf Council on 31.03.2010—Order is bad—Terms and conditions of the service of the petitioner shall be determined by the Council and not by the Central Government or the Ministry—Appointment of the petitioner was made under Rule 7—Chairman/Chairperson is appointing authority on the terms and conditions fixed by the Council in accordance with Rule 7—Appointment letter leaves no room for any ambiguity, so far as the appointing authority is concerned; Central Government is appointing authority—Held—Terms of service of petitioner is governed by Rule 7 of Central Wakf Council Rules, 1998 and the Council has its final say in the matter rather than the respondent no.3; the term of retirement of the petitioner fixed by the Council in exercise of its power under Rule 7 cannot be rendered inoperative due to the impugned order passed by respondent no. 3—Order dated 10.03.2010, quashed being in violation of Rule 7.

Dr. Mohammad Rizwanul Haque v. *Central Wakf Council & Ors.* *1*

— Article 226—Minimum Wages Act, 1948—Section 2(h)—Payment of Bonus Act, 1965—Section 2(21) (ii)—Petition challenging Award dated 16.09.2002 passed by Industrial Tribunal—Contention—Workman is entitled to payment of

bonus on the wages minus the house rent allowance and not on the entire amount of wages—Held—When reading the definition of salary or wages as found in the Payment of Bonus Act, 1965, we must also take into account the intention and purpose of the legislature in enacting the Payment of Bonus Act and the observation of the Supreme Court in Airfreights Ltd. (Supra) case that the minimum wages ought not to be broken up—In view of the above, I hold that the minimum wage is a figure which is to be taken as a whole and when bonus is paid on the same, the petitioner/Management is not entitled to break up this figure of minimum wage by stating that the minimum wage includes the figure of house rent allowance which should be deducted from the minimum wage and bonus is then payable only on such reduced figure of wages after removing the alleged figure of house rent allowance—Petition dismissed.

— Article 226, 229—Delhi High Court Establishment (Appointment and Conditions of Service) Rules, 1972—Rule 11—Petition seeking promotion to post of Joint Registrar, when her juniors were promoted without claiming any monetary benefits—Her case for promotion was considered along with other candidates—She was superseded despite being the senior most Deputy Registrar—She made representations—Representation rejected—Subsequently appointed as Joint Registrar with effect from 21.03.2009—Petitioner Contention—According to OM No. 35034/7/97—Estt. (D) dated 08.2.2002 once the persons to be appointed on the basis of merit-cum-seniority meet the bench mark, no super-session in selection/promotion is permissible—Respondent no.1 contends that the selection in question being merit-cum-seniority, the subjective findings of the Selection Committee dated 04.08.2008 which have taken the

comparative merit into consideration ought not to be interfered with—Application of OM No. 35034/7/97—Estt. (D) dated 08.02.2002 not disputed—Private respondent opposed the petition—OM No. 35034/7/97—Estt. (D) is not applicable in view of the provisions of Article 229 of the Constitution of India—Held—We are unable to accept the said contention for the reason that the said Rules have been issued under Article 229 of the Constitution of India and provide for Rules and Orders of Central Government to be made applicable when no provision or insufficient provision has been made in the said Rules—Other than stating that the criteria is merit-cum-seniority, nothing else was sent out in the Rules and thus OM No. 35034/7/97—Estt. (D) dated 08.02.2002 was made applicable—There is little doubt over the application of the OM No. 35034/7/97—Estt. (D) dated 08.02.2002 when the office note itself proceeds by relying on OM No. 35034/7/97—Estt. (D) dated 08.02.2002 which office note resulted in the case being put up for consideration before the Selection Committee for promotion of the petitioner R-2 and R-3 and other officers—OM No. 35034/7/97—Est. (D) dated 08.02.2002 would apply to the present case and would entitle petitioner to be promoted prior to promotion of R-2 and R-3—The petitioner is entitled to be placed in seniority above R-2 and R-3 and would be entitled to all the consequential benefits from the date when she ought to have been promoted to the post of Joint Registrar i.e. 07.08.2008 without the benefit of actual pay for the period she has not worked on the post of Joint Registrar till her appointment as Joint Registrar vide order dated 03.06.2009 with effect from 21.03.2009.

— Article 226—Petition claiming 'Liberalized Family Pension; Late Mukhtiar Singh, husband of the petitioner was attached to 5th Battalion, ITBP which was stationed near Pantha Chowk,

Srinagar—While on duty at the Unit Quarter Guard on 15.6.1999 late Mukhtiar Singh suffered Myocardial Infarction—Respondent denied that the place where Mukhtiar Singh died, was an operation area—It was a disturbed area—It was denied that ITBP was involved in war fought at the Line of Control—Held—Admittedly, late husband of the petitioner was not on combat duty; as were the late husband of Smt. Manju Tewari and Smt. Kanta Yadav—The petitioner asserted that her husband was in an operational area, a fact denied by respondents No. 1 to 3 who assert that petitioner's husband was in a 'Disturbed Area' and not in an 'Operational Area'—It is settled law that the onus lies upon the party who asserts a fact—That apart, we can take judicial fact of the matter that Kargil war was fought on the Line of Control between India and Pakistan and not in Srinagar Town—The admission by the petitioner that her husband was attached to the 5th Battalion of ITBP which was stationed at Pantha Chowk near Srinagar in the State of Jammu & Kashmir entitles this Court to presume that the husband of the petitioner was not in an 'Operational Area'—Under category 'E' of the OM, the entitlement to grant of 'Liberalized Family Pension' is contingent upon the death being in an operational area or while on the way to an operational area—Thus, claim has to be rejected.

Kamla Devi v. *Union of India & Ors.* *68*

— Article 226—Petition claiming ex-gratia payment under a policy decision taken by the Government of Haryana and by the State of Jammu & Kashmir; Late Mukhtiar Singh, husband of the petitioner was attached to the 5th Battalion, ITBP, which was stationed near Pantha Chowk, Srinagar—While on duty at the Unit Quarter Guard on 15.6.1999 late Mukhtiar Singh suffered Myocardial Infarction—Respondent denied that the place where Mukhtiar Singh died, was an operation area—It was a disturbed area—It is denied that ITBP is involved in

war fought at the Line of Control—Held—As per OM dated 30.9.1999 the ex-gratia payment was contingent upon death while on duty in operational areas in Kargil—It is apparent that the ex-gratia scheme for grant of ex-gratia payment framed by the State of Haryana is to reward gallantry and no more—Similarly, pertaining to the State of Jammu & Kashmir, policy decision taken on 10.7.1990 is restricted when death is 'a result of violence attributable to the breach of law or order or other form of civil commotion'.

Kamla Devi v. *Union of India & Ors.* *68*

— Article 226, 14—Delhi Financial Corporation (Staff) Regulations, 1961—Regulations 20—Petition challenging the order dated 24th April, 1996 vide which the appellant was retired prematurely—The Regulation 20 is unconstitutional—The regulation is arbitrary and hit by Article 14 of the Constitution of India as there is no guidance in the said provision and confers unguided, unfettered and unbridged powers on the authority to prematurely retire a person—Held—The present Regulation, is similar to the Regulations which have been struck down as ultra vires by the Apex Court in various decisions—It suffers from the same fallibility and vulnerability, which has repeatedly prompted and compelled the Supreme Court to strike down the unguided power of compulsory retirement—In view of the aforesaid, unfettered, unbridled and unguided power has been conferred on the authority to pass the order of compulsory retirement and, accordingly, we declare the said provisions to be unconstitutional—Order of compulsory retirement set aside—Benefit restricted to 40% of back wages with all consequential benefits including pension after adjusting the benefits already availed.

Mahinder Kumar v. *Delhi Financial Corporation* *151*

— Article 226 & 227—Challenge to a test after undertaking it without any protest—Petitioners challenged-conduct of test on manual typewriters on the ground that some of the candidates were allowed to take the test on computer—Respondents contended that pursuant to the consent order dated 30.04.2007 passed by the Division Bench the Petitioners who were called for typing test were asked to bring their own typewriters-denied that test was taken on computer—Some candidates were exempted by the Division Bench having qualified the test earlier it was only in those cases that test was conducted on computer.

— Petitioner consciously approbated the methodology adopted for conducting the test and participated without reservation—Challenged the test only on being unsuccessful—Therefore the objection of Petitioners has no force and must be rejected.

Amit Dagar & Ors. v. *Union of India and Ors.* *165*

— Article 226—All India Services (Death-cum-Retirement Benefits) Rules, 1958—Rule 16 A and Rule 3—Petitioner moved application to change his date of birth from 06.05.1948 to 06.05.1952—His representation was rejected by Govt. of India—Petition filed before the Central Administrative Tribunal—Matter remanded back to the Govt. of India to re-examine—Central Government again declined the representation—Pursuant to the rejection of the change of date of birth by order dated 27.05.2008, the order dated 30.05.2008 was issued retiring the applicant from the service—Tribunal finally allowed the original application of the applicant—It is rarest of the rare case—Directed Central Government to consider the applicability of Rule 3 of the All India Services (Death-cum-Retirement Benefits) Rules, 1958 and to take a decision whether or not, the applicant is entitled for dispensation or relaxation of the requirement of rules or regulations on account of undue hardship to him—Order

challenged by Union of India—Contested by the respondent/applicant—Held—This is no more res-integra that for invoking Rule 3 of All India Services (Conditions of service—Residuary Matters) Rule, 1960 requirement is that there should be an appointment to the service in accordance with the rules, and by operation of the rule, undue hardship has been cause, that too in an individual case in which case the Central Government on satisfaction of the relevant conditions, is empowered to relieve such undue hardship by exercising the power to relax the condition—This cannot be disputed that in the context of 'Undue hardship' undue means something which is not merited by the conduct of the claimant, or is very much disproportionate to it—In the circumstances the three factors as alleged on behalf of applicant, retirement before the age of superannuation, deprivation of salary, allowance and qualifying service before which the applicant would be retired and the effect on his pension as the last drawn salary is the determinant effect which would be lifelong, would not constitute 'undue hardship' as contemplated under the said rule—Rule 16 of the rules of 1985 makes it clear that the said Rule is made to limit the scope of correction of date of birth and service record and the intent of the rule is to exclude all other circumstances for the said purpose—If under the rules applicable to the service of the applicant in State, he would not have been entitled for alteration of his date of birth in the State, the relief cannot be granted to him under Rule 3 of All India Services (Conditions of Service—Residuary Matters) Rule, 1960 nor the scope of Rule 16 A could be enlarged—In the circumstances the directions as given by the Tribunal cannot be sustained in the facts and circumstances of the case.

Union of India v. *Mr. D.R. Dhingra & Anr.* *170*

— Article 226—Refusal to exercise writ jurisdiction where suitable alternative remedy exists—Petitioner companies engaged in ship broking and other activities—Petitioners

registered with Service Tax Department under "Steamer Agent Service" category—Category brought into service tax net by Finance Act, 1997—Amendment in form of Clause (i), Section 65(105) read with section 65(100), Finance Act, 1997—Petitioners liable to pay service tax under said clauses—However whether Petitioners liable to pay service tax under "Business Auxiliary Heads" made taxable by Finance Act, 2003 whereby sub-section (zzb) to Section 65(105) enacted—Finance Act, 2004 expanded scope of "Business services"—Petitioners not acting as "commission agents"—Hence instant Petitions.

— Primary issue is with regard to actual nature and character of activity undertaken—Necessarily requires factual examination—Without first ascertaining and deciding factual dispute, interpretation of Finance Act will be in vacuum—No appropriate for writ court to go into factual aspects—Said examination should be undertaken by appellate authority, i.e. the Tribunal—Petitioners not allowed to circumvent said remedy—The other contention with respect to brokerage received in foreign exchange—Said contention also requires factual examination.

Interocean Shipping (I) Pvt. Ltd. v. *Union of India & Anr.* *217*

— Article 226—Refusal to exercise writ jurisdiction where suitable alternative remedy exists the exceptions are when alternative remedy is appeal from "Caesar to Caesar's wife" ie velief sought should not be mirage or fulite; When petition filed for enforcement of fundamental rights; where there is violation of natural justice and where order/proceeding wholly without jurisdiction or virus of Act is challenged.

Interocean Shipping (I) Pvt. Ltd. v. *Union of India & Anr.* *217*

— Letter issued by Ministry of finance—Opinion that activities of Petitioners covered under "Business Auxiliary Service"—Said letter not binding on Tribunal—Can go into matrix and interpret relevant provisions.

Interocean Shipping (I) Pvt. Ltd. v. *Union of India & Anr.* *217*

— Article 226—Writ Jurisdiction—Whether the same to be exercised against show cause notice—Normally such petitions not entertained as Premature—Not desirable and appropriate to stall enquiry or investigation—Unless virus of statutory enactment or there is complete lack of jurisdiction or authorities ex-facie acting malafidely with ulterior motives—No such case made out—Hence petition against show cause notice not to be entertained—Petitioners granted leave to file appeal before Appellate Tribunal.

Interocean Shipping (I) Pvt. Ltd. v. *Union of India & Anr.* *217*

— Article 226—Challenge to Denial of Appointment—Effect of Surpressio Veri—Petitioner applied for the post of Ramp Service Agent—Cleared trade test and personal interview—Allegedly found medically unfit—Petitioner presented himself for Pre-Employment Medical Examination ("PEME")—Respondent did not disclose result of PEME—Legal notice sent in August 2007—Application dated 01.12.2007 filed under Right to Information Act—Only on 12.12.2007 Petitioner informed of failure to pass PEME—Respondent did not specify nature of medical unfitness—Another RTI application filed—Petitioner found to be suffering from right ear deafness according to Respondent—Petitioner got himself examined by private ENT Specialist—No such abnormality found—Petitioner sent letter to Respondent—Another application under RTI Act filed with respect to qualifications of individuals who prepared medical report—Informed that said doctors were not

ENT Specialists—Hence present petition—However, petition silent on the fact that one of the examining doctors was an ENT Specialist.

— PEME Consists of various medical examinations conducted by Specialists—Said reports then handed over to Medical Officer for final review—Specialists who examined Petitioner included ENT Specialist—Petitioner chose not to disclose this fact—Tone and tenor of petition gave impression that Medical Officers had no material before them—Petitioner chose to remain silent—Said silence deliberate and not out of ignorance—Petitioner must approach with clean hands.

Mukesh v. *Air India & Anr.* *272*

— Petitioner no.1 filed writ petition seeking directions to Respondent university to accept his result of qualifying examination which was subsequently declared and to allow him to appear in first semester end term examination—Petitioner no.2 prayed for cancellation of his provisional admission by Respondent University—Petitioners urged they cleared LLB entrance test and were admitted to LLB course provisionally since their results of qualifying examination of graduation were not declared till then—Petitioners were required to have their provisional admission confirmed not later than 15.10.2010 failing which provisional admission was to stand automatically annulled—In subsequently declared graduation result of petitioners they had compartment in one of the papers and were required to clear said paper in supplementary examination to be held in month of September 2010—However owing to common wealth games, compartment examination was held on 14.12.2010—Thus, as deadline provided of 15.10.2010 ended, petitioner no.1 was not allowed to appear in first semester end term examination and provisional admission of petitioner no.2 was cancelled by Respondent university—Held:- Once the supplementary

examination is passed, the result thereof would relate back to first appearance in examination and effect of that would be treated as if candidate had passed examination on the date when result was declared initially—Candidate who cleared qualifying examination in first attempt and those who cleared the same with a compartment, for the purposes of determining eligibility cannot be discriminated—Petitioner declared entitled to confirmation of their provisional admissions—Respondent University directed to allow petitioners to take ensuing semester end term examination in accordance with its rules.

Sanwal Ram v. *University of Delhi & Ors* *310*

—Article 226—Petition seeking directions to respondents to grant full pension to the petitioner—Petitioner superannuated while holding the post of Commandant i.e. on attaining the age of 55 years—For purpose of full pension, qualifying service is 30 years and not 33 years—Respondent does not dispute that full pension has to be paid to all those who have rendered 33 years of qualifying service—Held—33 years qualifying service for pension is premised on the entitlement of civil servants to service till the age of 58 years and if the Government fixes a lower age when an employee would superannuate eg. 55 years for a Commandant, the span of qualifying service has to be lessened by such number of years as is the differential between 58 years and the lesser tenure—Accordingly, we allow the writ petition and issue a mandamus to the respondents to pay full pension to the petitioner within 8 weeks from today together with interest @ 9% p.a.

M.C. Sharma v. *UOI & Ors.* *491*

— Article 226—Delhi School Education Act, 1973—Section 10—Petition challenging the order of Deputy Director Education wherein date is fixed as 1st January 1981 for purpose of computing pension of petitioner—Petitioner claims date ought to have been 1st May, 1976—Petitioner was

appointed as a TGT (Science) on 1st January, 1976 in DTEA Higher Secondary School, Janakpuri, New Delhi—The school was unrecognized at that time—The school was granted recognition on 1st May, 1976—The "grant-in-aid" was given to school from 1st May 1981—The Director of Education contends that benefit of pension is made available to an employee on the basis of certain contributions towards that benefit, both by the school as well as by the government—Those contributions towards pension by the government only commenced after grant-in-aid—School also started contribution only after grant-in-aid—Director of Education has no liability towards payment of pension for a period for which, no contribution has been received—Held—A bare reading of Section 10 (1) of the Act clearly, states inter alia, that the scale of pension of the employees of, "any recognized private school" shall not be less than those of the employees of corresponding status in schools run by the appropriate authority—Admittedly, in schools run by the Authority, there is no question of any grant-in-aid being bestowed to them and employees of such schools are entitled to pension, regardless of any considertation of the nature of grant-in-aid to the school—Thus, if grant-in-aid cannot be a consideration for giving the benefit of pension to an employee of a school run by the Authority, and the employees of recognized private schools, such as the petitioner, have been accorded parity with them by the Statute, then the issue of grant-in-aid must also not be allowed to affect the pensionary benefits to be granted to the employees of recognized private schools—As discussed above, the date of grant-in-aid has nothing to do with calculating the pension of petitioner—Till the time no grant-in-aid was given to the school, the liability to pay the pension was of the school only—The Director of Education therefore directed to take into account the petitioner's service from the date on which the school was given recognition, i.e. From 1st May, 1986 and compute the pension accordingly, and to

disburse the petitioner's pension every month on that basis henceforth.

—`Writ Petition—Article 226—Right to Information Act, 2005—Respondent applied under RTI Act for copy of optical response sheet (ORS) of Joint Entrance Examination, 2010 (JEE 2010) and Graduate Aptitude Test 2010 (GAT 2010)—Denied—Challenged before Centre Information Commissioner (CIC)—CIC directed petitioner to supply the copies—Filed Writ Petition against the order of CIC—Contended fiduciary relationship between the petitioner and evaluator—Under Section 8 (1) (e) of RTI Act—The photocopy of ORS not to be disclosed—If the request for providing photocopies acceded to it Would open flood gate of such applications by other candidates—System would collapse—Further contended—Evaluation final and no request for evaluation can be entertained—Court observed: Admittedly evaluation carried out through computerised system not manually—The fiduciary relationship between IIT and Evaluator does not arise—No prejudice caused to IIT by providing a candidate a photocopy—Information not sought by third party—The apprehension of flood gate exaggerated—No difficulty if the IIT confident that system of evaluation foolproof—It is unlikely each and every candidate would want photocopy of ORS—Held—Present case was not about request of re-evaluation—The right of a candidate sitting for JEE or GATE to obtain information under RTI Act statutory—It cannot be waived by a candidate on the basis of a clause in the Information Brochure—The condition in the brochure that no photocopy of ORS shall be provided subject to RTI Act cannot override RTI Act. Writ Petition dismissed.

— Article 226—Letter Patent Appeal—Appellant denied permission to appear in examination for shortage of attendance—Said denial challenged—Appellant also challenged appointment of Dean of University of Law and Legal Studies—Said challenge rejected—Appellant only attended 28.5% of classes against 75% requirement—Appellant permitted to appear in examination—Result kept in sealed cover—Appellants contended that attendance record of college forged and fabricated—Appellant claimed entitled for remission of recorded attendance for participation in Commonwealth Games. Hence instant appeal—Held; Need for attending requisite lectures for LLB course repeatedly highlighted and emphasized—Student of law has to be dedicated person required to take study of law seriously—College records—No dispute that minimum requirement is 75% Difficult to accept that attendance records forged—Cannot be challenged on mere ipse dixit—Writ Courts not to get embroiled in such factual disputes—Credit for attending Commonwealth Games even if granted, Appellant to still have shortfall in attendance—Appellant allowed to sit for examination provided meeting of eligibility criteria—Allegations against Dean, School of Law and Legal Studies constitutes a distinct and separate cause of action—Cannot be ground for granting grace attendance to Appellant—Said question left open.

Vibhor Anand v. *Vice Chancellor, Guru Gobind Singh I.P. University & Ors.* *654*

— Article 226 & 227—Personal with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995—Section 47—Petition challenging the order passed by the Central Administrative Tribunal, Principal Bench dated 18.05.2010 allowing the petition of the respondent quashing the order of pre-mature retirement—Directions given to reinstate the respondent in service on deemed basis with all consequential benefits—Respondent was employed as

conductor with the petitioner—He met with an accident on 07.01.1991 and remained admitted in the hospital upto 07.06.1991—On 08.06.1991, respondent joined his duties after getting medical fitness certificate—Posted in Ticketing Section—Working upto 25.01.1992—Sent to DTC Medical Board for examination—Medical Board declared him medically unfit—On his application, he was again examined by another Board and was declared permanently unfit for the post of conductor—He preferred a petition seeking appropriate directions not to terminate his service—Court directed that he be examined again—Medical Board declared the respondent unfit for the post of conductor permanently—Directions issued to examine the respondent's case and provide such employment to him protecting his salary—No alternative job was available—Competent Authority approved the compensation amount of Rs. 39,278,40/-—Not collected by the respondent—He moved contempt petition, which was dismissed—Respondent moved another writ petition challenging the order declaring him unfit for the post or any other lower post and his premature retirement—On account of jurisdiction, writ was transferred to Central Administrative Tribunal—Order passed—Petition—Held—Section 47 of the Act casts statutory obligation on the employer to protect employee acquiring disability during service—Petitioner ought to have considered the case of respondent under the aforesaid Act—The petitioner has not been able to show as to how Section 47 of the Act is not applicable to the facts and circumstances of the case either before the Tribunal or before this Court despite the fact that full liberty was given to the petitioner—Rather, considering the facts and circumstances of the case, a duty was cast upon the petitioner to consider on its own the case of the respondent under Section 47 of the Act—The Tribunal relying upon the provisions of Section 47 of the Act as well as judgments of the Supreme Court in Kunal Singh v. Union of India (supra) has allowed the petition

of the respondent and has granted relief to him as has been stated above—In view of above discussion, no illegality or irrationally is seen in the order of the Tribunal which calls for interference of this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

Delhi Transport Coporation v. *Sh. Manmohan* *663*

— Article 226—Central Reserve Police Force Act, 1949—Section 11—Petition assailing the order dated 17.04.1990, whereby she was removed from service after departmental inquiry and the appellate order dated 03.08.1990, whereby her appeal against the removed order had been dismissed—Petitioner joined the Central Reserve Police Force as Mahila Sub-Inspector in 1986—In October 1987, petitioner sought permission from the department to appear in the Combined States Service Examination, 1987—Permission granted—Petitioner was granted one day casual leave for 08.02.1988 to appear in the aforesaid examination—On 08.02.1988, Kumari Mamta Sabharwal, reportedly a friend and neighbour of the petitioner was caught impersonating the petitioner and writing her answer sheet in the examination—Kumari Mamta Sabharwal gave a handwritten statement admitting that she was impersonating as the petitioner thereby defrauding the examination authorities on the request/advice of petitioner—Inquiry conducted—Petitioner held guilty and order passed—Petition—Held—Failure to maintain integrity and honesty in public examination would be covered within the meaning of expression "other misconduct" as defined under Section 11 (1) of the CRPF Act, 1949—The petitioner has not ceased to be a member of the force on 8th February, 1988 when she was appearing in the Combined State Service Examination, 1987—The petitioner though not on duty, did not cease to be a member of the force—The petitioner is a member of the disciplined force—It needs no elaboration that integrity and

dignity of the service with which she is employed, is required to be observed at all times—The petitioner who was the sub-inspector, was taking the examination as an in service candidate—Causing any person to impersonate the service personnel in an examination with dishonest intention is reprehensible and certainly misconduct of the highest level—The challenge is solely premised on the plea that the acts attributed to the petitioner are not relatable to her service—This submission is wholly misplaced. Held: No legally tenable grounds of judicial review.

Poonam Sharma v. *Union of India & Ors.* *739*

— Article 217(2)(b)—Appointment and conditions of office of Judge of High Court—Petition filed against recommendation of collegium recommending appointment of Respondent No.3 as Judge of High Court—Petitioner contended that Respondent No.3 not practicing advocate at time of recommendation—Petitioner appointed as member of Income Tax Appellate Tribunal—Non-fulfillment of qualification laid down in Article 217(2)(b) alleged—Hence present petition. Held- Article 217(2) postulates two sources for elevation as Judges of High Court—Judicial office for at least ten years or has been advocate for at least ten years—Two sources independent and separate—Expression "has for at least ten years been an advocate" does not mean appointee must be advocate on date of recommendation or at time of appointment—Past experience as Advocate not obliterated upon appointment as Member of Tribunal—Advocate with 10 years practice—Appointed as member of Tribunal—Will be forced to resign and formally renew his license to get over objection—Eligibility and "suitability"—Difference explained—Eligibility does not make individual suitable for post—Petition lacking merits—Hence, dismissed.

D.K. Sharma v. *Union of India & Ors.* *769*

CONTRACT ACT, 1872—Section 25—Aggrieved appellant with dismissal of his suit being barred by limitation filed appeal urging communication dated 25.09.2004 between parties extended period of limitation by virtue of Section 18 of Limitation Act and Section 25 of Contract Act—As per Respondent suit barred by limitation as partial amount sent by Respondent with covering letter dated 21.05.1998 as well as communication dated 25.09.2004, did not extend period of limitation as alleged acknowledgment was beyond period of limitation since suit was filed on 08.04.2008—Held:- A plain reading of Clauses (3) of Section 25 of the Indian Contract Act makes it clear that a promise to pay a time barred debt is a condition precedent for application of the Section—Communication dated 25.09.2004 falls short of ingredients of Section 25(3) of the Act as Respondent clearly stated that he does not wish to make any meaningless commitments at that stage nor he stated that he would pay suit amount in future.

Promod Tandon v. *Anil Tandon* *762*

DELHI FINANCIAL CORPORATION (STAFF) REGULATIONS, 1961—Regulations 20—Petition challenging the order dated 24th April, 1996 vide which the appellant was retired prematurely—The Regulation 20 is unconstitutional—The regulation is arbitrary and hit by Article 14 of the Constitution of India as there is no guidance in the said provision and confers unguided, unfettered and unbridged powers on the authority to prematurely retire a person—Held—The present Regulation, is similar to the Regulations which have been struck down as ultra vires by the Apex Court in various decisions—It suffers from the same fallibility and vulnerability, which has repeatedly prompted and compelled the Supreme Court to strike down the unguided power of compulsory retirement—In view of the aforesaid, unfettered, unbridled and unguided power has been conferred on the authority to pass the order of compulsory retirement and,

accordingly, we declare the said provisions to be unconstitutional—Order of compulsory retirement set aside—Benefit restricted to 40% of back wages with all consequential benefits including pension after adjusting the benefits already availed.

Mahinder Kumar v. *Delhi Financial Corporation* *151*

DELHI HIGH COURT ACT, 1966—Section 10—Appeal—Maintainability of—Plaintiff filed an application for appointment for Local Commissioner for carrying out measurement of work done by plaintiff—Ld. Single Judge opined—Appropriate course would be to get measurements done on its own level from expert independent body—Local commissioner not required to be appointed—Dismissed the application—Preferred appeal against the order—Respondent contended—Real purpose behind the application to nullify the joint inspection carried out by parties—Court after going through the record, found substance in the arguments—Observed—Plaintiff's refusal to carry out inspection/measurement by its own engineer indicative of oblique and malafide purpose behind the application for appointment of local co ` mmissioner—Carrying out measurements not only method by which plaintiff could prove the extent of work done by it—Must have possessed sufficient documents of its own showing—Deployment of man power, utilisation of material and resources at site, to be dealt with in detail in arbitration proceedings—Held—The appeal is maintainable against an interlocutory order having traits and traping of finality—Court possesses power for appointment of Local Commissioner but to exercise such power depend on the peculiarity of factual matrix—It can scarcely be claimed that local commissioner should be appointed to nullify the joint measurements in the face of offer of defendant to plaintiff to carry out measurements on its own—Appeal dismissed.

Prashant Projects (P) Ltd. v. *Indian Oil Corpn. Ltd.*.. *586*

DELHI HIGH COURT RULES—Chapter 13-A—Rule 2 & 7—Dying Declaration—As per prosecution case appellants sprinkled kerosene oil on Rashida (deceased) wife of appellant Rashid and ignited her with a matchstick as a result of which she died of burn injuries—This done because Rashid had illicit relations with appellant Mehtab—At the time of incident Rashida was 6 months pregnant—Four Dying Declarations recorded, three were the alleged histories recorded by the three separate doctors on MLC, fourth recorded by ASI PW13—Held, no motive made out—Language of fourth Dying Declaration was not of an ordinary person but of the police officer (PW13) himself—Noting of three doctors on MLC as history of patient was that of suffering accidental burn—Because of discrepancies, testimonies of witnesses regarding recording of Dying Declarations cannot be believed—No Magistrate called to record Dying Declaration despite Rashida having died 15 days after incident—Dying Declaration not attested by anyone—Trial Court wrongly convicted accused solely on basis of fourth dying declaration which was the only evidence against him—Copy of judgment directed to be sent to the Commissioner of Police to take steps in accordance with law in respect of PW13 and to ensure that investigations are not conducted improperly as done in present case—Appellants acquitted—Appeal allowed.

Rashid & Ors. v. *State Govt. of NCT of Delhi* *571*

DELHI RENT CONTROL ACT, 1958—Section 4, 6 and 9—Petitioner demolished residential construction for reconstruction of a new building on plot of land—Assessing authority held rateable value of land which is not built upon but is capable of being built upon and/or is in process of erection, is to be fixed at 5% of estimated capital value of land—Statutory appeal against order of assessing authority dismissed by ADJ—Order challenged before High Court—Plea

taken, principles of parity are applicable irrespective of whether rateable value is determined on basis of standard rent or actual rent—Section 63 (1) makes no distinction between self occupied and let out premises—Provisions of Section 63 (2) apply only to land which has not been built up earlier and would not apply to land which has already been built upon and building where upon is demolished for purpose of re-construction—Per contra plea taken, even before Sec. 4, 6 and 9 of DRC Act were declared invalid, assessment of rateable value of land on which building existed was different from assessment of rateable value of land alone, provisions of DRC Act were not applicable to open plot of land, principle of standard rent was not applicable to vacant land—Vacant land stands in its own class and is not to be governed by principles of parity—Once statute provided mode of assessment of rateable value of vacant land at 5% of capital value thereof, other modes of assessment are excluded—Held—Literal reading of Section 63 (2) does not limit scope thereof to only virgin land—Expression used, is "the rateable value of any land" Which would also include land which was earlier built upon and building therefrom has been demolished—Only qualification for a land to fall under Section 63 (2) is that same is not built upon but is capable of being built upon—Only provision in statute for determination of rateable value of vacant land is Section 63 (2) and if same were to be held to not apply to land, though vacant but having been built upon earlier, it would create a void which is not desirable—There is no basis or rationale for discriminating between land which has earlier been built upon and building whereon has been demolished and land which has never been built upon—There can be no parity between built up property and vacant land—Municipal statute does not provide for parity—It provides for determination of rateable value as per rent at which property might reasonably be expected to be

let—In supervisory jurisdiction, Court can refuse to interfere even where petitioner has made out a case.

Nakul Kapur v. *NDMC & Ors.* *510*

— Sections 4—Petitioners were tenant in shop measuring 15'x8' (120 sq. ft.) in property bearing no. E-3, Kalkaji, New Delhi at a monthly rent of Rs. 100/-—Respondent purchased some portion of the building including the premise in question from the previous owner—Petitioners attorned the respondent as landlord/owner and started paying rent to him—The respondent is a practicing Chartered Accountant—Respondent filed a petition for eviction u/s 14 (1) (e) and Section 25-B of the Act that premises are required for his bonafide requirement—Contented by the petitioner that landlord is not sure for what purpose the premises is required and alternative accommodation is available to him—Respondent submitted that he has no other suitable commercial accommodation; other property is a residential property and is fully occupied—No space is available for respondent there—Held—The respondent/ landlord was in bonafide need of the rented premises because the need of the respondent was to use that rented premises for his personal commercial use and the other property available to the respondent in Greater Kailash was purely residential property which did not fulfill the requirement of respondent as he could not start his work from there—Petitioners failed to raise any triable issue, which if proved, might disentitle the respondent from getting an order of eviction in their favour—The trial court has given a detailed and reasoned order which does not call for any interference nor the same suffers from any infirmity or erroneous exercise of jurisdiction.

Girdhari Lal Goomer v. *P.P. Gambhir* *553*

— Section 2(i)—"Premises"—Meaning and interpretation—Appellant filed suit for, inter alia, possession of suit plot—Held,

Respondent was tenant of plot with built up portion—Respondent entitled to protection of Delhi Rent Control Act, 1958 ("DRC Act")—Suit dismissed—Hence present appeal. Held—Issue limited to whether the "plot" fell within meaning of "premises" 2(i), DRC Act—Only land or land with temporary structure will not fall within definition of "premises"—Built up area temporary structure—Not "premises"—Since at best there was only temporary structure, Respondent not entitled to protection of DRC Act—Temporary structure such as Khoka/tin shed temporary structure—DRC Act not applicable—Built up portion can also be temporary structure—Impugned judgment set aside—Appeal allowed.

Shri Harish Chander Narula & Anr. v. *Shri Purshotam Lal Gupta* *293*

DELHI SCHOOL EDUCATION RULES-RULE 64(1)(B)—Aided Minority Institute—Powers of management and administration—Petitioners challenged the circular dated 07.12.2001 by GNCTD in furtherance of Rule 64(1)(b) being not binding on them and be declared void. Held—Rule 64(1)(b) and consequential circulars declared not binding in view of the judgment of the Supreme Court in *Sindhi Education Society & Anr. v. Chief Secretary, GNCTD & Ors.* (2010) 8 SCC 49.

Gurdwara Shri Guru Singh Sabha & Anr. v. *Union of India & Ors.* *558*

— Proof of possession—Recording of memo/panchnama is proof of possession—Possession memo proved in instant case—Same cannot be assailed by way of suit.

Shri Ganga Dutt v. *Union of India & Ors.* *677*

— Section 10—Petition challenging the order of Deputy Director Education wherein date is fixed as 1st January 1981 for

purpose of computing pension of petitioner—Petitioner claims date ought to have been 1st May, 1976—Petitioner was appointed as a TGT (Science) on 1st January, 1976 in DTEA Higher Secondary School, Janakpuri, New Delhi—The school was unrecognized at that time—The school was granted recognition on 1st May, 1976—The "grant-in-aid" was given to school from 1st May 1981—The Director of Education contends that benefit of pension is made available to an employee on the basis of certain contributions towards that benefit, both by the school as well as by the government—Those contributions towards pension by the government only commenced after grant-in-aid—School also started contribution only after grant-in-aid—Director of Education has no liability towards payment of pension for a period for which, no contribution has been received—Held—A bare reading of Section 10 (1) of the Act clearly, states inter alia, that the scale of pension of the employees of, "any recognized private school" shall not be less than those of the employees of corresponding status in schools run by the appropriate authority—Admittedly, in schools run by the Authority, there is no question of any grant-in-aid being bestowed to them and employees of such schools are entitled to pension, regardless of any considertation of the nature of grant-in-aid to the school—Thus, if grant-in-aid cannot be a consideration for giving the benefit of pension to an employee of a school run by the Authority, and the employees of recognized private schools, such as the petitioner, have been accorded parity with them by the Statute, then the issue of grant-in-aid must also not be allowed to affect the pensionary benefits to be granted to the employees of recognized private schools—As discussed above, the date of grant-in-aid has nothing to do with calculating the pension of petitioner—Till the time no grant-in-aid was given to the school, the liability to pay the pension was of the school only—The Director of Education therefore directed to take into account the petitioner's service from the

date on which the school was given recognition, i.e. From 1st May, 1986 and compute the pension accordingly, and to disburse the petitioner's pension every month on that basis henceforth.

HINDU MARRIAGE ACT, 1955—Section 24—Petitioner challenged order passed on application under Section 24 of Act granting maintenance @Rs. 10,000/- to Respondent on ground his income was only Rs.6,200/- per month and proof of his income, appointment letter and salary slip placed on record were ignored by learned trial Court—Per-contra, Respondent urged, petitioner willfully concealed material documents as it was extremely improbable that out of bare earnings of Rs.6,200/- he would be looking after his parents, two unmarried sisters and would be maintaining Honda city car received by him at time of marriage—Held:- Although there cannot be an exhaustive list of factors, which are to be considered in guessing the income of spouses, but order based on guess work cannot be arbitrary, whimsical or fanciful—While guessing income of the spouse, when sources of income are either not disclosed or not correctly disclosed, Court can take into consideration amongst others following factors; (i) Life style of spouse; (ii) Amount spent at time of marriage and manner in which marriage performed: (iii) Destination of honeymoon; (iv) Ownership of motor vehicles; (v) Household facilities; (vi) Facility of driver, cooking and other held; (vii) Credit cards; (viii) Bank Account details; (ix) Club membership; (x) Amount of insurance premium paid; (xi) Property or properties purchased; (xii) Rental income; (xiii) Amount of rent paid; (xiv) Amount spend on travel/holiday; (xv) Locality of residence; (xvi) Number of mobile phones; (xvii) Qualification of spouse; (xviii) School(s) where the child or children are studying when parties were residing together; (xix) Amount spent on fees and other expenses incurred; (xx)

Amount spend on extra-curricular activities of children when parties were residing together; (xxi) Capacity to repay loan.

Jayant Bhargava v. *Priya Bhargava* *345*

INCOME TAX ACT, 1961—Section 52(2)—Income Tax (Appellate Tribunal) Rules, 1963—Rule 29—Code of Civil Procedure, 1908—Order 41 Rule 27 (1)—Assessing Officer (AO) rejected claim of assessee for management expenses—CIT(A) dismissed appeal of assessee—Assessee preferred appeal before ITAT—Alongwith appeal, application filed by assessee for further evidence which he did not produce before AO and CIT(A)—ITAT admitted that evidence and remitted case back to AO to decide issue after considering said additional evidence—Order challenged before High Court—Plea taken, under no circumstance, such additional evidence could be permitted—There was hardly any justifiable reason for permitting production of additional evidence—Rule 29 precludes producing additional evidence before Tribunal—Rule has limited scope and permits Tribunal production of any document or witness or affidavit to enable it to pass orders or for any other substantial cause—Assessee had no right to move application for additional evidence and Tribunal did not *suo moto* thought it proper to ask for production of these documents—Per contra plea taken, Rule 29 is to be given liberal interpretation as purpose behind Rule was to do substantial justice and to prevent failure of justice—Held—Discretion lies with Tribunal to admit additional evidence in interest of justice, once Tribunal forms opinion that doing so would be necessary for proper adjudication of matter—This can be done even when application is filed by one of parties to appeal and need not be *suo moto* action of Tribunal—Once it is found that party intending to lead evidence before Tribunal for first time was prevented by sufficient cause to lead such evidence and that this evidence would have material bearing on issue which needs to be decided by Tribunal and ends of

justice demand admission of such evidence, Tribunal can pass order to that effect—True test in this behalf is whether Appellate Court is able to pronounce judgment on materials before it without taking into consideration additional evidence sought to be adduced—Legitimate occasion for exercise of discretion is not before Appellate Court hears and examines case before it, but arises when on examining evidence as it stands, some inherent lacuna or defect becomes apparent to Appellate Court coming in its way to pronounce judgment—Reference is not to pronounce any judgment or judgment in a particular way, but is to pronounce its judgment satisfactory to mind of Court delivering it—Reason given by assessee for additional evidence was that these records could not be produced before lower authorities due to non retrievability of email because of technical difficulties—Ground pleaded by assessee was not confronted by Revenue—Tribunal found requirement of said evidence for proper adjudication of matter—Once Tribunal predicated its decision on that basis, no reason to interfere with the same—Appeal dismissed.

The Commissioner of Income-Tax-IV v. *Text Hundred India Pvt. Ltd.* *475*

INCOME TAX (APPELLATE TRIBUNAL) RULES, 1963—Rule 29—Code of Civil Procedure, 1908—Order 41 Rule 27 (1)—Assessing Officer (AO) rejected claim of assessee for management expenses—CIT(A) dismissed appeal of assessee—Assessee preferred appeal before ITAT—Alongwith appeal, application filed by assessee for further evidence which he did not produce before AO and CIT(A)—ITAT admitted that evidence and remitted case back to AO to decide issue after considering said additional evidence—Order challenged before High Court—Plea taken, under no circumstance, such additional evidence could be permitted—There was hardly any justifiable reason for permitting production of additional evidence—Rule 29 precludes

producing additional evidence before Tribunal—Rule has limited scope and permits Tribunal production of any document or witness or affidavit to enable it to pass orders or for any other substantial cause—Assessee had no right to move application for additional evidence and Tribunal did not *suo moto* thought it proper to ask for production of these documents—Per contra plea taken, Rule 29 is to be given liberal interpretation as purpose behind Rule was to do substantial justice and to prevent failure of justice—Held—Discretion lies with Tribunal to admit additional evidence in interest of justice, once Tribunal forms opinion that doing so would be necessary for proper adjudication of matter—This can be done even when application is filed by one of parties to appeal and need not be *suo moto* action of Tribunal—Once it is found that party intending to lead evidence before Tribunal for first time was prevented by sufficient cause to lead such evidence and that this evidence would have material bearing on issue which needs to be decided by Tribunal and ends of justice demand admission of such evidence, Tribunal can pass order to that effect—True test in this behalf is whether Appellate Court is able to pronounce judgment on materials before it without taking into consideration additional evidence sought to be adduced—Legitimate occasion for exercise of discretion is not before Appellate Court hears and examines case before it, but arises when on examining evidence as it stands, some inherent lacuna or defect becomes apparent to Appellate Court coming in its way to pronounce judgment—Reference is not to pronounce any judgment or judgment in a particular way, but is to pronounce its judgment satisfactory to mind of Court delivering it—Reason given by assessee for additional evidence was that these records could not be produced before lower authorities due to non retrievability of email because of technical difficulties—Ground pleaded by assessee was not confronted by Revenue—Tribunal found requirement of said evidence for proper adjudication of

matter—Once Tribunal predicated its decision on that basis, no reason to interfere with the same—Appeal dismissed.

The Commissioner of Income-Tax-IV v. *Text Hundred India Pvt. Ltd.* *475*

INDIAN CONTRACT ACT, 1872—Section 128, 134—Regular second appeal against Appellate Court's order endorsing Trial Court's judgment dismissing suit for recovery by plaintiff/ Appellant on the basis that suit stood abated in view of Section 134—Defendant 1 Principal debtor expired during pendency, suit stood abated qua Defendant No. 1—Defendant no.2 Guarantor—Whether in view of Section 128 and 134 of Contract Act, suit survives against Defendant 2—Held—Since suit abated against the principal debtor the result would be that suit is dismissed qua him. The question of continuation of suit against Guarantor does not arise—Claim against Guarantor not divisible and not an independent claim Section 134 applicable, surety stood discharged. Appeal dismissed.

State Bank of Patiala v. *S.K. Mathur* *160*

— Code of Civil Procedure Section 39, Rule 1, 2—Time is essence of contract—Interpretation—Defendant being owner of first floor and 2/9th share holder in suit property—Entered into Agreement to Sell with Plaintiff for the said share—Defendant had two daughters and one son—Partition suit pending between them—Case decreed one basis of compromise—Defendant acquired first floor—Each child got 2/9th share each—Understanding arrived at between daughters and Defendant for sale of share—Said sale not materialized—Suit for specific performance against daughters filed—Dismissed—Appeal pending—One daughter entered into agreement to sell her share to outsider—Defendant filed suit against daughter under Section 44, Transfer of Property Act, 1882—Defendant also acquired 2/9th share of son—Entire ground floor in in occupation of Official Liquidator appointed

by Company Court—Plaintiffs filed suit for specific performance of Agreement to Sell—Application for permanent injunction also made—Total sum of Rs. 1 crore already paid by Plaintiffs—Application under Order 39 dismissed—Defendant directed to deposit sum of Rs. 7 crore with Registrar General—Defendant restrained from parting with share in suit property—Hence two appeals filed—Plaintiff claiming injunction and Defendant alleging Rs. 7 crore to be excessive.

— Parties specifically agreed that Plaintiff entitled to negotiate with daughters without affecting sale price as soon as possible—Parties further agreed that after purchase of share of daughters, transaction with Defendant to be completed within three months—Consideration to remain 7 crores irrespective of transaction amount with daughters—Purchase of share of daughters condition precedent for implementation of agreement—Intention of parties to complete transaction within shortest possible period—However no agreement reached between daughters and Plaintiffs—Four year elapsed since original Agreement to Sell.

Smt. Rani Sharma v. *Ms. Sangeeta Rajani & Others*..... *75*

— Rightly held that essence of clause providing for shortest possible time had already elapsed—Period of four years rightly held to be too long—Defendant, *prima facie* entitled to say that sale price had become unrealistic—Defendant rightly unwilling to suffer transaction at earlier price—Factum of increase in price of suit property admitted by both parties.

Smt. Rani Sharma v. *Ms. Sangeeta Rajani & Others*..... *75*

— Restraining Defendant from dealing with suit premises—Reliance placed on ratio of KS Vidyandan—When delay makes specific performance inequitable even where time not essence of contract—Contract to be performed with reasonable time—Reasonable time determined by looking at surrounding

circumstances.

Smt. Rani Sharma v. *Ms. Sangeeta Rajani & Others*..... *75*

— Period of four years lapsed—Prices of suit premises have arisen—Co owners have created third party interests in their shares—Completion of original transaction beyond implementation and unenforceable—Defendant cannot be made to suffer the transaction.

Smt. Rani Sharma v. *Ms. Sangeeta Rajani & Others*..... *75*

— Injunction—Rightly not granted—In given circumstances neither prima facie case nor balance of convenience lies in favour of Plaintiff—Irreparable loss—Defendant offered to deposit sum of Rs. 7 crore—Offer made by Defendant herself—No infirmity in the same.

Smt. Rani Sharma v. *Ms. Sangeeta Rajani & Others*..... *75*

— Code of Civil Procedure Section 39, Rule 1, 2—Time is essence of contract—Interpretation—Defendant being owner of first floor and 2/9th share holder in suit property—Entered into Agreement to Sell with Plaintiff for the said share—Defendant had two daughters and one son—Partition suit pending between them—Case decreed one basis of compromise—Defendant acquired first floor—Each child got 2/9th share each—Understanding arrived at between daughters and Defendant for sale of share—Said sale not materialized—Suit for specific performance against daughters filed—Dismissed—Appeal pending—One daughter entered into agreement to sell her share to outsider—Defendant filed suit against daughter under Section 44, Transfer of Property Act, 1882—Defendant also acquired 2/9th share of son—Entire ground floor in in occupation of Official Liquidator appointed by Company Court—Plaintiffs filed suit for specific performance of Agreement to Sell—Application for permanent injunction also made—Total sum of Rs. 1 crore already paid

— Section 34—Entires made in books of accounts—Admissible as relevant evidence—One M/s JC Enterprises a partnership firm—Dissolved vide dissolution deed on 01.04.1997—Thereafter, Plaintiff running firm as proprietorship concern—Entered into oral agreement with Defendant—Defendant appointed as stockist of lotteries on whole sale rate basis—Plaintiff required to dispatch lottery tickets to Defendant as per requirement of Defendant—Defendant required to make payment within one week from date of draw—In default Plaintiff entitled to interest—Plaintiff alleged that Defendant is liable to pay total sum of Rs. 43,82,473- Hence present suit for recovery. Held:

M/s. J.C. Enterprises (Regd) v. *Ranganatha Enterprises* *128*

— Section 34—Entries made in books of accounts—Admissible as relevant evidence—Rationale—Regularity of habit, difficulty of falisification, fair certainty of ultimate detection—However, entries alone not sufficient to charge person with liability—Must be corroborated.

M/s. J.C. Enterprises (Regd) v. *Ranganatha Enterprises* *128*

— Sections 91&92—Suit filed for specific performance—Parties entered into agreement to sell for sale of a DDA flat eligible for conversion on charges as per policy—At the time of agreement property in possession of tenant—Agreed sale was to be completed on vacation of property by tenant—Vacation of Flats responsibility of Plaintiff (Respondent)—Vacant possession was to be handed over by 30th June, 2004—Plaintiff (Appellant) also undertook to get the flat converted freehold in the agreement (clause 4)—Fee/charges for conversion to be borne by Defendant (Appellant)—Suit decreed in favour of Plaintiff (respondent) inter-alia directing

the Defendant (Appellant) to get the Flat converted to freehold and then get the sale deed executed—Submitted on behalf of Defendant (Appellant) on the basis of pleadings and oral testimony, Plaintiff (Respondent) responsible for conversion of property to freehold as per oral agreement—Also submitted Appellant being an old lady was not in position to run around to secure the necessary permission for conversion—Held by Appellate Court, provisions of Evidence Act exclude any oral agreement or statement for purpose of contradicting varying or subtracting from its terms after the document has been produced to prove the its terms—Appeal dismissed.

Shailendra Nath Endlay & Anr. v. *Kuldip Gandotra* ... *783*

INDIAN PENAL CODE, 1860—Section 302 and 34—All five appellants challenged their conviction under Section 302 IPC read with Section 34 IPC—It was urged on behalf of four appellants, they cannot be made liable for acts of others with aid of Section 34 IPC as prosecution version was that quarrel took place all of a sudden on spur of moment without any pre concert or pre planning and they were not armed with any weapon—On other hand, it was contended on behalf of the State, there were some minor variations and discrepanies here and there in testimonies of three eye witnesses which do not affect the main substratum of prosecution version—Held:- In criminal law, every accused is responsible for his own act of omission or ommission—This rule is subject to exception of vicarious liability enshrined under Section 34 IPC—Direct proof of common intention is seldom available and therefore such intention can only be inferred from the facts and circumstances of each case.

Murari v. *State* *422*

— Section 307—Aggrieved by judgment of conviction under Section 307 of Act and order on sentence to undergo rigorous

imprisonment for 10 years and fine of Rs.5,000/-, in default of payment of fine to undergo rigorous imprisonment for one year, appellant has challenged order only qua quantum of sentence—It was urged period of sentence be modified to period already undergone as case of appellant does not fall within ambit of an 'intention' to commit an act that is likely to cause death but an intention to cause an injury which may probably cause death—Held:- To justify a conviction under this section it is not essential that bodily injury capable of causing death should have been inflicted—Although nature of injury actually caused may often give considerable assistance in coming to a finding as to intention of deceased, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds—Section makes a distinction between an act of accused and its result, if any—Such an act may not be attended by any result so far as person assaulted is concerned, but still there may be cases in which the culprit would be liable under this section—It is not necessary that injury actually caused to victim of assault should be sufficient under ordinary circumstances to cause death of person assaulted—Intention of appellant was clear from fact that after shooting once at thigh of PW1, appellant again shot him and also asked his accomplice to shoot him and it was mere co-incidence that both bullets did not hit Complainant as he ran into house—Order of sentence modified, appellant to undergo Rigorous Imprisonment for a period of 8 years and fine of Rs.30,000/- out of which if realised Rs. 25,000/- be given as compensation to complainant.

Harish Chawla v. *State* *447*

— Section 302, 316/34—Delhi High Court Rules—Chapter 13-A—Rule 2 & 7—Dying Declaration—As per prosecution case appellants sprinkled kerosene oil on Rashida (deceased) wife of appellant Rashid and ignited her with a matchstick as a

result of which she died of burn injuries—This done because Rashid had illicit relations with appellant Mehtab—At the time of incident Rashida was 6 months pregnant—Four Dying Declarations recorded, three were the alleged histories recorded by the three separate doctors on MLC, fourth recorded by ASI PW13—Held, no motive made out—Language of fourth Dying Declaration was not of an ordinary person but of the police officer (PW13) himself—Noting of three doctors on MLC as history of patient was that of suffering accidental burn—Because of discrepancies, testimonies of witnesses regarding recording of Dying Declarations cannot be believed—No Magistrate called to record Dying Declaration despite Rashida having died 15 days after incident—Dying Declaration not attested by anyone—Trial Court wrongly convicted accused solely on basis of fourth dying declaration which was the only evidence against him—Copy of judgment directed to be sent to the Commissioner of Police to take steps in accordance with law in respect of PW13 and to ensure that investigations are not conducted improperly as done in present case—Appellants acquitted—Appeal allowed.

Rashid & Ors. v. *State Govt. of NCT of Delhi* *571*

— Section 302—Case of the prosecution that appellant and deceased were neighbours—On the night of the incident, deceased disturbed by high volume of sound of tape-recorder played by appellant—Deceased woke up and objected to the high volume of music—Appellant slapped deceased—Deceased along with sons PW2 and PW3 went to Police Station to lodge report against appellant, on way, appellant armed with knife attacked deceased—PW2 and PW3 (sons of deceased) removed their father to health centre where he expired—Trial Court convicted appellant u/s 302—Held, testimony of two eye-winesses is consistent on the manner of inflicting injuries on the person of deceased—Evidence proved that three injuries

mentioned in post mortem report on the body of deceased were inflicted by the appellant with a knife—First injury inflicted on the back, second on the shoulder and third on the leg—Neither of the injuries individually or taken together were opined to be sufficient to cause death in the ordinary course of nature—Appellant had intention of causing of such bodily injury as was likely to cause death—Not prosecution case that there was any previous enmity between appellant and deceased—Considering that injuries were not inflicted on the vital parts of the body, it cannot be said that appellant had taken undue advantage or acted in a cruel manner—Appellant convicted u/s 304 Part I instead of Section 302.

Ram Saran @ Balli v. *State* *722*

— Section 302 and 120 B—Appellants preferred appeal against judgment and order on sentence convicting them under Section 302 and 120 B and directing them to undergo rigorous imprisonment for life and to pay fine of Rs.2,000/- each, in case of default to undergo simple imprisonment for two months each under both offences and both offences were directed to run concurrently—Appellants challenged judgments on grounds that no evidence pertaining to conspiracy of murder of deceased established and prosecution failed to prove motive to commit offences—Circumstances led by prosecution do not establish guilt thus, appellants entitled to be acquitted—Held:- Well known rule governing circumstantial evidence is that:- (a) circumstances from which inference of guilt of accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with principal fact sought to be inferred from those circumstance; (b) circumstances should be of a determinative tendency unerringly pointing towards guilt of accused; and (c) circumstances, taken collectively, are incapable of leading to any conclusion on a reasonable hypothesis, other than that of guilt of accused—There are two riders to aforesaid principle

namely, (i) there should be no missing links but it is only that every of links must appear on surface of evidence, since some of these links can only be inferred from proved facts and (ii) it cannot be said that prosecution must meet each and every hypothesis put forward by accused however far-fetched and fanciful it may be—Prosecution proved case under section 302 and 120 B against both appellants.

Smt. Guddo @ Sonia v. *State* *800*

— 498A/304B—Dying Declaration (DD)—Victim/deceased set herself on fire—Removed to hospital in PCR—On way victim told PCR official that her parents-in-law and brother-in-law harassed her for dowry and so she put herself on fire—In MLC victim gave history of pouring oil on herself and setting herself on fire as she was being forced by her inlaws to commit suicide—Subsequently statement was recorded by SDM—Victim succumbed to injuries—Charge-sheet filed u/s 304B/498A—Trial Court acquitted husband of victim/deceased and convicted mother-in-law and two brothers-in-law (appellants) u/s 498A/304B and sentenced accordingly—During pendency of appeal, mother-in-law died—Held, there were contradictions in three DDs made to PCR official, SDM and in MLC—As per statement to PCR official and history recorded on MLC, deceased poured kerosene oil on herself and set herself on fire while as per DD before SDM, deceased told in-laws that she would commit suicide and asked them for kerosene which they gave and she poured it over her body and her father-in-law set her on fire—SDM did not take opinion of doctor as to fitness of deceased for making statement, nor satisfied himself about her fitness to make statement—Doctor who certified deceased as fit for statement not present when statement recorded nor did doctor sign DD—Time when doctor certified deceased as fit for statement not proved by the prosecution—No evidence to show that DD recorded when deceased in fit state of mind thus DD cannot

be relied upon—Where DD is suspicious, it cannot be acted upon without corroborative evidence and where DD suffers from infirmity, it cannot be the basis of conviction—Where more than one DD and there is inconsistency between them, conviction cannot be based solely on DD—Father of deceased admitted in cross-examination that in none of the letters of deceased, she had written regarding demand of money or any article—From perusal of letters evident that grievance of deceased was about impotency, drug-addiction and un-employment of husband—Neither in DD nor in letters there is demand in relation to dowry soon before the death of deceased—Appellants acquitted—Appeal allowed.

Misri Devi & Ors. v. *State* *455*

INDUSTRIAL DISPUTES ACT, 1947—Section 10(1)—Petition challenging the reference made under Section 10 (1) of the Act, on 4th January 2007 by the Government of NCT of Delhi—The reference was unwarranted being hit by the doctrine of delay and laches—On the date of reference no industrial dispute as such was in existence—The respondent no. 1 was a daily wager in AIIMS—Terminated by the management on 1st March, 1996—Moved application for conciliation before the District Labour Officer on 26th May, 2005—No reconciliation took place—Failure report submitted—Respondent no. 2 made the reference to Labour Court for adjudication—Learned Single Judge dismissed the writ petition—Letters Patent Appeal—Held—The workman, the respondent no. 1 herein chose to maintain silence from 1996 till 2005 for a period of almost more than nine years and two months—Thereafter, he woke up from slumber and raised a dispute—In our considered opinion, the workman could not have risen like a phoenix or awake like Rip Van Winkle as if the time was arrested—As the workman had not taken any steps whatsoever for a span of nine years, that makes the dispute extinct by efflux of time—It tantamounts

to acceptance of the order by the workman—Therefore, reference made by the respondent no. 2 is totally unsustainable and, accordingly, the same is quashed.

All India Institute of Medical Sciences v. *Sanjay Kumar & Anr.* *495*

— Sections 25-F, 2 (oo) (bb)—Respondent was working with appellant as peon w.e.f 12th September 1989 as daily wager—On 08th May, 1990, he was issued an appointment letter putting him on probation for a period of one year—On 18th June, 1990, the appellant terminated his service—Matter referred to Labour Court—The Court held that the termination of the workman was not retrenchment but was governed under the exception to the definition of retrenchment under Section 2 (oo) (bb) of the Act—Writ Petition filed—Ld. Single Judge remanded the matter back—Letters Patent Appeal—Termination during probation period did not amount to retrenchment under Section 2 (oo) of the Act—Held—The appointment letter clearly sets out the terms of employment which make it clear that his services could be put to an end at any time by giving twenty four hours notice during the period of probation and his services would be regularized only after satisfactory completion of the probation period—These terms were accepted by the workman and were never challenged before the Tribunal or writ Court—In fact, the respondent-workman has not led any evidence in the Courts below that appointment letter was issued with malafide intent to terminate his services—Termination of services of workman in accordance with condition mentioned in the employment contract clearly fall within the domain of exception to definition of retrenchment as provided in clause (bb) of Section 2 (oo) of the Act.

Management of Apparel Export Promotion Council v. *Surya Prakash* *464*

— Sections 25-F, 2 (oo) (bb)—Respondent was working with appellant as peon w.e.f 12th September 1989 as a daily wager—On 08th May, 1990, he was issued an appointment letter putting him on probation for a period of one year—On 18th June, 1990, the appellant terminated his service—Matter referred to Labour Court—The Court held that the termination of the workman was not retrenchment but was governed under the exception to the definition of retrenchment under Section 2 (oo) (bb) of the Industrial Disputes Act—Writ Petition filed—Ld. Single Judge remanded the matter back—Letters Patent Appeal—The workman did not work for requisite 240 days as daily wager which is mandatory to get the benefit under Section 25-F of the Act—Held—The provisions of Section 25-F of the Act are available to an employee who has put in continuous service for one year—Section 25-B contains a notional definition that once 240 days service has been put in by the workman in the preceding twelve months it will be deemed to be continuous service for a year—We are of the view that once the workman was appointed and was put on probation for a period of one year, this appointment amounts to a fresh appointment—The days put in by the workers on his probation cannot be considered for counting 240 days for the concept of continuous service.

Management of Apparel Export Promotion Council v. *Surya Prakash* *464*

LAND ACQUISITION ACT, 1894—Jurisdiction of civil Court—Barred—Appellant claimed to be owner of suit property—Land acquired by Award No.35 dated 10.11.1981 under Land Acquisition Act 1894—No physical possession taken—No notice of taking possession given—Appellant filed suit seeking, inter alia, permanent injunction against Defendant not to be dispossessed from suit property—Suit dismissed—Dismissal upheld on appeal—Hence present second appeal.

Shri Ganga Dutt v. *Union of India & Ors.* *677*

LIMITATION ACT, 1963—Section 5—Article 123, Civil Procedure Code, 1908—Order 9, Rule 13—Petitioner preferred writ petition challenging order of trial Court dismissing her application seeking condonation of delay in moving application under Order 9, Rule 13—As per petitioner, she came to know of ex-parte judgment and decree dt. 08.01.1997 on 24.12.1999 when she received notice from Court in another case—She handed over notice to her Advocate who did not take steps and expired on 21.01.2000—Thereafter she managed to get back notice and engaged new counsel on 29.01.2000, who inspected records in first week of May, 2000 and she filed applications on 08.05.2000—Thus, she explained sufficient reasons for non filing condonation application within prescribed period which were ignored by trial Court—Respondent contended that besides preferring applications after a lapse of about three years, petitioner also failed to give any reasons for not filing applications between 29.01.2000 till 08.05.2000—There no ground to condone delay—Held:- The legal maxim vigilanibus, non dormentibus, jura subvenient which means that equity aids the vigilant and not the indolent is an undisputed axiom that eternal vigilance is the price of liberty and if one sleeps upon his right, his right will slip away from him—Petitioner failed to explain not taking timely steps to file the applications.

Smt. Vidya Devi v. *Smt. Ramwati Devi* *502*

— Section 18, Contract Act, 1872—Section 25—Aggrieved appellant with dismissal of his suit being barred by limitation filed appeal urging communication dated 25.09.2004 between parties extended period of limitation by virtue of Section 18 of Limitation Act and Section 25 of Contract Act—As per Respondent suit barred by limitation as partial amount sent by Respondent with covering letter dated 21.05.1998 as well as communication dated 25.09.2004, did not extend period of limitation as alleged acknowledgment was beyond period of

limitation since suit was filed on 08.04.2008—Held:- A plain reading of Clauses (3) of Section 25 of the Indian Contract Act makes it clear that a promise to pay a time barred debt is a condition precedent for application of the Section—Communication dated 25.09.2004 falls short of ingredients of Section 25(3) of the Act as Respondent clearly stated that he does not wish to make any meaningless commitments at that stage nor he stated that he would pay suit amount in future.

Promod Tandon v. *Anil Tandon* *762*

MINIMUM WAGES ACT, 1948—Section 2(h)—Payment of Bonus Act, 1965—Section 2(21) (ii)—Petition challenging Award dated 16.09.2002 passed by Industrial Tribunal—Contention—Workman is entitled to payment of bonus on the wages minus the house rent allowance and not on the entire amount of wages—Held—When reading the definition of salary or wages as found in the Payment of Bonus Act, 1965, we must also take into account the intention and purpose of the legislature in enacting the Payment of Bonus Act and the observation of the Supreme Court in Airfreights Ltd. (Supra) case that the minimum wages ought not to be broken up—In view of the above, I hold that the minimum wage is a figure which is to be taken as a whole and when bonus is paid on the same, the petitioner/Management is not entitled to break up this figure of minimum wage by stating that the minimum wage includes the figure of house rent allowance which should be deducted from the minimum wage and bonus is then payable only on such reduced figure of wages after removing the alleged figure of house rent allowance—Petition dismissed.

Globe Detective Agency (P) Ltd. v. *Presiding Officer Industrial Tribunal No. III & Anr.* *44*

MOTOR VEHICLE ACT, 1988—Appellant suffered grievous injuries in accident occurring on 27.04.1993—Appellant standing near front gate of bus—Driver abruptly applied

brakes—Appellant fell out of bus and right foot crusted under wheels—Under treatment from 27.04.1992 to 11.06.1993—Right forefoot amputated and skin grafting done—Motor Accidents Claims Tribunal awarded total compensation of Rs. 1,55,000/-—Appellant seeks enhancement of compensation—Hence instant appeal—Held—Appellant aged 28 years at time of accident—Working as Machine Operator drawing salary of Rs.3,469 Though no loss of earning capacity—Appellant suffered 60% disability—Appellant transferred to administrative department as Junior Assistant after accident—No loss of earning capacity—However promotions delayed due to transfer—Lump sum of Rs.50,000/- awarded for loss of income due to delayed promotions—Compensation enhanced to Rs.3,30,000/-—Appeal allowed.

Purshotam Dass v. *New India Asso. Co. Ltd. & Ors.* .. *355*

— Section 166—On 30.12.2006, Banwari Lal was hit by a truck from behind while going on motorcycle—He died in the accident—Claim petition preferred by the widow of deceased, four children and father—Tribunal awarded a sum of Rs. 26,56,000/- with 9% p.a., from the date of filing of the petition—Appeal filed against award—Further increase of 30% towards future prospects was not in accordance with Sarla Verma's case—Held—The Supreme Court while dealing with the aspect of future prospects in Sarla Verma's case (supra) has drawn no distinction between a private job, corporate job or Government job, though a distinction was made for obvious reasons between a temporary job and permanent employment—All that the Supreme Court emphasized in the aforesaid case was that while assessing the future prospects of the deceased, the permanency or otherwise of his job be taken into account and the future prospects of the deceased be adjudged accordingly—No hard and fast rule was laid down as is clear from the fact that the Court held that in special circumstances of the case a different approach may be

warranted—The deceased was not self-employed but had a permanent job in a private limited company where every employee was getting yearly increments—There is also evidence on record that at the time of his superannuation, the salary of the deceased would have most certainly doubled—In view of the aforesaid facts, the learned Tribunal cannot be faulted for adding 30% of the salary which the deceased was drawing at the time of his death to his last drawn salary towards "future prospects" for the purpose of calculation of "loss of dependency".

NEGOTIABLE INSTRUMENTS ACT, 1881—Section 138—Code of Criminal Procedure, 1973—Section 382—Complaint made by petitioner u/s 138 dismissed by trial Court on ground of lack of territorial jurisdiction—ASJ dismissed criminal revision—Held, the two acts of presentation of cheque and issuance of legal notice from Delhi, so also the fact that loan agreement executed at Delhi and loan disbursed to respondent from account of petitioner in New Delhi vests territorial jurisdiction in Delhi Courts—Magistrate only taking cognizance of an offence must prima facie have territorial jurisdiction to try a case—Respondent after being summoned has a right to take the plea with regard to lack of territorial jurisdiction—Petition allowed—Case remanded back to trial Court with direction to proceed further with complaint.

NEW DELHI MUNICIPAL COUNCIL ACT, 1994—Section 63 (1) and (2), 72, 109, 115 (1)—Delhi Rent Control Act, 1958—Section 4, 6 and 9—Petitioner demolished residential construction for reconstruction of a new building on plot of land—Assessing authority held rateable value of land which

is not built upon but is capable of being built upon and/or is in process of erection, is to be fixed at 5% of estimated capital value of land—Statutory appeal against order of assessing authority dismissed by ADJ—Order challenged before High Court—Plea taken, principles of parity are applicable irrespective of whether rateable value is determined on basis of standard rent or actual rent—Section 63 (1) makes no distinction between self occupied and let out premises—Provisions of Section 63 (2) apply only to land which has not been built up earlier and would not apply to land which has already been built upon and building where upon is demolished for purpose of re-construction—Per contra plea taken, even before Sec. 4, 6 and 9 of DRC Act were declared invalid, assessment of rateable value of land on which building existed was different from assessment of rateable value of land alone, provisions of DRC Act were not applicable to open plot of land, principle of standard rent was not applicable to vacant land—Vacant land stands in its own class and is not to be governed by principles of parity—Once statute provided mode of assessment of rateable value of vacant land at 5% of capital value thereof, other modes of assessment are excluded—Held—Literal reading of Section 63 (2) does not limit scope thereof to only virgin land—Expression used, is "the rateable value of any land" Which would also include land which was earlier built upon and building therefrom has been demolished—Only qualification for a land to fall under Section 63 (2) is that same is not built upon but is capable of being built upon—Only provision in statute for determination of rateable value of vacant land is Section 63 (2) and if same were to be held to not apply to land, though vacant but having been built upon earlier, it would create a void which is not desirable—There is no basis or rationale for discriminating between land which has earlier been built upon and building whereon has been demolished and land which has never been built upon—There can be no parity between built up property

and vacant land—Municipal statute does not provide for parity—It provides for determination of rateable value as per rent at which property might reasonably be expected to be let—In supervisory jurisdiction, Court can refuse to interfere even where petitioner has made out a case.

Nakul Kapur v. *NDMC & Ors.*..... *510*

THE OFFICIAL SECRETS ACT, 1929—Section 13—Code of Criminal Procedure, 1973—Section 91, 173, 207, 208, 227, 228—Indian Evidence Act, 1872—Section 3, 45, 124—Constitution of India, 1950—Article 21—Complaint filed against petitioner under Official Secrets Act—Application filed before trial Court for summoning of documents/reports/final reports prepared by erstwhile IO who carried out investigation of case and was of view that closure report be filed—Application dismissed by trial Court as documents sought by petitioner were not meant to be used against him as they were not relied upon by CBI and petitioner was not entitled to production of said documents—Order challenged in High Court—Held- Final report prepared after investigation is opinion rendered by IO—Said opinion can not bind either his Superior Officer or any other person much less Court—Opinions of IO are not statements of facts and thus not relevant—These opinions can not be used except for limited purpose of confronting IO as no other witness is bound by it—Before a charge sheet is filed, IO is bound to investigate into all aspects of matter and file a report thereon—During pendency of investigation there is no bar, if on being not satisfied by one officer investigation is transferred to another officer by senior officer and a final report is filed on being satisfied by investigation conducted—Accused can not claim indefeasible legal right to claim every document of Police file—No case made out for issuance of a writ.

Ashok Chawla v. *Ram Chander Garvan, Inspector CBI* *638*

PAYMENT OF BONUS ACT, 1965—Section 2(21) (ii)—Petition challenging Award dated 16.09.2002 passed by Industrial Tribunal—Contention—Workman is entitled to payment of bonus on the wages minus the house rent allowance and not on the entire amount of wages—Held—When reading the definition of salary or wages as found in the Payment of Bonus Act, 1965, we must also take into account the intention and purpose of the legislature in enacting the Payment of Bonus Act and the observation of the Supreme Court in Airfreights Ltd. (Supra) case that the minimum wages ought not to be broken up—In view of the above, I hold that the minimum wage is a figure which is to be taken as a whole and when bonus is paid on the same, the petitioner/Management is not entitled to break up this figure of minimum wage by stating that the minimum wage includes the figure of house rent allowance which should be deducted from the minimum wage and bonus is then payable only on such reduced figure of wages after removing the alleged figure of house rent allowance—Petition dismissed.

Globe Detective Agency (P) Ltd. v. *Presiding Officer Industrial Tribunal No. III*..... *44*

PERSONAL WITH DISABILITIES (EQUAL OPPORTUNITIES, PROTECTION OF RIGHTS AND FULL PARTICIPATION) ACT, 1995—Section 47—Petition challenging the order passed by the Central Administrative Tribunal, Principal Bench dated 18.05.2010 allowing the petition of the respondent quashing the order of pre-mature retirement—Directions given to reinstate the respondent in service on deemed basis with all consequential benefits—Respondent was employed as conductor with the petitioner—He met with an accident on 07.01.1991 and remained admitted in the hospital upto 07.06.1991—On 08.06.1991, respondent joined his duties after getting medical fitness certificate—

Posted in Ticketing Section—Working upto 25.01.1992—Sent to DTC Medical Board for examination—Medical Board declared him medically unfit—On his application, he was again examined by another Board and was declared permanently unfit for the post of conductor—He preferred a petition seeking appropriate directions not to terminate his service—Court directed that he be examined again—Medical Board declared the respondent unfit for the post of conductor permanently—Directions issued to examine the respondent's case and provide such employment to him protecting his salary—No alternative job was available—Competent Authority approved the compensation amount of Rs. 39,278,40/-—Not collected by the respondent—He moved contempt petition, which was dismissed—Respondent moved another writ petition challenging the order declaring him unfit for the post or any other lower post and his premature retirement—On account of jurisdiction, writ was transferred to Central Administrative Tribunal—Order passed—Petition—Held—Section 47 of the Act casts statutory obligation on the employer to protect employee acquiring disability during service—Petitioner ought to have considered the case of respondent under the aforesaid Act—The petitioner has not been able to show as to how Section 47 of the Act is not applicable to the facts and circumstances of the case either before the Tribunal or before this Court despite the fact that full liberty was given to the petitioner—Rather, considering the facts and circumstances of the case, a duty was cast upon the petitioner to consider on its own the case of the respondent under Section 47 of the Act—The Tribunal relying upon the provisions of Section 47 of the Act as well as judgments of the Supreme Court in Kunal Singh v. Union of India (supra) has allowed the petition of the respondent and has granted relief to him as has been stated above—In view of above discussion, no illegality or irrationally is seen in the order of the Tribunal which calls for

interference of this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

Delhi Transport Coporation v. *Sh. Manmohan* *663*

REQUISITION AND ACQUISITION OF IMMOVABLE PROPERTY ACT, 1952—Section 8—Entitlement to rent on a residential premises used by Government for running offices—The Appellant contended that they were entitled to compensation/rent as was applicable to commercial property as it was used for running offices—Finding of the arbitrator that the property was a residential and not commercial premise-also contended that property was used for commercial purposes even if initially it was residential. Held—Under Section 8 the term “for the use and occupation of the property” does not mean the current use of the property but the initial purpose/ usage for which the property was constructed—The appellant therefore not entitled to enhanced rent.

Ballabh Das Aggarwal (Decd.) v. *Union of India & Ors.* *606*

RIGHT TO INFORMATION ACT, 2005—Respondent applied under RTI Act for copy of optical response sheet (ORS) of Joint Entrance Examination, 2010 (JEE 2010) and Graduate Aptitude Test 2010 (GAT 2010)—Denied—Challenged before Centre Information Commissioner (CIC)—CIC directed petitioner to supply the copies—Filed Writ Petition against the order of CIC—Contended fiduciary relationship between the petitioner and evaluator—Under Section 8 (1) (e) of RTI Act—The photocopy of ORS not to be disclosed—If the request for providing photocopies acceded to it Would open flood gate of such applications by other candidates—System would collapse—Further contended—Evaluation final and no request for evaluation can be entertained—Court observed: Admittedly evaluation carried out through computerised system not

Furthermore, Defendant failed to produce his account books—Adverse inference may be drawn from the same.

M/s. J.C. Enterprises (Regd) v. *Ranganatha Enterprises* *128*

— However, Plaintiff only entitled to recover that amount which is not barred by limitation—Only amount not time barred as on 06.06.1996, when payment was made, recoverable.

M/s. J.C. Enterprises (Regd) v. *Ranganatha Enterprises* *128*

— Claims—Compensation—Railways Accident—Untowards incident—Compensation for Railway Accident—Deceased a daily passenger—Commuting from Khekra to Vivek Vihar—At Shahdara Railway Station—Due to heavy rush could only hold onto gate after train started—Fell down and sustained grievious injuries—Eventually led to death—Hence claim filed by Appellant, wife of deceased, before Railways Claim Tribunal—Tribunal held accident due to negligence of deceased—Deceased standing on edge of platform, unmindful of arrival of train—Hence present appeal. Held—"Untoward incident" includes accidental falling while trying to board train, not limited to when person got inside train and fell off thereafter—No evidence led to show negligence of deceased—Observation that deceased fell on tracks due to gush of wind not sustainable—Order passed by Tribunal not sustainable.

— Appeal allowed—Respodent directed to pay Rs. 4 lacs along with interest with interest from dated of filing of claim petition.

Kala v. *Union of India* *266*

— Petitioner also fell short of prescribed standards—Once candidate declared medically unfit as per relevant rules, no provision for second round of medical examination—Hence,

no fault to be found with Medical Officers—Furthermore no vacancies available—Hence Petition dismissed.

Mukesh v. *Air India & Anr.* *272*

— Public Premises (Eviction of Unauthorised Occupants) Act 1971—Appellants filed three writ petitions challenging order passed by Additional District Judge, upholding orders passed by Estate Officer of first respondent ordering possession to be recovered of subject land from appellants in proceedings under Act—All the writ petitions dealt with common questions qua acquiring title to disputed land by prescription—Held:- A person who claims adverse possession should show : (a) On what date he came into possession, (b) What was the nature of his possession, (c) Whether the factum of possession was known to the other party, (d) How long his possession has continued and (e) His possession was open and undisturbed—Respondent University of Jamia Millia Islamia had no right, title or interest in property against whom Appellants claimed adverse possession of the property.

Rustam Decd Thr LRS v. *Jamia Milia Islamia University* *318*

TRANSFER OF PROPERTY ACT, 1882—Section 106—Suit for recovery—Plaintiff took flat no. 401, New Delhi, House no. 27, Barakhamba Road, New Delhi on rent for a period of three years vide registered lease deed dated 18.04.1995—Furnishings and fittings provided in the premises were leased out to plaintiff by defendant no. 4—Clause 17 of the agreement provided for giving a prior six English calendar months notice during the initial or renewed lease term for vacating the premises—Plaintiff on 07.10.1997 wrote a letter exercising option to renew the lease, which was to expire on 31.03.1998 for a further period of three years—On 16.12.1998 plaintiff claims to have written to the defendants to expressing its

intention to vacate the tenanted premises six months therefrom—Vide subsequent letters dated 14.05.1999 and 14.07.1999 plaintiff sought extension from the defendants to continue to occupy the premises on a month to month basis till 31.08.1999—Vide letter dated 29th September, 1999 plaintiff finally called upon the defendants to take possession of tenanted premises and collect keys—Defendants failed to take possession—Plaintiff demanded the security deposit along with interest with effect from 30th September, 1999—Defendants contested the suit and filed counter claim for recovery of Rs. 19,18,079/- from plaintiff—Defendants denied receipt of letters dated 16th December 1998 and 14th May 1999—Admitted receipt of letter dated 14th July, 1999—No notice terminating the tenancy in terms of clause 17 of the lease agreement—The Lease expired only by efflux of time on 31st March 2001—Defendants claimed rent from 1st September, 1999 to 31st March, 2001—Damages for the same period, Maintenance charges, electricity and water charges etc.—Another suit filed by defendants no. 1 to 3 claiming possession of the aforesaid tenanted premises as well as furnishings and fittings and for recovery of damages for use and occupation, maintenance charges, charges towards increase in property tax etc.—Defendant denied its liability—Held—Since the plaintiff company, on expiry of the lease by efflux of time on 31st March, 1998, continued in possession with the consent of the landlords, it became 'a tenant holding over' the tenanted premises, and is not a 'tenant at sufferance' Tenancy of the plaintiff company could have been determined by giving 15 days notice in accordance with Section 106 of the Transfer of Property Act—The purpose of giving notice of termination of tenancy by a tenant to the landlord is to make it known to him that he does not propose to continue in possession of the tenanted premises after the date from which the tenancy is being terminated by him—The letter dated 14th July, 1999

meets all necessary requirements of a notice of termination of tenancy—Adopting a pragmatic and constructive approach in interpretation of such notices, letter amounted to valid notice of termination of tenancy on the part of plaintiff company—The month to month tenancy, therefore, stood terminated with effect from 31st August 1999.

Tata Finance Ltd. v. *P.S. Mangla & Ors.* *682*

WAKF ACT, 1995—Section 9—Central Wakf Council Rules 1998—Rule 7 and 13—Petitioner seeking to quash the order passed by respondent no. 3 dated 10.03.2010, whereby the respondent no. 1 was directed to retire the petitioner from the post of Secretary to Central Wakf Council on 31.03.2010—Terms and conditions of the service of the petitioner were to be determined by the Council and not by the Central Government or the Ministry—Rule 7 empowers the Council to fix the terms and conditions of the appointment—Rule 13 has no applicability—Respondent asked that Chair Person is acting only as an Appointing Authority—Central Government actually appointed the Secretary—Rule 13 is applicable to regulate the terms and conditions of services of the petitioner—When Rule 7 is read along with Rule 13, same makes clear that Rule 13 will govern each and every post in the Council, wherein the Central Government and rules applicable to the Central Government employees shall operate—Held—The Rules in Central Wakf Rules, 1998 thus provides for distinct posts which can be categorized under the Rules—The said posts include that of the members, Secretary and Chairperson and recognized posts as against the post which have been created from time to time which is mandated under Rule, 13 (1)—Thus, the Rules relating to the staff of the Council which is created post from time to time cannot be pressed into service so far it relates to recognized post of Secretary (who has separate allocated powers within rules also) which is governed

by Rule 7 of the Rules—When there is specific provision enacted under the Rules for carrying out specific purpose, the said provision must be given its effect against the provision which can only be used by way of interpretative tools to render the specific provision ineffective—Applying this rule of construction that in cases of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision, appointment of the Secretary and its terms and conditions of the employment shall be governed by Rule 7 which means the same which has been fixed by the Council a is against Rule 13 which deals with creating posts.

Dr. Mohammad Rizwanul Haque v. *Central Wakf Council & Ors.* *1*

— Section 9—Central Wakf Council Rules 1998—Rule 7 and 13—Petition seeking to quash the order passed by respondent no. 3 dated 10.03.2010, whereby the respondent no. 1 was directed to retire the petitioner from the post of Secretary to Central Wakf Council on 31.03.2010—Order is bad—Terms and conditions of the service of the petitioner shall be determined by the Council and not by the Central Government or the Ministry—Appointment of the petitioner was made under Rule 7—Chairman/Chairperson is appointing authority on the terms and conditions fixed by the Council in accordance with Rule 7—Appointment letter leaves no room for any ambiguity, so far as the appointing authority is concerned; Central Government is appointing authority—Held—Terms of service of petitioner is governed by Rule 7 of Central Wakf Council Rules, 1998 and the Council has its final say in the matter rather than the respondent no.3; the term of retirement of the petitioner fixed by the Council in exercise of its power under Rule 7 cannot be rendered

inoperative due to the impugned order passed by respondent no. 3—Order dated 10.03.2010, quashed being in violation of Rule 7.

Dr. Mohammad Rizwanul Haque v. *Central Wakf Council & Ors.* *1*