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— Sec. 8—Suit for recovery of possession of tenanted premises with mesne profits upon expiration of lease by efflux of time, whereafter tenancy became on month to month basis, but

defendant did not vacate despite service of quit notice—Defendant moved application under Sec. 8, relying upon the arbitration clause that existed in the lease deed—Held, since the lease deed was duly stamped and registered, the arbitration clause therein must be given full play and Court has no option but to refer the case to arbitration and the suit is not maintainable, so dismissed.

Anjuman Taraqqi Urdu (Hind) v. *Vardhman Yarns & Threads Ltd.*..... *770*

THE ARCHITECTS ACT, 1972—The respondent No. 1 COA has been established by the Central Government vide Section 3 of The Architects Act and was to consist inter alia of electees from Institute of Architects, nominees of AICTE, nominees of Head of Architectural Institutions in India, Chief Architects in the Ministry of the Central Government, Architects from each State etc. There is no provision in The Act prescribing the functions of respondent No.1 COA. However, The Act vide Section 23 vests the duty of maintaining a Register of Architects for India on respondent No. 1 COA; vide Section 29 vests the jurisdiction to remove from the Register the name of any Architects in the Respondent no.1 COA; and vide Section 30 the respondent No. 1 COA has been further vested with the jurisdiction to hold an enquiry into allegations of professional misconduct against the Architects—There is no other provision in the Act where under respondent No. 1 COA can trace its power to prescribe minimum standards for grant of qualifications other than the recognized qualification. Section 45 of the Architects Act to which also reference has been made, empowers the respondent No. 1 COA to make regulations but only with the approval of the Central Government. However, the said Regulations again have to be with respect to recognized qualifications and not others—What emerges from aforesaid is that the source of power to prescribe minimum standards for the courses of M. Arch.

(Urban & Regional Planning), M. Arch. (Transportation Planning & Design) and M. Arch. (Housing) which are not recognized qualifications under The Architects Act, and as has been done vide impugned guidelines cannot be traced to the Architects Act—The respondent No. 1 COA is a statutory body. It can exercise only such powers as are vested in it none other. There is nothing to show that the respondent No.1 COA was intended to or is the sole repository of the education in the field of Architecture—Had the legislature intended to so empower the COA it would not have restricted its power to recognized qualifications mentioned in the Schedule. On the contrary, Section 14(2) of the Architectural Act vests the power to grant recognition to any architectural qualification in the Central Government and which power is to be exercised after consultation with the COA. Thus, when COA is not even empowered to recognize any architectural qualification, it cannot certainly be held to be empowered to prescribe minimum standards therefore.

Institute of Town Planners, India v. *Council of URE & Ors.* *503*

ARMS ACT, 1959—Section 27—Case of prosecution that accused was fighting with deceased (his wife) when both were working in the factory and threatened to kill her—He stabbed her on her neck and stomach, taking out chura from underneath his shirt—He also stabbed himself with chura and fell down—PW3 sister-in-law of accused who witnessed incident raised alarm and police telephonically called by owner of factory PW6—Trial Court convicted accused u/s 302, 309 IPC and Section 27 Arms Act—Held, accused did not dispute his presence at the site of occurrence—Although defence taken was that accused objected to the deceased having illicit relations with one Debu and the incident took place because of Debu in his presence, none of the prosecution witnesses, including owner of factory (PW6), testified about the presence

of Debu—No suggestion put to any of the witnesses regarding any altercation between appellant and Debu—PW5, daughter of accused and deceased an eye-witness of incident testified against father—No motive imputed to PW5 for deposing falsely against father—PW3 sister-in-law of accused supported case of prosecution on all material facts and implicated appellant for causing stab injuries on vital organs of deceased in her presence—Appellant named by PW3 in her statement recorded at earliest point of time—No major deviation in version given by PW3 in her statement and testimony before court—PW6 supported prosecution and corroborated deposition of PW3—Injury sustained by accused at the spot lends credence to prosecution case—Oral evidence coupled with medical evidence, proved that accused caused injuries to deceased—However no evidence to infer that prior to incident accused attempted to cause serious injuries to deceased or threatened the deceased with weapon—No injuries were ever caused by accused to deceased prior to incident with any sharp object—Cannot be ruled out that knife Ex. P-1 was picked up by accused from the spot, as PW5 disclosed that deceased was doing tailoring job of rexine—No evidence on record pointing to any serious quarrel between appellant and deceased before incident, prompting appellant to commit murder—Evidence revealed that quarrel had started between appellant and deceased at about 11.30 a.m. and in that quarrel, appellant stabbed deceased—Appellant did not abscond from spot but attempted to commit suicide by stabbing himself—This reaction shows that quarrel/fight/altercation between appellant and deceased took place suddenly for which both the parties were more or less to be blamed—No previous deliberation or determination to fight—Circumstances rule out that appellant planned to murder deceased and had intention to kill her—Occurrence took place all of a sudden on trivial issue in which appellant in heat of passion on account of deprivation of self control stabbed deceased—Considering

wise—Held:- during the entire period of contracts appellant/ defendant raised bills on the basis of length of the cloth and payments were made lengthwise—Parties understood the schedule rates in particular manner, payments received in the manner understood i.e. only lengthwise—Cannot claim payment lengthwise as well as breadth wise—Suit decreed and counter claim dismissed—Aggrieved by the order filed the present appeal—Held—Not open to say that the contract did not mean what the parties had acted upon under the contract—Appeal dismissed.

Rati Ram v. *D.C.M. Shroram Consolidatd Ltd.* *516*

CODE OF CRIMINAL PROCEDURE, 1973—Section—156, 200—Petitioner filed complaint in Police Station for registration of FIR against Respondent no. 2 alleging Respondent No.2 in conspiracy with other Respondents misappropriated Flat in Rohini by concealing Will bequeathing said Flat exclusively to him—FIR not registered—Petitioner, then filed complaint under Section 200 Cr.. P.C. along with application under Section 156 (3) before Metropolitan Magistrate (MM)—Application dismissed by learned MM expressing view, investigation not required by police and he directed petitioner to lead pre-summoning evidence—Aggrieved by said order, petitioner filed criminal revision before court of learned Additional Sessions Judge which was also dismissed—Petitioner assailed said order in Criminal M.CA—He urged, investigation by police necessary as part of record was maintained by DDA and Sub—Registrar, Amritsar which could not be collected by petitioner and could only be unearthed through police investigation—Held—Section 156 (3) of the Code empowers to Magistrate to direct the police to register a case and initiate investigation but this power has to be exercised judiciously on proper grounds and not in a mechanical manner. In those cases where the allegations are not very serious and the complainant himself is in possession

of evidence to prove his allegations there should be no need to pass order under Section 156(3) of the Code.

Vikrant Kapoor v. *The State & Ors.* *687*

— Sec.197 and Delhi Police Act, 1978 Sec. 140—Magistrate ordered under Section 156 (3) CrPC for registration of FIR for offences under Sec. 193/196/200/209 IPC against petitioner, working as Sub Inspector with Delhi Police on the allegations that in conspiracy with few others, the petitioner framed incorrect record in FIR No. 99/01—Challenged—Held, since petitioner was a government servant and is still working as Inspector in Delhi Police, the alleged acts have reasonable connection with duties of the office held by him, so prosecution without obtaining sanction is bad in law—Magisterial order quashed.

Mukesh Kumar v. *State* *490*

— Sections 319 & 353—Indian Penal Code, 1860—Sections 307, 498A and 34—Summoning u/s 319—Case filed u/s 498A/ 406—Judgment passed convicting three of the family members of petitioner u/s 498-A & 406 along with order summoning him u/s 319—Contention of petitioner that order u/s 319 can only be passed during trial and not after judgment dictated/pronounced—Contention of prosecution that trial court while pronouncing of judgment on other family members of petitioner, on same day passed orders summoning petitioner u/s 319 Cr.P.C and since both orders were passed simultaneously, so it could not be said that impugned order was passed after trial was concluded—Held, although application u/s 319 was filed by Public Prosecutor during course for trial, order on application passed after pronouncement of judgment convicting other family members of Petitioner—According to Section 353 after arguments are heard, trial came to an end and pronouncement of judgement

which the petitioner no.1 is one of the shareholders bid for both the plots and its bid being the highest was accepted and conveyance deeds dated 3rd November, 2006 with respect thereto executed in favour of the petitioner no. 2 Company and possession handed over, subject to the outcome of the legal proceedings initiated by M.S. Shoes East—Petitioners, immediately after being delivered possession of the two plots and before commencing construction thereon, requested DDA for amalgamation of the two plots—Upon not receiving any response, W.P. (C) No. 4251/2007 was filed—Court vide order dated 29th may 2007 directed DDA to consider the request for amalgamation and communicate its decision within fifteen days—Chairman of the DDA vide order dated 30th July 2007 rejected the said request for amalgamation on the ground of the said request being in contravention to the condition mentioned in the auction document at Clause 3.10 (vii)—W.P.(C) No. 8101/2007 filed impugning the said order of rejection—WP was however dismissed vide judgment dated 8th April, 2008 holding *inter alia* that being a term of the auction stood incorporated in the conveyance deed, amalgamation would not be allowed—No mandamus for amalgamation could be issued—Intra—Court Appeal being LPA 210/2008 was preferred by the petitioners—LPA 210/2008 (supra) was ultimately disposed of vide judgment dated 20th October, 2008 remanding matter to Chairman of the DDA for fresh decision on the application of the petitioners for amalgamation, after considering the various factors which had emerged during the hearing before the Division Bench—Vide order dated 10th November, 2008 again the request for amalgamation was rejected—Hence present Writ Petition—Held—DDA has neither dealt with the request of the petitioners for amalgamation of the two plots, both in its name, in accordance with guidelines nor given any reasons—DDA even though in the capacity of a seller of land, is in such matters

required to act reasonably and in accordance with law and any arbitrary action on its part would become subject to judicial review—Reasons given by respondent No.1, in order for rejection of request for amalgamation, amounting to change of auction conditions had already been negatived by Division Bench in earlier round of litigation; ii) reason that amalgamation will totally change type of Hotel that can be constructed and if plots had been auctioned as one, would have invited better bids from International Hoteliers was also contrary to findings of Division Bench in earlier round of litigation that single plot was bifurcated for commercial gains of DDA and even otherwise irrelevant once resolution supra was held to apply to Hotel Plots also it may be noticed that said reasoning equally applies to plots for office buildings / shopping malls in as much as class of builders / developers thereof were also different for smaller and large plots—It may also be mentioned that though proposal leading to resolution supra was for linking charges for amalgamation to premium paid for amalgamated plot, what was approved/resolved was to link same to market rate on date of application for amalgamation If it was case of DDA that premium/market price for bigger plot would have been / be more, it would proportionately earn higher charges for amalgamation; (iii) reason that hotel plots had different architectural control than office buildings/shopping malls was irrelevant once hotel plots were included as aforesaid in commercial category It was also worth mentioning that though proposal leading to resolution supra required application for amalgamation to be referred first to Architectural Control and Building Department but resolution did not accept same and expressly stated that same was not necessary DDA neither in impugned order nor now had explained as to how amalgamation would contravene any other norms—Thus, impugned order rejecting request for amalgamation was found to be in contravention of resolution/decision of DDA itself and

thus arbitrary and whimsical and did not pass test—Hence, petition allowed.

Sachin J. Joshi & Anr. v. *LT. Governor & Anr.* *750*

DELHI POLICE ACT, 1978—Sec. 140—Magistrate ordered under Section 156 (3) CrPC for registration of FIR for offences under Sec. 193/196/200/209 IPC against petitioner, working as Sub Inspector with Delhi Police on the allegations that in conspiracy with few others, the petitioner framed incorrect record in FIR No. 99/01—Challenged—Held, since petitioner was a government servant and is still working as Inspector in Delhi Police, the alleged acts have reasonable connection with duties of the office held by him, so prosecution without obtaining sanction is bad in law—Magisterial order quashed.

Mukesh Kumar v. *State* *490*

DELHI PROFESSIONAL COLLEGES OR INSTITUTION (PROHIBITION OF CAPITAL FEE, REGULATION OF ADMISSION FIXATION OF NON-EXPLOITATIVE FEE & OTHER MEASURES TO ENSURE EQUITY AND EXCELLENCE) ACT, 2007—Sections 19(1)—Petition filed for quashing of the order dated 29.12.2009 passed by a Committee whereby a penalty of Rs. 10.00 Lacs was imposed on the petitioner/Institute for compounding an offence punishable under Section 18 of the Act on Account of non-compliance of Rule 8(2)(a)(ii) of the Rules contravening the provisions of the aforesaid Act—Brief facts—Petitioner/Institute, a society engaged in providing education to students and affiliated to respondent No. 3./University—For the academic year 2008-09 for MCA course, the petitioner had advertised the management quota seats through its website and its notice board, instead of advertising the said seats in two leading newspapers (one in Hindi and one in English) as

required under Rule 8(2)(a)(ii) of the Rules—Aforesaid deficiency noticed by respondent No. 3/University—Petitioner/Institute called upon to furnish explanation—Peititioner/Institute admitted to having breached the aforesaid Rule and sought condonation of the lapse and expressed its sincere regret—Respondent No. 1/Director of Higher Education was requested to take a lenient view in the matter and impose minimum penalty as the Institute had already apologized for the error—Respondent No.1/Director of Higher Education issued a notice to show cause to the petitioner/Institute stating *inter alia* that a meeting of the Committee constituted under Section 19 of the Act was held to compound an offence under Section 18 of the Act—Noticed that the petitioner/Institute had not advertised the admission notice of the management quota seats for the MCA course in two leading newspapers as required under the said rules—The petitioner/Institute submitted its reply stating inter alia that the admission notice was displayed in the website of the Institute and on the notice board but on account of an inadvertent omission, the petitioner/Institute did not advertise the admission notice in two daily newspapers—Further explained that despite the fact that the advertisement could not be published in newspapers, there was a very good response from applicants as indicated by the fact that the Institute received 96 applications against 6 seats under the management quota—Under such circumstances, condonation of the omission was sough by the petitioner/Institute—Committee took into account the fact that it was the first time that the Institute had committed such an offence after the Act had come into force, therefore, by the impugned order dated 29.12.2009 decided to compound the offence by imposing a penalty of Rs. 10 lacs on the petitioner/Institute for contravening Rule 8(2)(a)(ii) of the Rules—Hence the present petition on the ground that the breach in the present case was purely technical in nature and no penalty ought to have been imposed on it—Held—Petitioner/Institute not

complied with requirement of advertising the management quota seats in two leading newspapers—Instead, chose to display the advertisement only on its website and on the notice board—The breach committed by the petitioner/Institute cannot be treated to be only technical in nature—The mode and manner of filling-up the management quota seats has been clearly laid out under Rule 8(2)(a)(ii) of the Rules. Once the petitioner/Institute decided to advertise the management quota seats and fill up the same, then Rule 8 of the Rules would automatically come into play and in such circumstances the term "may" used in the proviso to Section 13 as a prefix to the phrase, "be advertised and filled-up" has to be read only in the context of Rule 8(2)(a)(ii) of the Rules, which mandates that an institution ought to issue an advertisement in the prescribed manner—The petitioner/Institute cannot be permitted to interpret the said Rule to state that displaying an advertisement on its website and on its notice board should be treated as sufficient for the purpose of advertisement—The purpose and intent of the aforesaid Rule is to ensure that the notice of filling up the management quota seats gets as wide a publicity as possible—It is for this reason that the advertisements are required to be carried in two languages, Hindi and English and not only in local newspapers, but in two leading daily newspapers, besides displaying the same on the institution's website and its notice board, as prescribed in the Act and Rules.

Management Education & Research Institute v. *Director Higher Education & Ors.* *693*

DELHI RENT CONTROL ACT, 1958—Sections 14 (1) (b) and 38—Eviction petition u/s 14 (1) (b) filed by landlord/petitioner with regard to tenanted premises—Case of landlord that tenant had sub-let whole of premises with possession without consent in writing of landlord—Plea of tenant/respondent no.1 company that premises had been taken for residence of its

employees and that its employees had been occupying tenanted premises—Respondent no. 2 (employee) had resigned from service and handed over vacant possession to respondent no. 1—ARC held no case of sub-letting and dismissed eviction petition—In appeal, judgment of ARC reversed on ground that retention of premises by respondent no. 2 even after his resignation amounted to sub-letting and eviction petition of landlord decreed—Held sub-letting means that owner has completed divested himself of the suit property and is in no manner connected with the same—Evidence established that there was *inter se* dispute between respondent no. 1 and respondent no. 2 relating to dues of respondent no. 2—Respondent no.2 had asked for clearance of dues and extension of time up to 6 months for vacating suit premises in resignation letter—This not a case where respondent no.1 had lost control over tenanted premises—The wife of respondent no. 2 was admittedly employee of respondent no. 1 and tenanted premises was for use of employees of respondent no. 1—Not a case where respondent no.2 was claiming independent title qua suit property—Mischief of Section 14 (1) (b) not attracted—Impugned order set aside—Petition filed by landlord u/s. (1)(b) dismissed.

Dhoota Papeshwar Industries Ltd. v. *Atma Ram & Anr.* *525*

— Section 6A and 8—Transfer of Property Act, 1882—Section 106—Appellant/defendant a tenant from 1979 at a monthly rent of Rs.1161.60—Rent increased from time to time under section 6A and 8—Rent Rs.2489.30 w.e.f 23.04.2004—legal notice dated 07.05.2007 enhancing rent to Rs. 3618.23 inclusive of maintenance charges Rs.880/- w.e.f. 23.04.2007—tenancy terminated by legal notice dated 07.09.2007—failure to vacate the premises—Suit for possession and mesne profits—Plea taken, notice dated 07.05.2007 defective as sought to increase the rent

effect of the 42nd Amendment to the Constitution whereby Article 311 of the Constitution of India was amended and came to the conclusion that in consonance with the principles of natural justice, still there would be requirement to serve upon the delinquent employee a copy of the inquiry report and give him an opportunity to make the representation against the findings recorded by the Inquiry Officer and thereafter take a decision whether to accept the findings of the Inquiry Officer or not—That would not mean that if there is a provision in any other law, Statue or Rules which still exists for affording an opportunity even against the proposed penalty, that becomes bad in law—It was a provision which was made in favour of the employee, though the same is taken away insofar as position under Article 311 of the Constitution of India qua civil servants is concerned—However such a provision available under Rule 120(1)(d)(ii) supra to the employees of School cannot be said to be contrary to the provisions of the Constitution.—Merely because punishment is proposed in the show cause notice, the Disciplinary Authority cannot be said to have pre-judged the matter or that the same results in the representation there against being considered with a closed mind or infructuous—Opinion formed at that stage is a tentative opinion formed only on the basis of the record of the inquiry proceedings and subject to the consideration of the representation by the employee there against—Formation of the said opinion does not stop the Disciplinary Authority from forming another opinion or changing the earlier opinion after considering the representation of the employee—Such a provision is favourable to the employee and cannot be treated as bad in law—Rule 120(1)(d) gives a right of hearing to the employee not only during the inquiry but also at the stage when those findings are considered by the Disciplinary Authority—Rule 120(1)(d) expressly provides for giving to the delinquent employee notice of the opinion formed and action proposed to be taken and calling upon him to submit his representation

against the proposed action and for "determining" the penalty if any to be imposed only after considering such representation of the delinquent employee—The procedure laid down leaves no manner of doubt that the opinion to be formed on consideration of the record of the inquiry is a tentative opinion and the final "determination" of guilt and penalty if any to be imposed is to take place only after considering the representation of the employee—Such a procedure is found to be fair and merely because a tentative opinion is required to be formed to enable cause to be shown there against, cannot be said to be a violation of principles of natural justice and rather such a procedure sub serves the principle.

INDIAN EVIDENCE ACT, 1872—Section 27—Circumstantial Evidence—As per prosecution case, gunny bag containing deadbody of teenaged male found in Railway Coach—On same day, PW16 (who was assigned case) met Mohd. Najim who furnished information about offenders—At his instance two accused arrested (one of them is appellant), later two more accused arrested—Police received secret information about involvement of another person who was also arrested—On disclosure statement of appellant, blood stained ustra recovered from tin-shade of platform—One of the accused Raj Kumar had received burn injuries during incident and died—Deposed by Autopsy Surgeon that deceased had 13 c.m. long cut injury on his neck and 9.5 cm. long injury in occipital region which was sufficient to cause death—Trial Court convicted accused u/s 302, 201 and 120B IPC—Held, prosecution case based on direct eye-witness account of Mohd. Najim—However eye-witness Mohd. Najim did not depose in court—Incriminating circumstances largely based on recovery from place which was public and accessible to all—The recovery of ustra not much consequence—Prosecution made no

deceased removed to DDU hospital by PCR—Appellant Pooran was arrested and he got recovered knife—Appellants Deepak and Ajay @ Minte were also arrested—Trial Court convicted appellants u/s 302/324/323/149 IPC—Held, as per PW1 and PW2, they were attacked by a sword by Raja (P.O) in concert with accused persons—However, medical evidence showed nature of injury as being abrasion and bruises caused by blunt object—Delay of six hours in lodging FIR—Contradictions in statements of PW1 and PW2 with regard to who held whom and how injuries were inflicted—Prosecution version doubtful PW31 (second IO) or PW30 did not depose about appellants being involved in any criminal activity making them suspicious about deceased's conduct as a police informer—Although prosecution claimed that number of public persons present at the spot, no person examined as witness—Normal human conduct would have induced PW1 to immediately remove his brother to the hospital who was seriously injured without waste of time instead of going to police station—Grave doubt in prosecution version—Appellants given benefit of doubt—Acquitted—Appeal allowed.

Puran @ Manoj & Ors. v. *The State (Govt. of N.C.T. of Delhi)*..... *562*

— Sections 302 & 309—Arms Act, 1959—Section 27—Case of prosecution that accused was fighting with deceased (his wife) when both were working in the factory and threatened to kill her—He stabbed her on her neck and stomach, taking out chura from underneath his shirt—He also stabbed himself with chura and fell down—PW3 sister-in-law of accused who witnessed incident raised alarm and police telephonically called by owner of factory PW6—Trial Court convicted accused u/s 302, 309 IPC and Section 27 Arms Act—Held, accused did not dispute his presence at the site of occurrence—Although defence taken was that accused objected to the deceased

having illicit relations with one Debu and the incident took place because of Debu in his presence, none of the prosecution witnesses, including owner of factory (PW6), testified about the presence of Debu—No suggestion put to any of the witnesses regarding any altercation between appellant and Debu—PW5, daughter of accused and deceased an eye-witness of incident testified against father—No motive imputed to PW5 for deposing falsely against father—PW3 sister-in-law of accused supported case of prosecution on all material facts and implicated appellant for causing stab injuries on vital organs of deceased in her presence—Appellant named by PW3 in her statement recorded at earliest point of time—No major deviation in version given by PW3 in her statement and testimony before court—PW6 supported prosecution and corroborated deposition of PW3—Injury sustained by accused at the spot lends credence to prosecution case—Oral evidence coupled with medical evidence, proved that accused caused injuries to deceased—However no evidence to infer that prior to incident accused attempted to cause serious injuries to deceased or threatened the deceased with weapon—No injuries were ever caused by accused to deceased prior to incident with any sharp object—Cannot be ruled out that knife Ex. P-1 was picked up by accused from the spot, as PW5 disclosed that deceased was doing tailoring job of rexine—No evidence on record pointing to any serious quarrel between appellant and deceased before incident, prompting appellant to commit murder—Evidence revealed that quarrel had started between appellant and deceased at about 11.30 a.m. and in that quarrel, appellant stabbed deceased—Appellant did not abscond from spot but attempted to commit suicide by stabbing himself—This reaction shows that quarrel/fight/altercation between appellant and deceased took place suddenly for which both the parties were more or less to be blamed—No previous deliberation or determination to fight—Circumstances rule out that appellant planned to murder deceased and had intention

to kill her—Occurrence took place all of a sudden on trivial issue in which appellant in heat of passion on account of deprivation of self control stabbed deceased—Considering nature of injuries, how they were caused, weapon of assault and conduct of accused whereby he caused himself grievous hurt to commit suicide, this not a case u/s 302—However, number of injuries inflicted by appellant on vital parts of deceased proved commission of offence punishable u/s 304 Part I—Appeal partly allowed—Conviction modified from Section 302 to 304 Part I, IPC.

— Sections 302, 201 and- 120B—Indian Evidence Act, 1872—Section 27—Circumstantial Evidence—As per prosecution case, gunny bag containing deadbody of teenaged male found in Railway Coach—On same day, PW16 (who was assigned case) met Mohd. Najim who furnished information about offenders—At his instance two accused arrested (one of them is appellant), later two more accused arrested—Police received secret information about involvement of another person who was also arrested—On disclosure statement of appellant, blood stained ustra recovered from tin-shade of platform—One of the accused Raj Kumar had received burn injuries during incident and died—Deposed by Autopsy Surgeon that deceased had 13 c.m. long cut injury on his neck and 9.5 cm. long injury in occipital region which was sufficient to cause death—Trial Court convicted accused u/s 302, 201 and 120B IPC—Held, prosecution case based on direct eye-witness account of Mohd. Najim—However eye-witness Mohd. Najim did not depose in court—Incriminating circumstances largely based on recovery from place which was public and accessible to all—The recovery of ustra not much consequence—Prosecution made no attempt to link recovery with accused—Prosecution made no attempt to prove motive—Prosecution

failed to prove offences against appellant—Accused acquitted—Appeal allowed.

— Sections 120-B, 420, 467, 468, 471—Prevention of Corruption Act, 1988—Sections 13 (2) and Section 13 (1) (d)—Bail—Case of prosecution that petitioners and other accused entered into conspiracy to eliminate all forms of competition and to ensure that the company Swiss Timing Ltd. (STL) was awarded contract for Time Scoring Result (TSR) system—Held, bail is the rule and committal to jail an exception—Refusal of bail is restriction on personal liberty of individual guaranteed under Article 21 of the Constitution—Requirements that have to be balanced are the seriousness of accusations, whether witnesses are likely to be influenced by accused and whether accused likely to flee from justice if granted bail—Prima facie case for offence u/s 467 IPC made out against petitioner—Although accusations against petitioners serious however, evidence to prove accusations is primarily documentary besides few material witnesses—If seriousness of offence on the basis of punishment provided, is the only criteria, courts would not be balancing the constitutional rights but rather recalibrating the scales of justice—Allegation made against petitioner Suresh Kalmadi of threatening witnesses and tampering evidence when witnesses were working under petitioner—Apparent that witnesses harassed and threatened only till they were working under petitioner and thereafter no influence on witnesses—Evidence on record that in past witnesses were intimidated does not prima facie show that there is any likelihood of threat to prosecution witnesses—No merit in contention of CBI counsel that mere presence of petitioners at large would intimidate witnesses—Petitioner Suresh Kalmadi in custody for over 8 month and petitioner

V.K. Verma for 10 months—No allegation that petitioners are likely to flee from justice and will not be available for trial—Allegations against petitioners of having committed economic offences which resulted in loss to State exchequer by adopting policy of single vendor and ensuring contract awarded only to STL—Whether case is of exercise of discretion for ensuring best quality or a case of culpability will be decided during the course of trial—No allegation of money trail to petitioners—No evidence of petitioners threatening witnesses or interfering with evidence during investigation or trial—No allegation that any other FIR registered against petitioners—Bail applications allowed.

Suresh Kalmadi v. *CBI* *630*

— Section—396, 397—Vienna Convention Consular Relations—1963—Article 36(1)(b)—Appellants preferred appeals against their conviction under Section 396 read with Section 397 IPC and pointed out various lacunas in prosecution case—They also urged that they were Bangladesh nationals and during investigations when they refused to participate in TIP, they were not assisted by Consular Officers of their country as provided by Vienna Convention on Consular Relations, which India had ratified, therefore, it was fatal irregularity in trial of appellants—Held—There is no automatic acceptance of an international treaty, even post ratification, as domestic law in India—It only becomes binding as law once Parliament has indicated its acceptance of the ratified treaty through enabling legislation—Since no legislation existed the said treaty was not binding—However, the appellants were given legal representation; therefore object of article 36(1)(b) of treaty was satisfied.

Jamal Mirza v. *State* *711*

— Sections 4, 107 and 120B—Prevention of Corruption Act,

1988—Section 4, 11 & 12—Non acceptance of closure report—Jurisdiction—Case of prosecution that petitioner Sanjay Tripathi posted as Deputy Commissioner Income Tax, Mumbai had made assessment of Income Tax for AY 2001-02 of M/s Videocon Industries Ltd. vide order dated 30.03.2004—Sanjay Tripathi moved residence to Bengaluru on promotion and thereafter to Vasant Kunj, New Delhi—On both occasions, his household goods were transported by M/s. Prakash Packers and Movers, Mumbai for which petitioner Prakash Kitta Shetty of Videocon contacted M/s Prakash Packers and Movers—Bills for Rs. 46,9,47 and Rs. 52,822 were raised on M/s. Videocon Industries Ltd.—Petitioner Suresh Madhav Hegde of Videocon issued cheques for said amounts—Case of prosecution that accused Sanjay Tripathi, Suresh Madhav Hegde and Prakash Kitta Shetty of M/s. Videocon Industries by entering into conspiracy committed offence u/s 12—Sanjay Tripathi while functioning as Public Servant obtained wrongful peculiarly advantage from M/s. Videocon Industries Ltd. during 2007-08 having official dealing and thus conducted mis-conduct—Contention of petitioner that in absence of sanction no cognizance of offence u/s 11 and 12 could be taken—No case for abetment u/s 107 made out as neither any overt act nor instigation on part of petitioner—Also contended that Special Judge had no territorial jurisdiction to take cognizance of offence—No part of offence committed in Delhi—Cheques issued at Mumbai—Contention of CBI that offence of conspiracy is single transaction which terminated at Delhi with the household goods of Sanjay Tripathi having being delivered at Delhi Court—Petitioner Prakash Kitta Shetty spoke to M/s Prakash Movers and Packers and arranged transportation while petitioner Suresh Madhav Hegde signed the cheques—Held, cognizance of offence u/s 12 PC Act and 120B IPC r/w. 12 PC Act will have to be taken by court within whose jurisdiction offence committed—In view of Section 4(1) of PC Act and Section 4(2) of IPC the Court competent

to inquire and try offence u/s 12 PC Act would be court where offence of abetment took place—Transportation of goods from Bengaluru to Delhi not an offence but payment for said transportation by petitioners Suresh Hegde and Prakash Kitta Shetty on behalf of Videocon Industries Ltd. at Mumbai an offence—Petitioners not charged for substantive offence of conspiracy but with Section 120B r/w Section 12 PC Act—Only Court which has jurisdiction to try offence u/s 12 r/w 120B and Section 12 is competent court in Mumbai—High Court has no power to direct transfer but it has jurisdiction to direct Special Judge to return closure report for being presented before a court of competent jurisdiction at Mumbai—Order of special judge taking cognizance for offences u/s 120B IPC r/w 12 PC Act and Section 12 PC Act set aside—Special Judge directed to return closure report to CBI to be presented to court of competent jurisdiction at Mumbai—Impugned order set aside—Petition allowed.

Sanjay Tripathi v. *CBI* *734*

— Section, 302—Appellant challenged his conviction under Section 302 IPC urging testimony of eye witness relied upon by Trial Court unbelievable which was also not corroborated by other evidence—On behalf of State it was submitted, appellant earlier convicted for having murdered two constables and he was sentenced to undergo life imprisonment—Consequently, while serving sentence he was released on parole for three weeks but he failed to surrender and went on to commit murder in said case—These facts not denied by appellant—Held:-Prosecution version in relying on the testimony of a witness who claims to have witnessed an incident, or crime, has to be critically examined—Thus, assessment of testimony for purpose of weighing its credibility is not confined to satisfying that the witness was merely consistent in his testimony; it extends to a critical examination of the entire probability of the facts deposed to, as well as

conduct of the witness himself—If any of these reveal suspicious or improbable circumstances, court mat be justified in rejecting his testimony altogether.

Manoj Shukla @ Prem v. *State (Govt. of NCT of Delhi)*..... *782*

— Section 302—Appellant convicted under Section 302—He challenged his conviction—On behalf of State it was urged, appellant did not deny his previous conviction or fact he had over stayed his parole, therefore his conduct is also important to deny him the relief—Held:- Mere absconding by itself does not necessarily lead to a firm conclusion of guilt—Act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case.

Manoj Shukla @ Prem v. *State (Govt. of NCT of Delhi)*..... *782*

THE INDIAN SUCCESSION ACT, 1925—Section 375 which requires such security to be furnished is impugned only on the ground that it is rigorous and is coming in the way of the petitioners from enjoying the money bequeathed to them and is thus ultra vires the Constitution of India—The provision for taking security bond with surety is intended to ensure safety of the debts received by the grantee of the Succession Certificate or Letters of Administration. The provision requires the grantee of Succession Certificate and/or Letters of Administration to furnish security to protect the right of heir inter se so that the person who is ultimately found to be entitled to the whole or part of the debts is indemnified—The law thus requires him under Section 375 supra to furnish security to ensure that no loss is caused to the rightful heirs. The petitioners in the petition have been unable to plead as to how such provision protecting the interest of the heirs is bad—

The right to property under the Constitution is always subject to reasonable restrictions and we find the aforesaid provision to be a reasonable one—Not only so, a bare perusal of Section 375 further shows that the furnishing of security itself is in the discretion of the Court. It is always open to the grantee to seek exemption from furnishing of such security—Held that the challenge to the *vires* of Section 375 of the Indian Succession Act, 1925 predicated on the same being mandatory is misconceived and in ignorance of law.

Rajesh Kumar Sharma & Anr. v. *Estate of Late Sh. Raj Pal Sharma & Anr.* *461*

JUDICIAL REVIEW—In the course of exercising its power under judicial review, the Court is required to examine the decision making process of an authority and not the decision itself—As held in the Supreme Court in the case of *A.P.S.R.T.C. Vs G. Sirnivas Reddy,* reported as AIR (2006) SC 1465, the power of judicial review under Article 226 lays emphasis on the decision making process, rather than the decision itself and only such an action is open to judicial review, where an order or action of the State or an authority is illegal, unreasonable, arbitrary or prompted by malafides or extraneous consideration—In the present case, even if it is assumed that the decision arrived at by the Court could have been different from the one arrived at by the Committee, as for example the quantum of fine imposed in the impugned order, could have been less than or more than that imposed by the Committee, would in itself not be a ground for interference as the Court ought not to step into the shoes of the Committee and then arrive at a different conclusion—For all the aforesaid reasons, the present petition is dismissed being devoid of merits.

Management Education & Research Institute v. *Director Higher Education & Ors.* *693*

LIMITATION ACT, 1963—Articles 74, 75 and 79—Code of Criminal Procedure, 1973—Section 156(3)—Summons—Period of limitation—Suit for damages and permanent injunction—Appellant/plaintiff in business of freight transporter—Engaged by respondent/defendant for providing logistic services—Difficulties in execution of the transaction—Allegation of breach of obligation on each side—Respondent/defendant filed suit for injunction and also criminal complaint with ACMM—Matter investigated u/s. 156(3)—preliminary report filed by the police no cognizable offence made out—Opportunity granted for filing a protest petition—No protest petition filed—No summon issued to the appellant/plaintiff—Report accepted and complaint dismissed on 24.03.2007—Suit filed on 09.10.2007—Held:- suit filed beyond the prescribed period of limitation—Declined to condone the delay in re-filing the suit—Suit dismissed vide order dated 02.02.2010—Aggrieved by the order appellant/plaintiff filed the present regular first appeal—Held—Action not founded on malicious prosecution, at best based on defamatory material contained in the complaint—Relevant Article is Article 75—period of limitation one year from the date of filing a complaint—Complaint filed on 26.03.2006—Expired on 25.03.2007—suit instituted on 09.10.2007 which is beyond the period of limitation—appeal dismissed.

Schenker India Pvt. Ltd. v. *Sirpur Paper Mills Ltd.* *476*

— Article 113—Regular First Appeal filed against the impugned judgment of the trial Court dated 18.10.2003 dismissing the suit filed by the appellant/plaintiff for recovery of Rs. 3,04,597.60/-—Held: The period of three years arises in the facts of the present case not from the date of the grant of the loan, but in fact from the date when default was committed inasmuch as the loan was repayable over a period of many years and in installments. In such a case, limitation will

commence from the date of the default and not from the date of grant of loan. Suits for recovery of amounts in these cases are governed by Article 113 and not by Article 19 of the Limitation Act, 1963.

IFCI Venture Capital funds Limited v. *Santosh Khosla & Ors.* *646*

MOTOR VEHICLE ACT, 1988—Compensation for death—The Appellant Reliance General Insurance Company Limited impugns the judgment dated 02.06.2010 passed by the Motor Accident Claims Tribunal, (the Tribunal) whereby a compensation of Rs.44,52,100/- was awarded on account of the death of Ram Nayak Mishra, who was working as an Air Conditioning Engineer in Northern Railway and was aged about 59 years at the time of the accident—The sole contention raised on behalf of the Appellant is that the actual income of the deceased is to be taken into consideration to compute the loss of dependency. A large component in the salary was for overtime which was not regular income and therefore, could not have been taken into account.—The basic pay of the deceased was Rs.14,260/-. He would be entitled to 30% of the pay towards House Rent Allowance (HRA) also, if he would not have opted for the govt. accommodation. It is well settled that all perquisites are to be taken into consideration for the purpose of computing the loss of dependency—Although, it appears that the deceased was almost regularly getting overtime allowance ranging between Rs. 10,000/- to 35,000/- per month. Since the deceased was to retire just after 10-11 months, a sum of Rs. 10,000/- only as overtime allowance, shall be taken for computing the loss of dependency—After adding the national sum of Rs.75,000/- under conventional heads as granted by the Tribunal, the overall compensation comes to Rs.21,26,460/- The compensation is thus reduced from Rs. 44,52,100/- to Rs. 21,26,460/- The excess amount of Rs. 23,25,640/- along with

the up-to date interest earned, if any, during the pendency of the Appeal, shall be refunded to the Appellant Insurance Company through its counsel. The statutory amount of Rs. 25.000/- shall also be returned.

Reliance General Insurance Co. Ltd. v. *Leela Wati & Ors.* *626*

— Order 12 Rule 8—Claims Tribunal awarded compensation—Appea l for reduction of compensation filed by Insurer before High Court—Plea taken, in absence of any evidence as to future prospects, same should not have been added—Driver did not possess any driving license at time of accident—A notice was served upon owner and driver to produce driving license—Non production of license would show that driver did not possess any driving license—Appellant should not have been saddled with liability to pay compensation—Held—In absence of any evidence as to deceased's permanent employment, Tribunal faulted in considering future prospects while computing loss of dependency—It is true that a notice was claimed to have been served upon driver and owner—However, no evidence with regard to same was produced—It is well settled that onus to prove breach of policy condition is on insurer—Simply stating that a notice under Order 12 Rule 8 of CPC was sent is not sufficient to discharge onus that driver did not possess any driving license to drive vehicle—Insurer cannot avoid liability to pay compensation.

National Insurance Co. Ltd. v. *Rajbala & Ors.* *793*

NEGOTIABLE INSTRUMENTS ACT, 1881—Sections 138, 143, 144, 145, & 147—Cross examination of complainant by accused—Complaint filed by respondent u/s 138 alleging that petitioner/accused one of the directors of M/s. Sukhdata Chits Pvt. Ltd. had issued cheque of Rs.50,000/- in his favour which was dishonoured with remarks "funds insufficient"—Petitioners told to honour cheque but refused—Despite legal notice dated 28.01.2010, petitioner did not make payment—

Complaint filed—Application filed by petitioner u/s 145 (2) NI Act for cross-examination of respondent—Vide impugned order dated 07.02.2011, MM permitted cross-examination of complainant confined to para 4 and 6 of the application, holding that rest of the paras of the application were legal or within personal knowledge of petitioners u/s 106 Evidence Act and hence do not require any cross-examination—Order challenged in revision before ASJ—Order of MM upheld by ASJ—Held, limiting the right of petitioner, to cross-examine only with regard to para 4 and 6 of the complainant's application may cause prejudice to the petitioners-Objective of 138 NI Act is to enhance acceptability of cheques in settlement of liabilities—Considering legislative intent of summary trial and expeditious disposal of cases, particularly 139 of NI Act and Section 118 of Evidence Act providing presumption in favour of complainant that issue was cheque was towards debt or liability and Section 145 providing that evidence could be led by the complainant by way of affidavit, accused does not have unlimited and unbridled right of subjecting complainant to usual and routine type of examination—Phraseology "as to the facts contained therein" in Section 145 (2) cannot be read to mean that complainant can be subjected to cross-examination of everything that he has stated on affidavit—However unjust to say that in all cases cross-examination would only be confined to defences of accused—Accused would be entitled to cross-examine complainant as done in summary trial but at the same time, not be precluded from putting certain questions that would be relevant and essential for just decision—Impugned order modified to the extent that cross-examination of the complainant would not remain limited to contents of Para 4 and 6 of application of complainant but shall also extend to facts in addition to their defences, as may be deemed essential by MM which are relevant in the facts and circumstances of the case keeping in view the object and scheme of the Act and particularly, provisions of Section 139, 143 of the Act

and Section 106 of Evidence Act—Petition accordingly disposed of.

Sukhdata Chits Pvt. Ltd. & Ors. v. *Rajender Prasad Gupta* *581*

PREVENTION OF CORRUPTION ACT, 1988—Sections 13 (2) and Section 13 (1) (d)—Bail—Case of prosecution that petitioners and other accused entered into conspiracy to eliminate all forms of competition and to ensure that the company Swiss Timing Ltd. (STL) was awarded contract for Time Scoring Result (TSR) system—Held, bail is the rule and committal to jail an exception—Refusal of bail is restriction on personal liberty of individual guaranteed under Article 21 of the Constitution—Requirements that have to be balanced are the seriousness of accusations, whether witnesses are likely to be influenced by accused and whether accused likely to flee from justice if granted bail—Prima facie case for offence u/s 467 IPC made out against petitioner—Although accusations against petitioners serious however, evidence to prove accusations is primarily documentary besides few material witnesses—If seriousness of offence on the basis of punishment provided, is the only criteria, courts would not be balancing the constitutional rights but rather recalibrating the scales of justice—Allegation made against petitioner Suresh Kalmadi of threatening witnesses and tampering evidence when witnesses were working under petitioner—Apparent that witnesses harassed and threatened only till they were working under petitioner and thereafter no influence on witnesses—Evidence on record that in past witnesses were intimidated does not prima facie show that there is any likelihood of threat to prosecution witnesses—No merit in contention of CBI counsel that mere presence of petitioners at large would intimidate witnesses—Petitioner Suresh Kalmadi in custody for over 8 month and petitioner V.K. Verma for 10 months—No allegation that petitioners are likely to flee from justice and will

not be available for trial—Allegations against petitioners of having committed economic offences which resulted in loss to State exchequer by adopting policy of single vendor and ensuring contract awarded only to STL—Whether case is of exercise of discretion for ensuring best quality or a case of culpability will be decided during the course of trial—No allegation of money trail to petitioners—No evidence of petitioners threatening witnesses or interfering with evidence during investigation or trial—No allegation that any other FIR registered against petitioners—Bail applications allowed.

RES JUDICATA—Details of the writ petition, being W.P. (C) No. 6742/2000 being taken for disposal of all the writ petitions challenge to legality and validity of communication dated 10.04.1999 issued by respondent No.2 demanding Additional Premium of Rs. 48,37,415/- and Revised Ground Rent @ Rs. 2,42,057/- per annum by applying land rates at four times of the actual notified rates in alleged violation of its own guidelines dated 11.01.1995—Petitioner also seeks to challenge the order dated 31.07.2000 by which respondent Nos. 1 and 2 have sought to determine the lease and the two notices dated 04.10.2000 issued by respondent No.4 under Sections 4 and 7 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971—The controversy revolves around the terms communicated by respondent Nos. 1 and 2 in respect of change of user of properties of the petitioners from the residential to commercial—The petitioner's family became owner of plot No.24 Barakhamba Road, New Delhi—Building plans for construction of a Multi-storeyed commercial building submitted to Respondent No.3 were approved—Petitioners entered into Collaboration Agreement with respondent no.5 for construction of the multi storeyed commercial building. As per the agreement, Respondent no.5 was liable to pay commercialization charges to Respondents 1 and 2—

Respondent 1 and 2 issued show cause notice for passing order of re-entry for construction of Multi Storeyed Building allegedly without their permission—Petitioner filed C.W. No. 909/1973 challenging the said notice dated 11.07.1973—Fresh policy guidelines issued by of respondents 1 and 2 received by petitioners—Petitioners agreed to abide by the said policy and requested for fresh terms as per policy issued—Fresh terms communicated by respondents 1 and 2 for permission for change of user of land, in purported compliance of the new policy—The fresh demand of Respondents 1 and 2 was allegedly not in accordance with the new policy. Hence petitioner wrote to respondents 1 and 2 accordingly—This Court passed a common judgment in about 22 writ petitions on similar matters as that of the petitioner, where detailed directions were given for calculation of Additional Premium and Revised Ground Rent—Respondents 1 and 2 issued fresh terms to the petitioners in purported compliance of judgment of this Court dated 19.05.1998. The terms communicated were erroneous in the view of the petitioner—SLP filed by other parties against the judgment of High Court dated 19.05.1998 disposed off. The said parties were permitted to move the High Court for clarification and/or for further directions—Order passed by respondents No.1 and 2 purportedly re-entering the premises and determining the lease—Two notices sent by Respondent No.4 under Section 4 and 7 respectively of The public Premises (Eviction of Unauthorized Occupants) Act, 1971 and the same are under challenge—Held—It is a second round of litigation because the issue involved has already been determined by two Division Benches of this Court who had quashed the revised demand of rates at four times of the actual notified rates—The Division Bench in its judgment date 19.05.1998 clearly held that the additional premium/conversion charges for the conversion of user of land will be determined with reference to the land rates (as notified by the Government (Ministry of Urban

Development) from time to time applicable on the "crucial date" as per FAR assigned to the plot prevailing on the crucial date—Policy dated 11.01.1995 is the policy which gave the formula for calculation of additional premium/conversion charges which has already been accepted by the Division Bench in its judgment dated 19.05.1998—Calculation issued by the respondent No. 2 vide letter dated 10.04.1999 claiming additional premium/conversion charges of Rs. 48,37,415/- is erroneous and without application of mind—Land rates have been wrongly presumed to be based on FAR 100 and the same were wrongly multiplied with 4—This is so, because the FAR assigned to the plot was already 400 and there was no scope for further multiplying by 4—Annexure P-17 shows the land rate @ 600 Sq. Yds. in 1969 but did not specify the FAR—There was no change in 1970—No contrary evidence in this regard has been produced by the respondent No.2 in order to show that the land rates in 1970 were prescribed for FAR 100—Therefore, the letter dated 10.04.1999 raising additional premium in view thereof is quashed—Notification/circular dated 18.01.1996 issued by the respondent No.2 is also quashed—The present writ petition is allowed and communication dated 10.04.1999 and the communication dated 31.07.2000 and the two communications dated 04.10.2000 are quashed—The respondent Nos. 1 and 2 are at liberty to raise their fresh demand for change of the user of the property No.24, Barakhamba Road, New Delhi in accordance with principles laid down by the Division Bench judgment dated 19.05.1998 and the finding arrived herein.

Ashoka Estate Pvt. Ltd. & Ors. v. *Union of India & Ors.* *651*

SERVICE LAW—Aggrieved petitioner challenged order passed by Central Administrative Tribunal directing petitioner to grant Assured Career Progression (ACP) benefits along with arrears and re-fixation of retiral benefits dues to Respondent no.1—

Petitioner urged, Respondent no.1 did not achieve requisite benchmark grading in ACR, so not entitled to benefits—On the other hand, Respondent no.1 claimed that relevant ACRs were not communicated to him which ought not to be considered for granting him benefits—Held:- Denial of a service benefit otherwise due to an employee, on the basis of un-communicated ACR, would be violative of the principles of natural justice.

Union of India Through Secretary & Ors. v. *Dhum Singh & Ors.* *778*

TRANSFER OF PROPERTY ACT, 1882—Section 106—Appellant/defendant a tenant from 1979 at a monthly rent of Rs.1161.60—Rent increased from time to time under section 6A and 8—Rent Rs.2489.30 w.e.f 23.04.2004—legal notice dated 07.05.2007 enhancing rent to Rs. 3618.23 inclusive of maintenance charges Rs.880/- w.e.f. 23.04.2007—tenancy terminated by legal notice dated 07.09.2007—failure to vacate the premises—Suit for possession and mesne profits—Plea taken, notice dated 07.05.2007 defective as sought to increase the rent retrospectively—Notice dated 07.05.2007 not served—Held, even if language defective it will operate to increase the rent by 10% after 30 days of service of notice—Notice was served—Suit decreed—Aggrieved by the judgment the appellant/defendant preferred the regular first appal—Held—Notices were sent at seven addresses by registered AD post and UPC—The addresses were correct—Notice deemed to have been served—Notice has a necessary legal effect of increasing rent 30 days after receipt of notice—Order 20 Rule 12 does not mandate that the court shall first take evidence only an aspect of illegality of possession and decree the suit for possession and only thereafter will go for trial with respect of mesne profits—Appeal dismissed.

Sewa International Fashions & Ors. v. *Meenakshi Anand* *607*

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W.P. (C)

RAJESH KUMAR SHARMA & ANR. ....PETITIONERS

VERSUS

ESTATE OF LATE SH. RAJ PAL SHARMA & ANR. ....RESPONDENTS

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

W.P. (C) NO. : 9108/2011 DATE OF DECISION: 02.01.2012

Constitution of India, 1950—The Indian Succession Act, 1925—Section 375 which requires such security to be furnished is impugned only on the ground that it is rigorous and is coming in the way of the petitioners from enjoying the money bequeathed to them and is thus ultra vires the Constitution of India—The provision for taking security bond with surety is intended to ensure safety of the debts received by the grantee of the Succession Certificate or Letters of Administration. The provision requires the grantee of Succession Certificate and/or Letters of Administration to furnish security to protect the right of heir inter se so that the person who is ultimately found to be entitled to the whole or part of the debts is indemnified—The law thus requires him under Section 375 supra to furnish security to ensure that no loss is caused to the rightful heirs. The petitioners in the petition have been unable to plead as to how such provision protecting the interest of the heirs is bad—The right to property under the Constitution is always subject to reasonable restrictions and we find the aforesaid provision to be a reasonable one—Not only so, a bare perusal of Section 375 further shows that the furnishing of security itself is in the discretion of the Court. It is always open to the grantee to seek exemption from furnishing of such security—Held that the challenge to the *vires* of Section 375 of the Indian Succession Act, 1925 predicated on the same being mandatory is misconceived and in ignorance of law.

The provision for taking security bond with surety is intended to ensure safety of the debts received by the grantee of the Succession Certificate or Letters of Administration. The provision requires the grantee of Succession Certificate and / or Letters of Administration to furnish security, to protect the right of heirs *inter se* so that the person who is ultimately found to be entitled to the whole or part of the debts is indemnified. The grantee of a Succession Certificate or Letters of Administration is only authorized to collect the debts of the deceased and is obliged to distribute the same amongst the heirs, as per the Will probated or as per entitlement under the law of succession. The grantee of a Succession Certificate or the Letters of Administration is not necessarily the heirs or only heir whether under the Will or otherwise and not entitled to the debts and properties of the deceased collected on the strength of the grant. The law thus requires him under Section 375 supra to furnish security to ensure that no loss is caused to the rightful heirs. The petitioners in the petition have been unable to plead as to how such provision protecting the interest of the heirs is bad. **(Para 7)**

Not only so, a bare perusal of Section 375 (supra) further shows that the furnishing of the security itself is in the discretion of the Court. It is always open to the grantee to seek exemption from furnishing of such security. We may record that this Court in **Sudershan K. Chopra (Smt.) Vs. State** 2006 IV AD (Delhi) 735 following the judgment of the Calcutta High Court in **Manmohini Dassi Vs. Taramoni** AIR 1929 Calcutta 733 and finding the grantee to be the sole legetee/beneficiary under the Will of all the properties bequeathed thereunder, directed furnishing of security bond of a nominal amount only. Similarly in **Asha Sikka Vs. State**

1996 3 AD (Delhi) 967 also this Court granted Letters of Administration without the grantee being required to execute any security. A similar view is found to have been taken by most of the other High Courts also. **(Para 10)**

Important Issue Involved: The right to property under the Constitution is always subject to reasonable restrictions the aforesaid provision to be a reasonable one—Not only so, a bare perusal of Section 375 further shows that the furnishing of the security itself is in the discretion of the Court. It is always open to the grantee to seek exemption from furnishing of such security.

[Ch Sh]

APPEARANCES:

FOR THE PETITIONER : None.

FOR THE RESPONDENTS : Ms. Ferida Satarawala, Adv. with Ms. Rachna Saxena Advocate. for R-2/State.

CASES REFERRED TO:

1. *Sudershan K. Chopra (Smt.)* vs. *State* 2006 IV AD (Delhi) 735.
2. *Asha Sikka* vs. *State* 1996 3 AD (Delhi) 967.
3. *Manmohini Dassi* vs. *Taramoni* AIR 1929 Calcutta 733.

RESULT: Dismissed.

A.K. SIKRI, ACTING CHIEF JUSTICE

1. The petition seeks a declaration that Section 375 of the Indian Succession Act, 1925 is *ultra vires* the Constitution of India.

2. The factual matrix leading to the filing of the petition seeking the declaration aforesaid is as follows. The two petitioners claim to have applied under Section 228 of the Indian Succession Act, 1925 seeking Letters of Administration in respect of debts and securities left by their late father. The petitioners further claim that their father had executed

Will dated 31.03.2005 bequeathing all his properties in favour of the petitioners. The said petition is stated to have been allowed vide order dated 24.08.2011 of the learned Additional District Judge. The said order records that though the Will does not give details of the properties but the petitioners had in Annexures to their petition given details of the properties. Accordingly, grant of the Letters of Administration was made subject to the petitioners showing ownership of the testator in respect of the said properties and filing of Court fees on the valuation thereof. The petitioners were also directed to file Administration Bond along with one surety for an amount equal to the value of properties after filing of the valuation report as per law.

3. This writ petition states that the Estate of the father of the petitioners comprises inter alia of bank deposits of approximately Rs. 13/- crores and four immovable properties. The petitioners further state that they do not wish to obtain probate for the immovable properties and confine the Letters of Administration to the bank deposits of approximately Rs. 13/- crores. They further state that having been settled at London for the last several decades, they have no relatives or friends in India who can stand surety for them, as directed by the learned Additional District Judge.

4. Section 375 of the Indian Succession Act which requires such security to be furnished is impugned only on the ground that it is rigorous and is coming in the way of the petitioners from enjoying the money bequeathed to them and is thus ultra vires the Constitution of India.

5. The counsel for the petitioners has not appeared inspite of the matter having been passed over twice.

6. Section 375 (supra) is as under:-

"375. Requisition of security from grantee of certificate:-

(1) The District Judge shall in any case in which he proposes to proceed under sub-section (3) or sub-section (4) of Section 373, and may, in any other case, require, as a condition precedent to the granting of a certificate, that the person to whom he proposes to make the grant shall give to the Judge a bond with one or more surety or sureties, or other sufficient security, for rendering an account of debts and securities received by him and for

indemnity of persons who may be entitled to the whole or any part of those debts and securities. (2) The Judge may, on application may by petition and on cause shown to his satisfaction, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise, as he thinks fit, assign the bond or other security to some proper person, and that person shall thereupon be entitled to sue thereon in his own name as if it had been originally given to him instead of to the Judge of the Court, and to recover, as trustee for all persons interested, such amount as may be recoverable thereunder."

7. The provision for taking security bond with surety is intended to ensure safety of the debts received by the grantee of the Succession Certificate or Letters of Administration. The provision requires the grantee of Succession Certificate and / or Letters of Administration to furnish security, to protect the right of heirs *inter se* so that the person who is ultimately found to be entitled to the whole or part of the debts is indemnified. The grantee of a Succession Certificate or Letters of Administration is only authorized to collect the debts of the deceased and is obliged to distribute the same amongst the heirs, as per the Will probated or as per entitlement under the law of succession. The grantee of a Succession Certificate or the Letters of Administration is not necessarily the heirs or only heir whether under the Will or otherwise and not entitled to the debts and properties of the deceased collected on the strength of the grant. The law thus requires him under Section 375 supra to furnish security to ensure that no loss is caused to the rightful heirs. The petitioners in the petition have been unable to plead as to how such provision protecting the interest of the heirs is bad.

8. We are therefore unable to agree that there is any illegality in the said provision and / or that the same is *ultra vires* the Constitution. The right to property under the Constitution is always subject to reasonable restrictions and we find the aforesaid provision to be a reasonable one.

9. We also find the petitioners to have filed this petition challenging the vires of the provision on the premise that surety, besides own security bond, is mandatorily required to be furnished. A bare perusal of Section 375 (supra) shows that the grantee of a Succession Certificate or a Letters of Administration can, besides a surety, furnish other sufficient security. The petitioners, who now claim to be interested in obtaining

Letters of Administration only qua deposits in Banks and not qua immovable properties, can always apply to the learned Additional District Judge for variation of the order and offering to furnish security of the said immovable properties or any other security in substitution of the surety as directed by the learned Additional District Judge. The petitioners do not appear to have made any such application / prayer to the learned Additional District Judge. The direction contained in the order dated 24.08.2011 (supra) to furnish surety has been issued in routine manner without any hearing or pleading to the said effect.

10. Not only so, a bare perusal of Section 375 (supra) further shows that the furnishing of the security itself is in the discretion of the Court. It is always open to the grantee to seek exemption from furnishing of such security. We may record that this Court in **Sudershan K. Chopra (Smt.) Vs. State** 2006 IV AD (Delhi) 735 following the judgment of the Calcutta High Court in **Manmohini Dassi Vs. Taramoni** AIR 1929 Calcutta 733 and finding the grantee to be the sole legetee / beneficiary under the Will of all the properties bequeathed thereunder, directed furnishing of security bond of a nominal amount only. Similarly in **Asha Sikka Vs. State** 1996 3 AD (Delhi) 967 also this Court granted Letters of Administration without the grantee being required to execute any security. A similar view is found to have been taken by most of the other High Courts also.

11. We are thus constrained to observe that the challenge to the vires of Section 375 of the Indian Succession Act, 1925 predicated on the same being mandatory is misconceived and in ignorance of law.

12. This writ petition is accordingly dismissed. The petitioner shall however be entitled to approach the Additional District Judge with appropriate application for waiver of the condition of furnishing of surety and / or security and the said application if filed shall be dealt with in accordance with law.

ILR (2012) II DELHI 467
RFA

P.E. LYALL ....APPELLANT

VERSUS

BALWANT SINGH ....RESPONDENT

(VALMIKI J. MEHTA, J.)

RFA NO. : 35/2002 & 197/2002 DATE OF DECISION: 03.01.2012

Code of Civil Procedure, 1908—Benami Transaction (Prohibition) Act, 1988—Section 4—Respondent/plaintiff filed two suits one for possession filed on 18.04.1988 and the other for injunction filed on 21.11.1987—Claims to be owner of the suit property—Benami Transaction (Prohibition) Act, 1988 came into force on 19.05.1988—Written Statements filed on 28.07.1988 and 18.07.1988 respectively—Plea taken that the property held benami and respondent/plaintiff not the real owner of the property—Funds for purchase of property given by their father—Held no document proved giving of funds by the father for purchase of property—Suits decreed—Aggrieved, defendant no.1/appellant filed the two appeals—Held suits filed before coming into force of the Act—The Defence taken by the defendant no.1 appellant is hit by the provision of Section 4(2) of the Act—Appeal dismissed.

Suit No. 451/1995 was a suit for possession which was filed on 18.4.1988. The suit for injunction being suit No. 34/2001 was filed on 21.11.1987. I am giving dates with respect to the filing of the suits inasmuch as the only issue which has been argued before this Court was the claim with respect to the respondent/plaintiff not being actual owner of the property, but only being the benamidar, and that it was the father/late

Sh Jiwan Singh who was stated to be a real owner of the property. The dates of filing of the suits are important inasmuch as the Benami Transactions (Prohibition) Act, 1988 came in to force on 19.5.1988. After coming into force of the Benami Transactions (Prohibition) Act, 1988 (hereinafter, referred to as 'the Act'), no suit can be filed to claim rights in a property on the ground that the property was held benami. Similarly, a defence which alleges that a property was benami and the actual owner was someone else, was also prohibited. This was a mandate of Section 4 of the Act. Though the Supreme Court initially in the case titled as **Mithilesh Kumari & Anr. v. Prem Behari Khare,** AIR 1989 SC 1247 had held that the Act was retrospective in operation and would even apply to pending proceedings, subsequently however, a Division Bench of three Judges in the case of **R. Rajagopal Reddy v. P. Chandrasekharan,** AIR 1996 SC 238 held that the passing of the Act will not affect pending proceedings i.e. the Act will not apply where/when a suit has already been filed before passing of the Act taking up the plea that the property was held as benami or when the defences of the property being benami were already taken up before passing of the Act. The suits which were filed by the respondent/plaintiff were for possession and injunction on the basis of title in his favour and therefore, the issue will be whether defences can be permitted in these suits setting up a case that the respondent/plaintiff is only a benamidar whereas the real owner was the father-late Sh. Jivan Singh. **(Para 5)**

A reference to the aforesaid paras shows that it is clearly mentioned in the highlighted portion of para 13 above, that a defence of benami taken after passing of the Act will not be allowed by virtue of Section 4(2) of the Act. A further reference to the highlighted portion of para 14 shows that the Supreme Court specifically held that though there was discrimination with respect to defences which were already taken up prior to coming into force of the Act and those defences were pleaded after coming into force of the Act, however, the Supreme Court observed that such

discrimination is inbuilt in the provision and a grievance raised that discrimination is caused cannot be sustained.

(Para 7)

Important Issue Involved : (A) Section 4 of the Benami Transaction (Prohibition) Act 1988, mandates that after coming into force of the Act on 19.05.1988, no suit can be filed to claim rights in a property on the ground that the property was held benami and a defence which alleges that a property was benami and the actual owner was someone else is also prohibited.

(B) The Act will not apply where/when a suit has already been filed before passing of the Act taking up the plea that the property was held as benami or when the defence of the property being benami were already taken up before passing of the Act.

[Vi Gu]

APPEARANCES:

FOR THE APPELLANT : Ms. Richa Kapoor, Advocate.

FOR THE RESPONDENT : Mr. R.M. Sinha, Advocate.

CASES REFERRED TO:

1. *R. Rajagopal Reddy* vs. *P. Chandrasekharan,* AIR 1996 SC 238.
2. *Mithilesh Kumari & Anr.* vs. *Prem Behari Khare,* AIR 1989 SC 1247.
3. *Jaydayal Poddar* vs. *Smt. Bibi Hazara and Ors.* AIR 1974 SC 171.

RESULT: Appeal Dismissed.

VALMIKI J. MEHTA, J. (ORAL)

1. The challenge by means of these two Regular First Appeals (RFAs) filed under Section 96 of Code of Civil Procedure, 1908 (CPC)

is to the impugned judgment and decree dated 15.12.2001.

2. The impugned judgment and decree disposed of two suits, suit Nos. 451/1995 and 34/2001. Suit No. 451/1995 was a suit filed by the respondent/plaintiff for possession of portion of ground floor of the property No. D-1043, ward No. 8, opposite Babar Kothi, Mehrauli, New Delhi (hereinafter, referred to as the suit/subject property). Suit No. 34/2001 was a suit filed for injunction to restrain the defendants in the suit from carrying out any construction on the suit property. Plaintiff in the suit, and the respondent herein, Sh. Balwant Singh claimed the reliefs of possession and injunction on the ground that he was the owner of the suit property. There were four defendants in the suit. Defendant No. 1 Mrs. P.E. Lyall, the appellant herein, is the sister of the plaintiff/Sh. Balwant Singh. The other defendants being defendant Nos. 2 to 4 were the legal heirs of the late brother of the respondent/plaintiff namely, late Sh.George J. Singh. Defendant No. 2 was the widow of late Sh. George J. Singh and defendant Nos. 3 and 4 were the children of late Sh. George J. Singh. Defendant Nos. 2 to 4, after passing of the impugned judgment, had vacated the portion in their possession i.e. a portion in the ground floor of the property.

3. The dispute is now confined only to original defendant No.1-Smt. P.E. Lyall, who is the appellant in this Court, and between the original plaintiff-Sh. Balwant Singh, who is the respondent herein.

4. I may state that for the sake of convenience I am referring to respondent as the original plaintiff-Sh. Balwant Singh, inasmuch as, Sh. Balwant Singh, original respondent in the appeals expired during the pendency of the appeals and is now represented by his legal heirs. Reference in this judgment will be made to original appellant and the original respondent when the appeals were filed i.e. to plaintiff/respondent-Sh. Balwant Singh and defendant No. 1/appellant-Smt. P.E. Lyall.

5. Suit No. 451/1995 was a suit for possession which was filed on 18.4.1988. The suit for injunction being suit No. 34/2001 was filed on 21.11.1987. I am giving dates with respect to the filing of the suits inasmuch as the only issue which has been argued before this Court was the claim with respect to the respondent/plaintiff not being actual owner of the property, but only being the benamidar, and that it was the father/late Sh Jiwan Singh who was stated to be a real owner of the property.

The dates of filing of the suits are important inasmuch as the Benami Transactions (Prohibition) Act, 1988 came in to force on 19.5.1988. After coming into force of the Benami Transactions (Prohibition) Act, 1988 (hereinafter, referred to as 'the Act'), no suit can be filed to claim rights in a property on the ground that the property was held benami. Similarly, a defence which alleges that a property was benami and the actual owner was someone else, was also prohibited. This was a mandate of Section 4 of the Act. Though the Supreme Court initially in the case titled as **Mithilesh Kumari & Anr. v. Prem Behari Khare,** AIR 1989 SC 1247 had held that the Act was retrospective in operation and would even apply to pending proceedings, subsequently however, a Division Bench of three Judges in the case of **R.Rajagopal Reddy v. P. Chandrasekharan,** AIR 1996 SC 238 held that the passing of the Act will not affect pending proceedings i.e. the Act will not apply where/ when a suit has already been filed before passing of the Act taking up the plea that the property was held as benami or when the defences of the property being benami were already taken up before passing of the Act. The suits which were filed by the respondent/plaintiff were for possession and injunction on the basis of title in his favour and therefore, the issue will be whether defences can be permitted in these suits setting up a case that the respondent/plaintiff is only a benamidar whereas the real owner was the father-late Sh. Jivan Singh.

6. So far as the suit for possession is concerned, the same was filed in 18.4.1988 wherein the written statement taking up the plea of benami was filed by the appellant on 28.7.1988. In the suit for injunction which was filed on 21.11.1987, written statement was filed on 18.7.1988. Thus, in both the suits the written statements were filed by appellant/ defendant No.1 after promulgation of the Act. The written statement, therefore, taking up a defence of benami was clearly prohibited inasmuch as the written statement taking up the defence of benami is specifically barred as per Section 4(2) of the Act. This aspect has been clarified by the Supreme Court in the judgment of **R.Rajagopal Reddy** (Supra) case which has held as under:-

> 13. So far as Section 4(2) is concerned, all that is provided is that if a suit is filed by a plaintiff who claims in his favour and holds the property in his name, once Section 4(2) applies, no defence will be permitted or allowed in any such suit, claim or

> action by or on behalf of a person claiming to be the real owner of such property held benami. The disallowing of such a defence which earlier was available, itself, suggests that a new liability or restriction is imposed by Section 4(2) on a pre- existing right of the defendant. Such a provision also cannot be said to be retrospective or retroactive by necessary implication. It is also pertinent to note that Section 4(2)does not expressly seek to apply retrospectively. So far as such a suit which is covered by the sweep of Section4(2) is concerned, the prohibition of Section 4(1) cannot apply to it as it is not a claim or action filed by the plaintiff to enforce right in respect of any property held benami. On the contrary, it is a suit, claim or action flowing from the sale deed or title deed in the name of the plaintiff. ***Even though such a suit have been filed prior to 19.5.1988, if before the stage of filing of defence by the real owner is reached, Section 4(2) becomes operative from 19th May, 1988, then such a defence, as laid down by Section 4(2) will not be allowed to such a defendant.*** However, that would not mean that Section 4(1) and 4(2) only on that score can be treated to be impliedly retrospective so as to cover all the pending litigations in connection with enforcement of such rights of real owners who are parties to benami transactions entered into prior to the coming into operation of the Act and specially Section 4 thereof. It is also pertinent to note that Section 4(2) enjoins that no such defence 'shall be allowed' in any claim, suit or action by or on behalf of a person claiming to be the real owner of such property. That is to say no such defence shall be allowed for the first time after coming into operation of Section 4(2). If such a defence is already allowed in a pending suit prior to the coming into operation of Section 4(2), enabling an issue to be raised on such a defence, then the Court is bound to decide the issue arising from such an already allowed defence as at the relevant time when such defence was allowed Section 4(2) was out of picture. Section 4(2) nowhere uses the words "No defence based on any right in respect of any property held benami whether against the person in whose name the property is held or against any other person, shall be allowed to be raised or continued to be raised in any suit." With respect, it was wrongly assumed by the Division Bench that such an

already allowed defence in a pending suit would also get destroyed after coming into operation of Section 4(2). We may at this stage refer to one difficulty projected by learned advocate for the respondents in his written submissions, on the applicability of Section 4(2). These submissions read as under :-

> Section 4(1) places a bar on a plaintiff pleading 'benami', while Section 4(2) places a bar on a defendant pleading 'benami', after the coming into force of the Act. In this context, it would be anomalous if the bar in Section 4 is not applicable if a suit pleading 'benami' is already filed prior to the prescribed date, and it is treated as applicable only to suit which he filed thereafter. It would have the effect of classifying the so-called 'real' owners into two classes - those who stand in the position of plaintiffs and those who stand in the position of defendants. This may be clarified by means of an illustration. A and B are 'real' owners who have both purchased properties in say 1970, in the names of C and D respectively who are ostensible owners viz. benamidars. A files a suit in February 1988 i.e. before the coming into force of the Act against C, for a declaration of his title saying that C is actually holding it as his benamidar. According to the petitioner's argument, such a plea would be open to A even after coming into force of the Act, since the suit has already been laid. On the other hand, if D files a suit against B at the same for declaration and injunction, claiming himself to be the owner but B's opportunity to file a written statement comes in say November 1988 when the Act has already come into force, he in his written statement cannot plead that D is a benamidar and that he, B is the real owner. Thus A and B, both 'real' owners, would stand on a different footing, depending upon whether they would stand in the position of plaintiff or defendant. It is respectfully submitted that such a differential treatment would not be rational or logical.

14. According to us this difficulty is inbuilt in Section 4(2) and does not provide the rationale to hold that this Section applies retrospectively. The legislature itself thought it fit to do so and

there is no challenge to the vires on the ground of violation of Article 14 of the Constitution. It is not open to us to re-write the section also. Even otherwise, in the operation of Section 4(1) and (2), no discrimination can be said to have been made amongst different real owners of property, as tried to be pointed out in the written objections. In fact, those cases in which suits are filed by real owners or defences are allowed prior to corning into operation of Section 4(2), would form a separate class as compared to those cases where a stage for filing such suits or defences has still not reached hy the time Section 4(1) and (2) starts operating. Consequently, latter type of cases would form a distinct category of cases. There is no question of discrimination being meted out while dealing with these two classes of cases differently. A real owner who has already been allowed defence on that ground prior to coming into operation of Section 4(2) cannot be said to have been given a better treatment as compared to the real owner who has still to take up such a defence and in the meantime he is hit by the prohibition of Section 4(2). Equally there cannot be any comparison between a real owner who has filed such suit earlier and one who does not file such suit till Section 4(1) comes into operation. All real owners who stake their claims regarding benami transactions after Section 4(1) and (2) came into operation are given uniform treatment by these provisions, whether they come as plaintiffs or as defendants. Consequently, the grievances raised in this connection cannot be sustained."

(Emphasis added)

7. A reference to the aforesaid paras shows that it is clearly mentioned in the highlighted portion of para 13 above, that a defence of benami taken after passing of the Act will not be allowed by virtue of Section 4(2) of the Act. A further reference to the highlighted portion of para 14 shows that the Supreme Court specifically held that though there was discrimination with respect to defences which were already taken up prior to coming into force of the Act and those defences were pleaded after coming into force of the Act, however, the Supreme Court observed that such discrimination is inbuilt in the provision and a grievance raised that discrimination is caused cannot be sustained.

8. Though, the impugned judgment of the trial Court is a detailed judgment running into 26 pages and deciding all the issues in the two suits, I need not go into the details on any of these aspects inasmuch as the only issue which is required to be determined in this appeal, and as argued before me, was with respect to the plea of benami i.e. the appellant claimed that respondent/plaintiff was not a real owner of the property because the funds for the purchase of property were infact given by the father of the parties late Sh. Jivan Singh.

Since I am not required to go into the merits of the matter, I am not going into the issue on merits as to whether really the respondent is the actual owner as contended by him or he was only a benamidar, as argued by the appellant. The appellant before the trial Court had tried to show that the respondent had no earnings and was of a very young age having just taken employment, though, on this very basis it cannot be said that automatically the property will become benami inasmuch as it is possible that the father can be said to have gifted the moneys to the respondent/plaintiff and therefore the property was purchased in the name of respondent/plaintiff. A leading judgment laying down the indicias for deciding whether property held benami or not is the judgment of the Supreme Court in the case of **Jaydayal Poddar v. Smt. Bibi Hazara and Ors.** AIR 1974 SC 171 and which provided for five indicias to decide the benami ownership of the property. As to who provided the funds/source of money is only one (and not the sole) indicia, another indicia being the motive for giving the transaction a benami colour, and which if does not exist the property will not be benami even if funds are provided by a person other than the benami owner. Therefore, on merits there could have been something to be said in favour of either the appellant or the respondent qua the issue of benami nature of property. Of course I must hasten to add that the trial Court has held that no document has been proved by the appellant/defendant No.1 showing giving of the funds from the retirement benefits of the father for purchase of the property in question.

9. Though, the respondent/plaintiff had raised the plea of bar of the Act before the trial Court, the trial Court has very surprisingly chosen to give findings on merits that the property is not benami, although, once the plea of bar of the defence of benami was raised by the respondent/plaintiff, the trial Court in fact ought to have instead of deciding the issue

on merits, disposed of the suit on account of bar to the taking of defence in the written statement of the property benami in view of Section 4(2) of the Act.

10. In view of the above, I hold that the defences which were taken by the appellant/defendant No.1 in the two suits of the plaintiff/respondent being only a benamidar and not the real owner and that the father-late Sh. Jiven Singh was the owner of the property are hit by provision of Section 4(2) of the Act. Since the defence itself is barred, nothing else is required to be looked into.

11. No other issue was urged or pressed before me.

12. I, therefore, sustain the judgments and decrees for possession and injunction passed in favour of the respondent/plaintiff and against the appellant/defendant No.1.

13. In view of the above, both the appeals are dismissed leaving the parties to bear their own costs. Trial Court record be sent back.

ILR (2012) II DELHI 476
RFA

SCHENKER INDIA PVT. LTD. ....APPELLANT

VERSUS

SIRPUR PAPER MILLS LTD. ....RESPONDENT

(SANJAY KISHAN KAUL AND RAJIV SHAKDHER, JJ.)

RFA (OS) NO. : 77/2010 DATE OF DECISION: 03.01.2012

Limitation Act, 1963—Articles 74, 75 and 79—Code of Criminal Procedure, 1973—Section 156(3)—Summons—Period of limitation—Suit for damages and permanent injunction—Appellant/plaintiff in business of freight transporter—Engaged by respondent/defendant for

providing logistic services—Difficulties in execution of the transaction—Allegation of breach of obligation on each side—Respondent/defendant filed suit for injunction and also criminal complaint with ACMM—Matter investigated u/s. 156(3)—preliminary report filed by the police no cognizable offence made out—Opportunity granted for filing a protest petition—No protest petition filed—No summon issued to the appellant/plaintiff—Report accepted and complaint dismissed on 24.03.2007—Suit filed on 09.10.2007—Held:- suit filed beyond the prescribed period of limitation—Declined to condone the delay in re-filing the suit—Suit dismissed vide order dated 02.02.2010—Aggrieved by the order appellant/plaintiff filed the present regular first appeal—Held—Action not founded on malicious prosecution, at best based on defamatory material contained in the complaint—Relevant Article is Article 75—period of limitation one year from the date of filing a complaint—Complaint filed on 26.03.2006—Expired on 25.03.2007—suit instituted on 09.10.2007 which is beyond the period of limitation—appeal dismissed.

In our view, the said Article would apply only if, necessary averments are made in the plaint. With the assistance of the learned Amicus Curiae, we have perused the plaint which, runs into 98 paragraphs. Despite prolixity of the plaint, we find that there is no averment to the effect that the action is founded on malicious prosecution. The only averment to which recourse was sought to be taken by the appellant are contained in paragraphs 90 to 94. For the sake of convenience, the same are extracted hereinbelow :-

> "90. That it is pertinent to mention that on 27.03.2006, the defendant herein has even tried to pressurize and blackmail the plaintiff by filing a complaint being CC No.107/1/06 under section 200 of Cr.PC for registration of FIR u/s. 383, 384, 385, 415, 418, 420 u/s. sec. 120-B of IPC against the plaintiff and its Managing

Director. The Ld. ACMM had directed the concerned Police Station to investigate the matter and file a report.

Accordingly, an Action taken Report (ATR) was filed before the Ld. ACMM wherein it is revealed that the allegations against the plaintiff was false, without any basis and devoid of substantial material and accordingly the Ld. Judge dismissed the complaint vide order dated 24.03.2007.

91. That the plaintiff herein has a right, title and interest in respect of such payment towards the goods and ought to be paid for services rendered. It is submitted in this regard that in terms of agreement entered into between the parties, the plaintiff is entitled to be paid a sum of Rs.76,03,821/- alongwith interest @ 12% p.a. for which the plaintiff reserves his right to file an appropriate proceedings to recover the same.

92. That the defendants because of their impish and puckish acts of filing false, baseless complaint has caused great disrepute to the plaintiff and has ill-reputed and defamed the image and goodwill of the plaintiff in the market for which the plaintiff is well-known. The defendant has knowingly and purposely harmed the reputation of the plaintiff.

93. That the plaintiff respectfully submits that it had blocked resources, deployed capital for these specific transactions and therefore the inordinate delay on the part of the defendant in getting the product registered unnecessarily delayed the project and the Clearing Agent wrote several emails stating this position and that the demurrage charges are increasing and cumulating day by day.

94. That the plaintiff herein has a right, title and interest in respect of such payment towards the goods

and ought to be paid for services rendered. Due to such acts of blackmail and attempts to bring disrepute to the plaintiff, the business of the plaintiff has suffered immensely and therefore, irreparable injury is caused to the plaintiff, for which the plaintiff can only be compensated in terms of money."

4.1 A perusal of the averments made therein would show that there is only a reference to the termination of the proceedings before the ACMM which, as noticed hereinabove, were terminated vide order dated 24.03.2007. The gravamen of the action is discerned, in actuality, on a perusal of the averments contained in paragraph 92 of the plaint. A perusal of the averments shows that the appellant (i.e., the original plaintiff) was evidently aggrieved on account of the defamatory allegations contained in the complaint filed before the ACMM. As observed hereinabove, there is no averment to the effect that a criminal **prosecution,** of the plaintiff, was set in motion with malice with a view to cause a damage to the appellant.

4.2. As a matter of fact, the averments made in paragraph 96, which pertain to cause of action, only advert to the date on which the proceedings before the ACMM were terminated. The relevant averments made therein are quoted hereinafter:-

"'The cause of action further arose on 24.03.2007 when the **false and baseless complaint** filed by the defendant was dismissed by the Ld. ACMM'."

4.3. These averments would show that the action is pivoted on the complaint filed before the ACMM once again; though a feeble attempt is made to seek extension of limitation based on the date of its dismissal.

4.4 In view of these averments, according to us, there was, as a matter of fact, no occasion to refer to Article 74 as this is not an action based on malicious prosecution. Similarly, in

our view, Article 79 which speaks of an action for compensation vis-a-vis "illegal, irregular or excessive distress"; would also have no application in the absence of relevant pleadings in that regard. What can be said, at the highest, in favour of the appellant, is that, the action is based on defamatory material contained in the complaint, and if that be so, then the relevant article is Article 75, which reads as follows :-

No.	Description of Suit	Period of Limitation	Time from which period begins to run
75	For compensation for a malicious prosecution	One year	When the plaintiff is acquited or the prosecution is otherwise terminated

(Para 4)

There is another facet of the matter which we would like to refer to, which is, as to whether Article 74 would at all get attracted in the instant case. The order on the basis of which the appellant seeks to sustain the institution of the suit is the order of ACMM dated 24.03.2007, which reads as follows :-

"24.03.2007
Present: AR of the complainant
IO SI N.R. Lamba

I have gone through the preliminary investigation report of the investigating officer. I have also gone through the various documents placed before me including the details regarding civil proceedings and the orders of the Hon'ble Delhi High Court. Despite an opportunity, the counsel for the complainant has not filed any protest to the preliminary report. I am satisfied by he preliminary investigation report and I do not find sufficient material to proceed with the complaint which is hereby dismissed. File be consigned to Record Room."

6.1. It is not in dispute that in the present case, no summons had been issued to the appellant based on the complaint filed by the respondent under section 156(3) of the Code of Criminal Procedure, 1973. The question therefore would arise as to whether in terms of Article 74 of the Limitation Act, **"prosecution"** if at all got triggered. The test to determine as to whether prosecution gets triggered for maintaining an action for malicious prosecution has been articulated by the Privy Council in the case of **Mohamed Amin Vs. Jogendra Kumar Bannerjee and Ors.,** 1947 AWR (P.C.) 1754. The observations of the court being apposite are extracted hereinbelow :-

> "'.From the consideration of the nature of an action for damages for malicious prosecution emerges the answer to the problem before the Board. To found an action for damages for malicious prosecution based on criminal proceedings the test is not whether the criminal proceedings have reached a stage at which they may be correctly described as a prosecution; the test is whether such proceedings have reached a stage at which damage to the plaintiff results. The Lordships are not prepared to go as far as some of the courts in India in saying that the mere presentation of a false complaint which first seeks to set the criminal law in motion will per se found an action for damages for malicious prosecution. If the Magistrate dismisses the complaint as disclosing no offence with which he can deal, it may well be that there has been nothing but an unsuccessful attempt to set the criminal law in motion, and no damage to the plaintiff results. But in this case the Magistrate took cognizance of the complaint, examined the complainant on oath, held an inquiry in open court under section 202 which the plaintiff attended, and at which, as the learned judge has found, he incurred costs in defending himself. The plaint alleged the institution of criminal proceedings of a character necessarily involving damage to

> reputation and gave particulars of special damage alleged to have been suffered by the plaintiff. Their Lordships think that the action was well founded, and on the findings at the trial the plaintiff is entitled to judgment."

6.2. In other words the test appears to be that: whether in an action for malicious prosecution, the criminal proceedings has reached a stage where it has caused damage to the plaintiff. The learned Judges have quite categorically observed, that they were not inclined to go to the extent of saying that mere dismissal of a false complaint, which sought to set the criminal law on motion, could per se be made a foundation for an action for damages, on the ground of malicious prosecution. It is observed, as indicated above, if a Magistrate dismisses the complaint as disclosing no offence, it may well be that it was nothing but an unsuccessful attempt to set the criminal law in motion, and no damage to the plaintiff consequently resulted.

6.3 In our view, in the facts of the present case, since no summons had been issued and cognizance had not been taken of the complaint filed by the respondent, the prosecution in terms of Article 74 had not commenced. It is trite to say that an enquiry ordered by a Magistrate under section 156(3) of the Code is at a pre-cognizance stage (*see* **Devarapalli Lakshminarayana Reddy and Others Vs. V. Narayana Reddy and Others,** (1976) 3 SCC 252. Therefore, Article 74 would have no applicability, in the facts of the present case. However, as indicated hereinabove, that since the plaint did not contain any averment qua malicious prosecution, in any event, Article 74 would have no applicability. **(Para 6)**

Important Issue Involved: (A) Article 74 Limitation Act, 1963 would apply only if necessary averments as to malicious prosecution are made in the plaint.

(B) Mere dismissal of a false complaint which sought to set the criminal law in motion, could not per se be made a foundation for an action for damages on the ground of malicious prosecution. If a Magistrate dismisses a complaint as disclosing no offence, it may be nothing but an unsuccessful attempt to set the criminal law in motion and no damage consequently results.

[Vi Gu]

APPEARANCES:

FOR THE APPELLANT : Mr. Sandeep Sethi, Sr. Advocate Amicus Curiae with Mr. Ashutosh Dubey and Mr. Love K. Sharma, Advocates.

FOR THE RESPONDENT : Ms. Saloni Nagoria, Advocate.

CASES REFERRED TO:

1. *Devarapalli Lakshminarayana Reddy and Others* vs. *V. Narayana Reddy and Others,* (1976) 3 SCC 252.
2. *Mohamed Amin* vs. *Jogendra Kumar Bannerjee and Ors,* 1947 AWR (P.C.) 1754.

RESULT: Appeal dismissed.

RAJIV SHAKDHER, J. (ORAL)

1. The present appeal is preferred against the judgment dated 02.02.2010 passed by the learned Single Judge whereby the suit has been dismissed. The learned Single Judge by the impugned judgment has dismissed the suit broadly on two grounds : (i). firstly, that the suit is barred by limitation and; (ii). secondly, that the delay in re-filing the suit of nearly 204 days, did not deserve to be condoned, in the facts and circumstances of the case.

2. The broad facts, in the background of which, the present suit was filed by the appellant, who is the original plaintiff in the suit, are as follows :-

2.1. The appellant in the suit has claimed damages in the sum of

Rs.5 Crores and a relief for permanent injunction. The appellant avers that it is carrying on the business of freight transporter, both at the international and domestic level; which inter alia requires it to deal with aspects, such as, air cargo, shipping, chartering, consolidation, forwarding, customs clearing and travel agents, etc.

2.2 It appears that the respondent, who is the original defendant, engaged the services of the appellant for providing logistic services. The respondent alleges that there were delays on the part of the appellant in transporting heavy duty machinery from Germany, for which purpose, the services of the appellant had been sought. There were, it appears, difficulties in the execution of this transaction which resulted in allegations of breach of obligation being hurled by each side against the other.

2.3 The respondent, it appears, filed a suit for injunction against the appellant, as a consequence of which, certain containers holding the machinery which the appellant had to transport were ultimately released.

2.4 It appears that the respondent also filed a criminal complaint with the Additional Chief Metropolitan Magistrate (in short, ACMM). It is not disputed that the complaint was filed on 26.03.2006 (though on the copy of the complaint appended to the appeal, the date adverted to is : 21.08.2006). It is also not in dispute that the matter was investigated, whereupon a preliminary investigation report was filed by the police. There is no dispute as regards the fact that in the report it was observed that no cognizable offence was made out as against the appellant.

2.5 Upon the investigation report being filed, an opportunity was granted to the respondent to file a protest petition as against the conclusion drawn in the preliminary investigation report filed by the police.

2.6 The respondent, it appears, did not file a protest petition and consequently, when the matter came up before the learned ACMM, on 24.03.2007, the complaint was dismissed.

2.7 The learned Single Judge taking into account the facts adverted to hereinabove, came to the conclusion that the suit was barred by limitation on account of the fact that the suit which had been admittedly filed on 09.10.2007, was beyond the prescribed period of limitation. In coming to this conclusion, the learned Single Judge has adverted to Article 74 of the Limitation Act, 1963 (hereinafter referred to as the

Limitation Act). As indicated hereinabove, the learned Single Judge also declined to condone the delay in re-filing the suit.

2.8 We may also note that there is also a reference to Article 79 of the Limitation Act in the impugned judgment.

2.9. In the present appeal, we had requested Mr. Sandeep Sethi, Sr. Advocate to assist us in the matter as we had found that the advocate for the appellant was unable to assist us in the matter. This order was passed by us on 21.12.2011.

3. Thus, in the background of the aforesaid facts, the first question which arises for consideration is whether the provisions of Article 74 of the Limitation Act, are at all, applicable. Article 74 prescribes for limitation where, an action is filed for malicious prosecution. The said article for the sake of convenience is extracted hereinbelow :-

No.	Description of Suit	Period of Limitation	Time from which period begins to run
74	For compensation for a malicious prosecution	One year	When the plaintiff is acquitted or the prosecution is otherwise terminated

4. In our view, the said Article would apply only if, necessary averments are made in the plaint. With the assistance of the learned Amicus Curiae, we have perused the plaint which, runs into 98 paragraphs. Despite prolixity of the plaint, we find that there is no averment to the effect that the action is founded on malicious prosecution. The only averment to which recourse was sought to be taken by the appellant are contained in paragraphs 90 to 94. For the sake of convenience, the same are extracted hereinbelow :-

> "90. That it is pertinent to mention that on 27.03.2006, the defendant herein has even tried to pressurize and blackmail the plaintiff by filing a complaint being CC No.107/1/06 under section 200 of Cr.PC for registration of FIR u/s. 383, 384, 385, 415, 418, 420 u/s. sec. 120-B of IPC against the plaintiff and its Managing Director. The Ld. ACMM had directed the concerned Police Station to investigate the matter and file a report.
>
> Accordingly, an Action taken Report (ATR) was filed before the

> Ld. ACMM wherein it is revealed that the allegations against the plaintiff was false, without any basis and devoid of substantial material and accordingly the Ld. Judge dismissed the complaint vide order dated 24.03.2007.
>
> 91. That the plaintiff herein has a right, title and interest in respect of such payment towards the goods and ought to be paid for services rendered. It is submitted in this regard that in terms of agreement entered into between the parties, the plaintiff is entitled to be paid a sum of Rs.76,03,821/- alongwith interest @ 12% p.a. for which the plaintiff reserves his right to file an appropriate proceedings to recover the same.
>
> **92. That the defendants because of their impish and puckish acts of filing false, baseless complaint has caused great disrepute to the plaintiff and has ill-reputed and defamed the image and goodwill of the plaintiff in the market for which the plaintiff is well-known. The defendant has knowingly and purposely harmed the reputation of the plaintiff.**
>
> 93. That the plaintiff respectfully submits that it had blocked resources, deployed capital for these specific transactions and therefore the inordinate delay on the part of the defendant in getting the product registered unnecessarily delayed the project and the Clearing Agent wrote several emails stating this position and that the demurrage charges are increasing and cumulating day by day.
>
> 94. That the plaintiff herein has a right, title and interest in respect of such payment towards the goods and ought to be paid for services rendered. Due to such acts of blackmail and attempts to bring disrepute to the plaintiff, the business of the plaintiff has suffered immensely and therefore, irreparable injury is caused to the plaintiff, for which the plaintiff can only be compensated in terms of money."

4.1 A perusal of the averments made therein would show that there is only a reference to the termination of the proceedings before the ACMM which, as noticed hereinabove, were terminated vide order dated 24.03.2007. The gravamen of the action is discerned, in actuality, on a

perusal of the averments contained in paragraph 92 of the plaint. A perusal of the averments shows that the appellant (i.e., the original plaintiff) was evidently aggrieved on account of the defamatory allegations contained in the complaint filed before the ACMM. As observed hereinabove, there is no averment to the effect that a criminal **prosecution,** of the plaintiff, was set in motion with malice with a view to cause a damage to the appellant.

4.2. As a matter of fact, the averments made in paragraph 96, which pertain to cause of action, only advert to the date on which the proceedings before the ACMM were terminated. The relevant averments made therein are quoted hereinafter :-

> "'The cause of action further arose on 24.03.2007 when the **false and baseless complaint** filed by the defendant was dismissed by the Ld. ACMM'."

4.3. These averments would show that the action is pivoted on the complaint filed before the ACMM once again; though a feeble attempt is made to seek extension of limitation based on the date of its dismissal.

4.4 In view of these averments, according to us, there was, as a matter of fact, no occasion to refer to Article 74 as this is not an action based on malicious prosecution. Similarly, in our view, Article 79 which speaks of an action for compensation vis-a-vis "illegal, irregular or excessive distress"; would also have no application in the absence of relevant pleadings in that regard. What can be said, at the highest, in favour of the appellant, is that, the action is based on defamatory material contained in the complaint, and if that be so, then the relevant article is Article 75, which reads as follows :-

No.	Description of Suit	Period of Limitation	Time from which period begins to run
75	For compensation for libel	One year	When the libel is published

5. The net result of the aforesaid discussion would be that the limitation would have to be calculated from the date on which the complaint was filed. As indicated above, it is not disputed that the complaint was filed on 26.03.2006. Thus, the limitation for filing the present suit would expire on 25.03.2007. The suit admittedly was instituted on a date, way beyond the period of limitation, which is, 09.10.2007.

6. There is another facet of the matter which we would like to refer to, which is, as to whether Article 74 would at all get attracted in the instant case. The order on the basis of which the appellant seeks to sustain the institution of the suit is the order of ACMM dated 24.03.2007, which reads as follows :-

> "24.03.2007
>
> Present: AR of the complainant
> IO SI N.R. Lamba
>
> I have gone through the preliminary investigation report of the investigating officer. I have also gone through the various documents placed before me including the details regarding civil proceedings and the orders of the Hon'ble Delhi High Court. Despite an opportunity, the counsel for the complainant has not filed any protest to the preliminary report. I am satisfied by he preliminary investigation report and I do not find sufficient material to proceed with the complaint which is hereby dismissed. File be consigned to Record Room."

6.1. It is not in dispute that in the present case, no summons had been issued to the appellant based on the complaint filed by the respondent under section 156(3) of the Code of Criminal Procedure, 1973. The question therefore would arise as to whether in terms of Article 74 of the Limitation Act, **"prosecution"** if at all got triggered. The test to determine as to whether prosecution gets triggered for maintaining an action for malicious prosecution has been articulated by the Privy Council in the case of **Mohamed Amin Vs. Jogendra Kumar Bannerjee and Ors,** 1947 AWR (P.C.) 1754. The observations of the court being apposite are extracted hereinbelow :-

> "....From the consideration of the nature of an action for damages for malicious prosecution emerges the answer to the problem before the Board. To found an action for damages for malicious prosecution based on criminal proceedings the test is not whether the criminal proceedings have reached a stage at which they may be correctly described as a prosecution; the test is whether such proceedings have reached a stage at which damage to the plaintiff results. The Lordships are not prepared to go as far as some of the courts in India in saying that the mere presentation of a false

> complaint which first seeks to set the criminal law in motion will per se found an action for damages for malicious prosecution. If the Magistrate dismisses the complaint as disclosing no offence with which he can deal, it may well be that there has been nothing but an unsuccessful attempt to set the criminal law in motion, and no damage to the plaintiff results. But in this case the Magistrate took cognizance of the complaint, examined the complainant on oath, held an inquiry in open court under section 202 which the plaintiff attended, and at which, as the learned judge has found, he incurred costs in defending himself. The plaint alleged the institution of criminal proceedings of a character necessarily involving damage to reputation and gave particulars of special damage alleged to have been suffered by the plaintiff. Their Lordships think that the action was well founded, and on the findings at the trial the plaintiff is entitled to judgment."

6.2. In other words the test appears to be that: whether in an action for malicious prosecution, the criminal proceedings has reached a stage where it has caused damage to the plaintiff. The learned Judges have quite categorically observed, that they were not inclined to go to the extent of saying that mere dismissal of a false complaint, which sought to set the criminal law on motion, could per se be made a foundation for an action for damages, on the ground of malicious prosecution. It is observed, as indicated above, if a Magistrate dismisses the complaint as disclosing no offence, it may well be that it was nothing but an unsuccessful attempt to set the criminal law in motion, and no damage to the plaintiff consequently resulted.

6.3 In our view, in the facts of the present case, since no summons had been issued and cognizance had not been taken of the complaint filed by the respondent, the prosecution in terms of Article 74 had not commenced. It is trite to say that an enquiry ordered by a Magistrate under section 156(3) of the Code is at a pre-cognizance stage (see **Devarapalli Lakshminarayana Reddy and Others Vs. V. Narayana Reddy and Others,** (1976) 3 SCC 252. Therefore, Article 74 would have no applicability, in the facts of the present case. However, as indicated hereinabove, that since the plaint did not contain any averment qua malicious prosecution, in any event, Article 74 would have no applicability.

7. For the reasons given hereinabove, we are of the opinion that the conclusion of the learned Single Judge is required to be sustained; albeit for different reasons.

7.1 In view of our discussion above, we are of the opinion that the other aspect of the matter, that is, whether the delay ought to be condoned or not, does not arise for consideration.

7.2 The appeal is accordingly dismissed and the impugned judgment is sustained.

8. We may place on record our appreciation for the assistance rendered by Mr. Sandeep Sethi, the learned Amicus Curiae.

ILR (2012) II DELHI 490
CRL. M.C.

MUKESH KUMAR ....PETITIONER

VERSUS

STATE ....RESPONDENT

(SURESH KAIT, J.)

CRL. M.C. NO. : 3549/2007 DATE OF DECISION: 03.01.2012

Code of Criminal Procedure, 1973—Sec.197 and Delhi Police Act, 1978 Sec. 140—Magistrate ordered under Section 156 (3) CrPC for registration of FIR for offences under Sec. 193/196/200/209 IPC against petitioner, working as Sub Inspector with Delhi Police on the allegations that in conspiracy with few others, the petitioner framed incorrect record in FIR No. 99/01—Challenged—Held, since petitioner was a government servant and is still working as Inspector in Delhi Police, the alleged acts have reasonable connection

with duties of the office held by him, so prosecution without obtaining sanction is bad in law—Magisterial order quashed.

Admittedly in the instant case, while handling the case mentioned above he allegedly committed the alleged offence as public servant. The prosecuting authority was supposed to take the sanction as enumerated under Section 140 of Delhi Police Act, and under Section 197 (1) of the Code, which they failed to do. **(Para 39)**

Important Issue Involved: Where impugned acts have reasonable nexus with the duties of the office held by the accused sanction to prosecute is necessary.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. J.P. Singh, Senior Advocate with Mr. Sumit Batra & Mr. Amit Bhardwaj Advocates

FOR THE RESPONDENT : Ms. Ritu Gauba, APP with SI Rajeshwar, police station Connaught Place, New Delhi in person.

CASES REFERRED TO:

1. *Tata Motors Pvt. Ltd.* vs. *Pharmaceutical Products of India Ltd. & Anr.* JT (2008) (9) SC 227.
2. *Kiran Bedi* vs. *NCT of Delhi & Anr.* 2001 DLS 51 HC.
3. *Balvinder Singh Sodhi* vs. *Mahender Singh (Inspector)* 1997 VI AD (Delhi) 830.
4. *R. Balakrishna Pillai* vs. *State of Kerala,* AIR 1996 Supreme Court 901.
5. *Prof. Sumer Chand* vs. *UOI & Ors.* AIR 1993 SC 2579.
6. *Radheyshyam Mishra* vs. *State of UP* 1986 ALL.L.J.1341.
7. *Virupaxappa Veerappa Kadampur* vs. *State of Mysore* (AIR 1963 SC 849).

RESULT: Petition Allowed.

SURESH KAIT, J.

1. The instant petition is being filed to assail the impugned order dated 26.06.2007 whereby ld. MM has summoned the petitioner for the offences under Section 167/201/218/420 read with Section 511/120B Indian Penal Code, 1860.

2. I note, vide order dated 02.05.2008 the proceedings before the Trial Court were stayed.

3. The petitioner in the instant petition has raised legal issues amongst other that prosecution has failed to obtain sanction as required under Section 197 Cr. P.C. and under Section 140 of the Delhi Police Act, 1978, therefore, the court has no power or jurisdiction to proceed with the trial of the case.

4. Facts in brief giving rise to registration of the present FIR are that on 05.03.2001 at 1.55 PM on the Outer Circle, Opposite Statesman Building, Connaught Place, New Delhi, a car bearing no. DL4C-G-9122 met with an accident. Pursuant to that FIR No.99/2001 was registered at Police Station – Connaught Place, New Delhi. During the course of investigation injured Ravinder Gupta and Lalit Roy were examined. Injured Ravinder Gupta submitted that car was being driven by Rajesh Gupta whereas injured Lalit Roy had stated that car was being driven by Ravinder Gupta. Thereafter, chargesheet under section 279/337 Indian Penal Code, 1860 was filed against accused Rajesh Gupta.

5. Thereafter, injured Lalit Roy filed a claim for compensation before Motor Accident Claim Tribunal vide case no.140/2001 wherein Oriental Insurance Company was also made a respondent. In the said case, injured Lalit Roy submitted that Car bearing no. DL4C-G-9122 was being driven by accused Ravinder Gupta. In the said case, Oriental Insurance Company filed its Written Statement, wherein they submitted that out of the present FIR one more Suit no. 198/2001 was filed, wherein it was submitted that accused Rajesh Gupta was driving the vehicle. Injured Lalit Roy on coming to know that other injured Ravinder Gupta in connivance with accused Rajesh Gupta was submitting false facts and were trying to obtain compensation through Motor Accident Claim Tribunal, injured Lalit Roy in Suit no. 98/2001 filed an application

under Section 156 (3) Cr.P.C. before the Court on 10.10.2002 and vide order dated 23.09.2003, ld. Trial Court directed SHO, PS-Connaught Place, New Delhi to register an FIR and investigate the matter.

6. In the said application under section 156(3) Cr.P.C, it was alleged by injured Lalit Roy that injured Ravinder Gupta, car Owner Ms. Sunita Gupta and accused Rajesh Gupta in connivance with IO / SI Mukesh Kumar / Petitioner was trying to obtain compensation from Motor Accident Claim Tribunal in suit no. 98/2001 by submitting false evidence. It was also alleged by the injured Lalit Roy that on day of incident i.e. 05.03.2001, the vehicle in question i.e. Car no. DL4C-G-9122 was being driven by injured Ravinder Gupta and two persons i.e. Lalit Roy and Ravinder Gupta were travelling in the said car. IO / SI Mukesh Kumar / Petitioner in connivance with injured Ravinder Gupta and Rajesh Gupta filed a false suit and wrongly made Rajesh Gupta as an accused in FIR no. 99/2001, PS-Connaught Place, New Delhi.

7. It is not in dispute that FIR no. 631/2003, PS-Connaught Place, New Delhi was registered, and after investigation chargesheet has been filed by another I.O. against accused Rajesh Gupta, Ravinder Gupta & Ms.Sunita Gupta for the offences Under Section 193/196/200/201/ 209/ 120B Indian Penal Code, 1860

8. It is also not in dispute that chargesheet FIR 631/1003, there is no complaint of court concerned under Section 195 Cr.P.C. with regard to the offences under section 193/196/200/209 Indian Penal Code, 1860. Therefore as per Section 195 (b) Cr.P.C. the cognizance of offences under the above-mentioned provision cannot be taken in the light of there being no complaint made by court concerned with regard to these offences.

9. Ld. Metropolitan Magistrate has recorded in its impugned order dated 26.06.2007 from the charge-sheet filed in this case, that there was sufficient material on record to show pursuant to the criminal conspiracy between Ravinder, Santosh, Rajesh and IO/SI Mukesh Kumar / petitioner, incorrect record was framed in FIR no. 99/2001, PS-Connaught Place. As per the statement of injured Lalit Roy on the day of incident i.e. 05.03.2001, the vehicle was being driven by Ravinder Gupta. Injured Lalit Roy categorically stated that apart from him and Ravinder Gupta there was none else in the car. His statement was corroborated by witness namely Ajay Kumar Mehta and Pritam Kumar. Apart from the

statement of witnesses the fact that accused Rajesh Gupta had sustained no injury in a very serious accident on 05.03.2001 also goes to show that accused Rajesh Gupta was not in the car.

10. The trial court did not believe that the person who driving the car will not get any injury when other two occupants of the car were badly injured in a serious accident. The other fact which shows that accused Rajesh Gupta was not travelling with injured Ravinder Gupta, otherwise Rajesh Gupta being the brother of injured Ravinder, would not have left the injured brother on the spot without taking him to the hospital, just to make a phone call to his house. The primary concern of every brother is to first provide the medical aid to his injured brother. However, in FIR no. 99/2001, it was done so, therefore, the trial court safely opined that accused Rajesh Gupta was not travelling the car on the date of accident i.e. 05.03.2001.

11. Ld. Metropolitan Magistrate was of the opinion that there was a conspiracy hatched between the accused persons and IO/SI Mukesh Kumar / petitioner as was stated in the statement of injured Lalit Roy recorded by the petitioner on 05.04.2001. In the said statement injured Lalit Roy had categorically stated that Car no. DL4C G 9122 was being driven by injured Ravinder Gupta. Despite recording statement of injured Lalit Roy, IO/SI Mukesh Kumar / Petitioner had made no efforts to visit Gauran Place Restaurant and examine the Manager / Owner of the said Restaurant to find out whether the statement given by injured Lalit Roy was correct or false. However, no such efforts were made by IO/SI Mukesh Kumar / Petitioner which shows that he was a part of criminal conspiracy to show accused Rajesh Gupta as a person, who was driving the Car no. DL-4CG-9122. In the case diary of FIR no. 99/2001, IO/SI Mukesh Kumar/petitioner had mentioned that injured Lalit Roy could not produce any bill of Gauran Place Restaurant which remained unpaid by injured Ravinder Gupta.

12. In the light of surrounding circumstances i.e. injury suffered by Lalit Roy and Ravinder Gupta, condition of the Car, Inspection Report regarding the car, IO/SI Mukesh Kumar / Petitioner the trial Judge did disbelieve the version of Lalit Roy merely because he could not produce the unpaid bill.

13. Ld. Metropolitan Magistrate has also perused the entire chargesheet of FIR no. 99/2001 and found no reasons as to why he did not believe the version of injured Lalit Roy. On the contrary the version of Ravinder Gupta, created lot of doubts regarding accused Rajesh Gupta, driving the car no. DL4C G 9122 on 05.03.2001. Accused Rajesh Gupta did not suffer any injury in a serious accident. Further both injured Ravinder Gupta and accused Rajesh Gupta had stated in FIR no.99/2001 that they were coming from Liberty Cinema, Karol Bagh after seeing a movie and on the way gave lift to injured Lalit Roy and when they reached Connaught Place outer circle, the car hit a Railing while taking left turn to Barakhamba Road. IO/SI Mukesh Kumar / Petitioner had not asked Ravinder Gupta and accused Rajesh Gupta regarding the tickets of the movie, which they went to see at Liberty Cinema. Even the name of the movie was not enquired by IO/SI Mukesh Kumar / Petitioner from them. In spite of that the Petitioner still believed their version which shows to be a part of criminal conspiracy to show the driver of the car as Rajesh Gupta.

14. Ld. Metropolitan Magistrate has also recorded in its impugned Order that the fact which shows that IO/SI Mukesh Kumar/petitioner was a part of Criminal Conspiracy, is the Site Plan and the Motor Vehicle Inspection Report dated 06.03.2001. As per the Site Plan dated 05.03.2001, which was prepared by IO/SI Mukesh Kumar / Petitioner himself, the car which hit the Railing in front of Statesman Building, Outer Circle N-Block. As per the motor vehicle inspection report all the damages in Car no. DL4C G 9122 were on the front side of the Car.

15. Both injured Ravinder Gupta and accused Rajesh Kumar in FIR no.99/2001, PS-Connaught Place, New Delhi had stated to IO/SI Mukesh Kumar/Petitioner that while taking a left turn to Barakhamba Road from outer circle, the car hit from the left side due to which the injuries had been sustained to Ravinder Gupta sitting on the front left side and Lalit Roy was sitting behind injured Ravinder Gupta. The said place of accident is near M-Block and contrary to the place of accident shown by IO/SI Mukesh Kumar / Petitioner in site plan. From the site plan, motor vehicle inspection report, IO/SI Mukesh Kumar / Petitioner could have easily made out that the version put forward by Rajesh Gupta and injured Ravinder Gupta was not correct and believable as no damages were there on the Car bearing no. DL4C G 9122 on the left side and even the place

of accident narrated by Ravinder Gupta and Rajesh Gupta was incorrect and contrary to site plan prepared by him. Therefore, the version of accused Rajesh Gupta and injured Ravinder Gupta was apparently found false by Ld. Metropolitan Magistrate and IO by believing it showed that he was a part of criminal conspiracy to show that accused Rajesh Gupta was driving the aforesaid vehicle on the said date of accident.

16. Ld. Trial Court has recorded another fact which shows that IO was a part of the criminal conspiracy is non-receipt of injuries by accused Rajesh Gupta. IO had visited the spot of accident on 05.03.2001 by seeing the condition of the car. IO/SI Mukesh Kumar / petitioner could have easily made out that driver of the mother could not have escaped unhurt.

17. Ld. Trial Judge further not believed that accused Rajesh Gupta, who happens to be the brother of the injured Ravinder Gupta will not accompany to the hospital and will rather go to make a phone call.

18. Ld. Metropolitan Magistrate has also recorded that bar of Section 197 Cr.P.C. does not apply to the acts of IO/SI Mukesh Kumar/Petitioner as it was not in the part of his official duty to give any false information to save the offender or to frame incorrect record to save the offender and to help the accused in making an attempt of cheating.

19. Mr. J.P. Singh, Ld. Sr. Counsel has submitted on behalf of the petitioner that the accident took place on 05.03.2001. Statement of Lalit Roy / Complainant was recorded on 05.04.2001. On 21.05.2001, the case FIR no.99/2001 was transferred from the petitioner. Thereafter on 12.06.2001, the case was assigned to another IO. The said IO investigated the case further and finally filed a chargesheet on 04.08.2001 and the Petitioner was shown as a witness in the chargesheet.

20. he further submitted that on 24.09.2002, after a gap of 1+ years complaint case was filed and thereafter on 23.09.2003, the complaint case was withdrawn qua the petitioner on moving application dated 01.07.2003. In the said order, Ld. Metropolitan Magistrate had recorded the statement of Complainant as he did not want to proceed against him, thereafter the name of the petitioner was deleted and against the other three accused, SHO, PS-Connaught Place, New Delhi was directed to investigate the matter under Section 156 (3) Cr.P.c. in accordance with law and was further directed to submit report.

21. It is submitted that Complaint Case was filed on the statement of the wife of the brother of complainant against the petitioner.

22. Ld. Sr. Counsel further submitted that on withdrawing the complaint filed by the complainant from the Court of Ld. Metropolitan Magistrate, and the petitioner discharged cannot be summoned again in the same case on the same charge.

23. He further submitted that the previous sanction as was required under Section 197 Cr.P.C. being the petitioner Govt. Servant was not taken by the prosecution.

24. It is argued that on 01.04.2005, SHO, PS-Connaught Place, New Delhi filed charge-sheet in FIR no.361/2003 and in Column No.4, name of accused persons (without arrest) shown as under:-

1. Ravinder Gupta,
   S/o Sh. Om Prakash Gupta,
   R/o 61, Shiv Puri, Shahdara, Delhi
2. Rajesh Gupta,
   S/o Sh. Om Prakash Gupta,
   R/o 60, Shiv Puri, Shahdara, Delhi
3. Ms. Sunita Gupa,
   W/o Ravinder Kumar,
   R/o 61, Shiv Puri, Shahdara, Delhi

He submitted that the name of the petitioner was indicated in the list of witnesses at Serial No. 6, which is at Page 62 of the Paper Book.

25. He has further submitted that the Petitioner did the preliminary enquiry as accident took place on 05.03.2001 and the case was transferred to another IO on 21.05.2001. Thereafter, the second IO filed the chargesheet and recorded the statement of the witnesses. During that time, the Complainant did not make any complaint against the petitioner and after that, reasons best known to him, on 24.09.2002, after 1+ year of the alleged incident he made a complaint against the petitioner.

26. Ld. Sr. Counsel has also relied upon Section 197 Cr.P.C. which is reproduced as under:-

> "(1) When any person who is or was a Judge or Magistrate or a Public Servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction –
>
> (a) In the case of a person, who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;
>
> (b) In the case of a person, who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government"

27. Ld. Sr. Counsel further submits that as per Section 197 Cr.P.C., no court shall take cognizance of an offence alleged to have been committed while acting or purporting to act in discharge of official duty without previous sanction. Therefore, Section 197 Cr.P.C. has not been complied.

28. Ld. Sr. Counsel has also referred Section 140 of Delhi Police Act, 1978, which is reproduced as under:-

> **"140. Bar to suits and prosecutions.** -(1) In any case of alleged offence by a police officer or other person, or of a wrong alleged to have been done by such police officer or other person, by any act done under colour of duty or authority or in excess of an such duty or authority, or wherein it shall appear to the court that the offence or wrong if committed or done was of the character aforesaid, the prosecution or suit shall not be entertained and if entertained shall be dismissed if it is instituted, more than three months after the date of the act complained of;
>
> Provided that any such prosecution against a Police Officer or other person may be entertained by the court, if instituted with the previous sanction of the Administrator, within one year from the date of the offence.
>
> (2) In the case of an intended suit on account of such a wrong as aforesaid, the person intending to sue shall give to the alleged wrongdoer not less than one month' s notice of the

intended suit with sufficient description of the wrong complained of, and if no such notice has been given before the institution of the suit, it shall be dismissed.

(3) The plaint shall set forth that a notice as aforesaid has been served on the defendant and the date of such service and shall state what tender of amends, if any, has been made by the defendant and a copy of the said notice shall be annexed to the plaint endorsed or accompanied with a declaration by the plaintiff of the time and manner of service thereof."

29. Section 140 of Delhi Police Act bars firstly, the prior sanction is required. Secondly, the prosecution or suit shall not be entertained more than 3 months after the date of act complained of. In proviso of 140 (1), it is provided that even in a case, if the previous sanction of the Administrator has been taken, in that case even the prosecution against such person may be entertained only within one year from the date of the offence.

30. Learned counsel has submitted, thus, in the present case provisions of Section 140 of the Delhi Police Act has not been complied with as no sanction has been taken before filing the complaint against the petitioner. Moreso, the complaint filed after one year which is not permissible under Section 140 of Delhi Police Act, 1978.

31. It is submitted, the Delhi Police Act, 1978 is a special law. The law on this issue is well settled in the case of **Tata Motors Pvt. Ltd. v. Pharmaceutical Products of India Ltd. & Anr.** JT (2008) (9) SC 227 wherein Apex Court has held that the special law shall prevail upon the general law.

32. Admittedly, at the time of committing the alleged offence, the petitioner was a Govt. Servant and he is still working as Inspector in Delhi Police.

33. Initially, as noted above, the petitioner was discharged from the complaint. Therefore, he has been summoned vide order dated 26.06.2007 for the offences referred above in Para no.1 of this judgement.

34. Ld. Sr. Advocate has relied upon the judgment titled as **Radheyshyam Mishra v. State of UP** 1986 ALL.L.J.1341, wherein it is held that the applicability of Section 319 (1) Cr.P.C. is only to a person

who is not an accused, but it appears from the evidence in the course of any inquiry or trial of an offence that he has committed any offence for which he could be tried together with the accused. It is clearly not applicable to a person who has been an accused in the case and has been discharged by the Court.

35. Ld. Sr. Advocate has also relied upon another judgment of Hon'ble Supreme Court in **R. Balakrishna Pillai v. State of Kerala,** AIR 1996 Supreme Court 901 whereby the Law Commission in its 41st Report in Paragraph 15.123 while dealing with Section 197 Cr.P.C, as it then stood, observed as under:-

"It appears to us that protection under the section in needed as much after retirement of the public servant as before retirement. The protection afforded by the section would be rendered illusory if it were open to a private person harbouring a grievance to wait until the public servant ceased to hold his official position, and then to lodge a complaint. The ultimate justification for the protection conferred by S. 197 is the public interest in seeing that official acts do not lead to needless or vexatious prosecutions. It should be left to the Government to determine from that point of view that the question of the expediency of prosecuting any public servant".

36. In Para 8 of the judgment referred above, it is held that in so far as the requirement of sanction under Section 197 (1) of the Code is concerned in relation to the charge of criminal conspiracy that sanction under Section 197 (1) of the Code is sine-qua-non. Therefore, the sanction under this provision is mandatory.

37. In this regard, Hon'ble Apex Court has settled law in **Prof. Sumer Chand v. UOI & Ors** AIR 1993 SC 2579 wherein it has been held as under:-

"8. Since the Act is a special law which prescribes a period of limitation different from the period prescribed in the Schedule to the Limitation Act for suits against persons governed by the Act in relation to matters covered by Section 140, by virtue of Section 29(2) of the Limitation Act, the period of limitation prescribed by Section 140 of the Act would be the period of limitation prescribed for such suits and not the period prescribed in the Schedule to

the Limitation Act. This means that if the suit filed by the appellant falls within the ambit of Section 140 then the period of limitation.

19. Having regard to the principles laid down in the aforementioned decisions of this Court on provisions contained in Section 161(1) of the Bombay Police Act, 1951 which are similar to those contained in Section 140(1) of the Act, we are of the view that the High Court was right in holding that the present case falls within the ambit of Section 140 of the Act. What is alleged against respondents 3 and 4 by the appellant in the plaint is that respondent 4, who was in charge of Mayapuri police post had registered a false, vexatious and malicious report against the appellant, and respondent 3, who was Station House Officer, P.S. Naraina, had filed the challan in the Court against appellant and other accused on the basis of the said report. The facts in the present case are similar to those in **Virupaxappa Veerappa Kadampur v. State of Mysore** (AIR 1963 SC 849) where the allegation was about the preparation of false panchnama and report of seizure of ganja. The said action of the appellant in that case was held to be done under the colour of duty since it was the duty of Police Head Constable to prepare a panchnama and for that reason it was held that there was a nexus between the act complained and the statutory duty that the Police Head Constable was to perform. Similarly in the present case it was the duty of respondent 4, being in-charge of Police Post Mayapuri, to record the report and so also it was the duty of respondent 3 the SHO of P.S. Naraina to file the challan in court. The acts complained of thus had a reasonable connection and nexus with the duties attached to the offices held by respondents 3 and 4. The acts complained of were, therefore, done under the colour of office of the said respondents and fell within the ambit of Section 140(1) of the Act. It is not disputed that if Section 140(1) is found applicable the suit filed by the appellant, as against the respondents, was barred by limitation having been filed after the expiry of three months and it could not be entertained against them."

Therefore, the acts in the instant case have reasonable connection and nexus with the duties of the office held by the petitioner. The acts,

complained of are, therefore, done under the colour of office of respondent and fell within the ambit of Section 140 (1) of the Act.

38. The Co-ordinate Benches of this Court have also taken similar view in **Balvinder Singh Sodhi v. Mahender Singh (Inspector)** 1997 VI AD (Delhi) 830 and **Kiran Bedi v. NCT of Delhi & Anr** 2001 DLS 51 HC.

39. Admittedly in the instant case, while handling the case mentioned above he allegedly committed the alleged offence as public servant. The prosecuting authority was supposed to take the sanction as enumerated under Section 140 of Delhi Police Act, and under Section 197 (1) of the Code, which they failed to do.

40. Keeping the above discussion into view, I do not agree with the observation made by ld. Trial Judge that the alleged offence committed by the petitioner was not a part of official duty and no sanction was required.

41. Accordingly, Criminal M.C.No.3549/2007 is allowed and the impugned order dated 26.06.2007 is hereby quashed qua the petitioner only.

42. No order as to costs.

ILR (2012) II DELHI 503
W.P. (C)

INSTITUTE OF TOWN PLANNERS, INDIA ....PETITIONER

VERSUS

COUNCIL OF URE & ORS. ....RESPONDENTS

(RAJIV SAHAI ENDLAW, J.)

W.P. (C) NO. : 8653/2008 DATE OF DECISION: 04.01.2012

The Architects Act, 1972—The respondent No. 1 COA has been established by the Central Government vide Section 3 of The Architects Act and was to consist inter alia of electees from Institute of Architects, nominees of AICTE, nominees of Head of Architectural Institutions in India, Chief Architects in the Ministry of the Central Government, Architects from each State etc. There is no provision in The Act prescribing the functions of respondent No.1 COA. However, The Act vide Section 23 vests the duty of maintaining a Register of Architects for India on respondent No. 1 COA; vide Section 29 vests the jurisdiction to remove from the Register the name of any Architects in the Respondent no.1 COA; and vide Section 30 the respondent No. 1 COA has been further vested with the jurisdiction to hold an enquiry into allegations of professional misconduct against the Architects—There is no other provision in the Act where under respondent No. 1 COA can trace its power to prescribe minimum standards for grant of qualifications other than the recognized qualification. Section 45 of the Architects Act to which also reference has been made, empowers the respondent No. 1 COA to make regulations but only with the approval of the Central Government. However, the said Regulations again have to be with

respect to recognized qualifications and not others—What emerges from aforesaid is that the source of power to prescribe minimum standards for the courses of M. Arch. (Urban & Regional Planning), M. Arch. (Transportation Planning & Design) and M. Arch. (Housing) which are not recognized qualifications under The Architects Act, and as has been done vide impugned guidelines cannot be traced to the Architects Act—The respondent No. 1 COA is a statutory body. It can exercise only such powers as are vested in it none other. There is nothing to show that the respondent No.1 COA was intended to or is the sole repository of the education in the field of Architecture—Had the legislature intended to so empower the COA it would not have restricted its power to recognized qualifications mentioned in the Schedule. On the contrary, Section 14(2) of the Architectural Act vests the power to grant recognition to any architectural qualification in the Central Government and which power is to be exercised after consultation with the COA. Thus, when COA is not even empowered to recognize any architectural qualification, it cannot certainly be held to be empowered to prescribe minimum standards therefore.

Important Issue Involved: A statutory body can exercise only such powers as are vested in it and none other. Thus when COA is not even empowered to recognize any architectural qualification, it cannot certainly be held to be empowered to prescribe minimum standards therefore.

[Ch Sh]

APPEARANCES:

FOR THE PETITIONER : Mr. Rakesh Kumar Khanna, Sr. Adv. with Mr. Pramod Gupta, & Ms. Seema Rao, Advocates.

FOR THE RESPONDENT : Mr. Naveen R. Nath, with Ms. Amrita Sharma, & Mr. Darpan K.M., Advs. for R-1. Mr. Amitesh Kumar, & Mr. Jatan Singh, Advs. for R-2/AICTE. Mr. Baldev Malik Adv. for R-3/UOI.

CASES REFERRED TO:

1. *Rajeev Hitendra Pathak* vs. *Achyut Kashinath Karekar* 2011 9 SCC 541.
2. *Competition Commission of India* vs. *Steel Authority of India Ltd.* (2010) 10 SCC 744.
3. *State Bank of Patiala* vs. *Vinesh Kumar Bhasin* (2010) 4 SCC 368.
4. *AICTE* vs. *Surinder Kumar Dhawan* (2009) 11 SCC 726.
5. *NDMC* vs. *Usha Gangaria* W.P.(C) No.13647/2009.
6. *Bhupinder Singh* vs. *Delhi Commission for Women* 137 (2007) DLT 411.
7. *Maharashtra Electricity Regulatory Commission* vs. *Reliance Energy Ltd.* (2007) 8 SCC 381.
8. *Ms. Sharmishtha S. Das* vs. *UOI* W.P.(C) No.2669/2005.
9. *MD Army Welfare Housing Organization* vs. *Sumangal Services (P) Ltd.* (2004) 9 SCC 619.
10. *P.M. Bhargava* vs. *University Grants Commission* (2004) 6 SCC 661.
11. *Morgan Stanley Mutual Fund* vs. *Kartick Das* (1994) 4 SCC 225.

RESULT: Disposed of.

RAJIV SAHAI ENDLAW, J.

1. The petition impugns the Minimum Standards of Architectural Education Guidelines for Post-Graduate Programme, 2006 published by the respondent No.1 Council of Architecture (COA), to the extent they lay down guidelines for Town & Country Planning courses viz. M. Arch. (Urban & Regional Planning), M. Arch. (Transportation Planning & Design) and M. Arch. (Housing). The petition also seeks to prohibit the respondent

No.1 COA and its affiliate Institutes and Colleges from introducing / conducting the said Post-Graduate courses. The petition yet further seeks direction in the nature of mandamus directing the respondent No.1 COA to operate within the framework of The Architects Act, 1972.

2. Notice of the petition was issued and on the application of the petitioner for interim relief, vide interim order dated 04.03.2009, it was directed that any admission made in respect of the courses aforesaid shall be subject to the outcome of the writ petition and the respondent No.1 COA was also directed to communicate the order to the students seeking admission to the said courses. However in LPA No.180/2009 preferred by respondent No.1 COA, vide order dated 27.04.2009 the requirement for respondent No.1 COA to so inform the students was dispensed with. Counter affidavits have been filed by respondent No.1 COA, respondent No.2 All India Council for Technical Education (AICTE) as well as respondent No.3 Ministry of Human Resource Development (MHRD). The counsels have been heard.

3. The petitioner, in the year 1951, was incorporated as a company under Section 26 of the Indian Companies Act, 1913 (equivalent of Section 25 of the Companies Act, 1956) and claims to be the national level apex body of professionals in the field of Town & Country Planning, with approximately 3000 members on its rolls. The petitioner claims to have been inter alia involved in evaluation and monitoring of the course curriculum of the Universities and Schools imparting education in Town & Country Planning and also claims to have been according recognition to the various Institutions / Schools imparting such education and which recognition entitles the students clearing the said courses to become members of the petitioner.

4. It is the case of the petitioner that the three courses aforesaid, though titled as Master of Architecture, but the course curriculum thereof is of Town & Country Planning over which respondent No.1 COA has no jurisdiction. It is further the case of the petitioner, that the respondent No.2 AICTE is the nodal authority for recognition of any technical courses; that technical education in Section 2(g) of the All India Council for Technical Education Act, 1987 is defined as meaning programmes inter alia in Architecture & Town Planning; that it is thus the respondent No.2 AICTE which is empowered to lay down norms and standards for courses, curricula, physical and instructional facilities, staff pattern, staff

qualifications etc. for such courses; that the petitioner has entered into a Memorandum of Understanding (MOU) with the respondent No.2 AICTE for utilization by respondent No.2 AICTE of expertise of the petitioner in the field of Town & Country Planning and for assessment of proposals for establishment of new institutions or introduction of new courses in Town & Country Planning.

5. The Guidelines aforesaid, impugned in this petition, inter alia require the Universities & Institutions intending to impart Post-Graduate programmes and courses in Architecture particulars whereof are given in "Appendix A" to the Guidelines and which include the three courses aforesaid to which objection is taken to furnish a detailed syllabus, course contents, period of studies and scheme of examinations to respondent No.1 COA for consideration and approval.

6. The respondent No.1 COA in its counter affidavit has pleaded that Town & Country Planning has always been an integral part of the course curriculum for the undergraduate degree programme in Architecture; the basic courses of B. Arch. which has been prescribed as part of the Minimum Standards of Architectural Education Regulations, 1983 itself prescribes subjects such as Landscape Design, Surveying and Leveling, Building, Service and Equipment, Humanities, Estimating and Costing, Principle of Human Settlement, Town Planning, Urban Design, Landscape & Urban Planning etc.; that the petitioner has no locus to question the authority of respondent No.1 COA for prescribing standards of education; that there are no undergraduate programmes in the subject of Town & Country Planning except that offered from the School of Planning & Architecture, New Delhi; that Urban Design, Housing and Site Development etc. are integral part of the Architecture and thus the respondent No.1 COA cannot be said to be having no power to prescribe guidelines and courses for the three programmes aforesaid. Reliance is placed on para 76 of judgment in **MD Army Welfare Housing Organization Vs. Sumangal Services (P) Ltd.** (2004) 9 SCC 619 where Hudson on 'Building and Engineering Contracts' defining the role of "Architect" was quoted with approval. It is further contended that the AICTE Act does not vest the respondent No.2 AICTE with the power to regulate either Architectural education or Town Planning and that under the AICTE Act no regulation has been framed in respect of Town Planning. With respect to the MOU between the petitioner and the

respondent No.2 AICTE, it is stated that the same was only for three years from the year 2006 and has lapsed and in any case cannot interfere with the Guidelines published by respondent No.1 COA. On the competence to publish the said Guidelines, source thereof is traced in Section 21 & Section 45(2)(e)(g)(h) & (j) of The Architects Act.

7. The respondent No.2 AICTE has supported the petitioner and has claimed itself to be the sole repository to lay down norms and standards for issues related to technical education including Town Planning. It is also pleaded that The Architects Act is only for the purposes of providing for registration of Architects and recognition of Architectural qualifications and the respondent No.1 COA has no such powers as have been exercised. Similarity is cited with Pharmacy Act, 1948 establishing the Pharmacy Council of India but which has no power qua the courses / education in Pharmacy. It is also claimed that not only Town Planning but even the subject of Architecture falls in the domain of respondent No.2 AICTE.

8. The respondent No.3 MHRD has also supported the petitioner and in its counter affidavit pleaded that the role of respondent No.1 COA is limited to maintaining minimum standards of architectural education and standards of professional conduct and etiquette and a code of ethics for architects and the respondent No.1 COA has no jurisdiction over the matters pertaining to the architectural courses / institutions. It is further pleaded that it is the respondent No.2 AICTE which has jurisdiction in this regard.

9. The petitioner along with its additional affidavit has filed the Recruitment Rules of Ministry of Works and Housing, Government of India prescribing membership of petitioner as a 'desirable qualification' for employment as Chief Planner, Additional Chief Planner & Town Planner.

10. The respondent No.3 MHRD in its supplementary affidavit has pleaded that, Architecture & Town Planning are two different subjects; respondent No.1 COA is concerned with the architectural profession only. It is further pleaded that the dispute between COA and AICTE as to the extent of powers and functions qua architectural education to be exercised by respondent No.1 COA is pending consideration before the Supreme Court. It is however clarified that the said dispute has nothing

to do with regard to the education in Town Planning and the Government of India does not envisage any role to be played by respondent No.1 COA in respect to education in the subject of Town Planning.

11. The respondent No.1 COA has been established by the Central Government vide Section 3 of The Architects Act and is to consist inter alia of electees from Institute of Architects, nominees of AICTE, nominees of Heads of Architectural Institutions in India, Chief Architects in the Ministry of the Central Government, Architects from each State etc. There is no provision in The Architects Act prescribing the functions of respondent No.1 COA. However, The Architects Act vide Section 23 vests the duty of maintaining a Register of Architects for India on respondent No.1 COA; vide Section 29 vests the jurisdiction to remove from the Register the name of any Architects in the Respondent No.1 COA; and vide Section 30 the respondent No.1 COA has been further vested with the jurisdiction to hold an enquiry into allegations of professional misconduct against the Architects.

12. As far as Architectural Education is concerned, Section 2(d) of The Architects Act defines recognized qualification as meaning "any qualification in Architecture for the time being included in the Schedule or notified under Section 15 of the Act". The Schedule to the Act is not found to contain any of the three courses, subject matter of this petition, or for that matter any Post-Graduate courses. Under Section 15 of the Architects Act, the power to recognize Architectural Qualifications granted by authorities in foreign countries is of the Central Government, though in consultation with respondent No.1 COA but not of respondent No.1 COA. The same has no application to the present case. Under Section 16 of the Architects Act, the power of amendment of the Schedule is also of the Central Government, though again in consultation with the respondent No.1 COA. Section 17 of the Architects Act provides that possessing a recognized qualification shall be sufficient qualification for enrolment in the Register. Though under Section 18 of The Architects Act the authorities granting recognized qualifications in India are required to furnish to respondent No.1 COA information sought as to courses of study and examinations to be undergone but no power has been given to respondent No.1 COA to prescribe courses of study. Again under Section 19 of the Architects Act though respondent No.1 COA has power to carryout inspection of Colleges or Institutions for granting recognition to

the Architectural qualifications imparted by such College or Institution but only for making recommendation to the Central Government. The respondent No.1 COA, under The Architects Act has no power to recognize such College or Institution. The power of withdrawal of recognition, under Section 20 of The Architects Act, again is of the Central Government though on the recommendation of respondent No.1 COA.

13. Section 21 of The Architects Act relied upon by the respondent No.1 COA however is as under:

> **"21. Minimum standard of architectural education.** – The Council may prescribe the minimum standards of architectural education required for granting recognized qualifications by colleges or institutions in India."

Though under the aforesaid provision, the respondent No.1 COA has been conferred the power to prescribe minimum standards of architectural education but only for grant of recognized qualifications and which recognized qualifications are mentioned in the Schedule as aforesaid and in which the three courses, subject matter of the present petition, do not find mention. Once it is held that the three courses i.e. M. Arch. (Urban & Regional Planning), M. Arch. (Transportation Planning & Design) and M. Arch. (Housing) are not recognized qualification, COA under Section 21 of the Architects Act would have no power to prescribe minimum standards therefor. There is no other provision in the Act whereunder respondent No.1 COA can trace its power to prescribe minimum standards for grant of qualifications other than the recognized qualifications. Section 45 of the Architects Act to which also reference has been made, empowers the respondent No.1 COA to make regulations but only with the approval of the Central Government. However, the said Regulations again have to be with respect to recognized qualifications and not others.

14. What emerges from aforesaid is, that the source of power to prescribe minimum standards for the courses of M. Arch. (Urban & Regional Planning), M. Arch. (Transportation Planning & Design) and M. Arch. (Housing) which are not recognized qualifications under The Architects Act, and as has been done vide impugned guidelines cannot be traced to The Architects Act.

15. The counsel for respondent No.1 COA has invited attention to Architects (Professional Conduct) Regulations, 1989 framed in exercise of powers under Section 45 of the Architects Act and which require every Architect to observe and uphold respondent No.1 COA's conditions of engagement and scale of professional charges. He has next invited attention to the conditions of engagement and scale of professional charges to contend that practice of architectural profession encompasses within itself Urban Design & City Planning. Attention is also invited to the Minimum Standards of Architectural Education Regulations, 1983 also framed in exercise of powers under Sections 45 & 21 of the Architects Act which *inter alia* provide as under:

> "Notwithstanding anything contained in these regulations, the, institutions may prescribe minimum standards of Architectural Education provided such standards does not, in the opinion of the Council, fall below the minimum standards prescribed from time to time by the Council to meet the requirements of the profession and education thereof."

It is contended that by virtue of the aforesaid clause, the respondent No.1 COA is empowered to prescribe minimum standards for qualifications other than recognized qualifications (defined in the Architects Act) as have been prescribed by way of Guidelines impugned in this petition. Reference is made to the judgment dated 11.02.2005 of this Court in W.P.(C) No.2669/2005 titled **Ms. Sharmishtha S. Das Vs. UOI** (which is also subject matter of proceedings pending before the Supreme Court) laying down that the provisions of The Architects Act are not impliedly repealed by AICTE Act and the final authority for fixing the norms and standards for admission to the architecture course and the course content would the respondent No.1 COA and the Minimum Standards of Architectural Education Regulations, 1983 would continue to govern the architectural courses and quashing the entrance examination held by respondent No.2 AICTE for the five years decree course in Architecture. He has also argued that once the minimum qualification of B. Arch. is regulated, the respondent No.1 COA would axiomatically have power over M. Arch. courses also and M. Arch. courses cannot be outside the purview of respondent No.1 COA and the Court must fill up the lacuna in law. Attention is invited to the Scheme of Examination and Syllabus, 2003 published by the petitioner to show that persons with qualification of B. Arch. can also be members of the petitioner. It is also contended

that in view of the Architects Act, the field for prescribing qualifications for the profession of Architect is occupied and the subsequent AICTE Act could not have made provision therefor. It is contended that in the absence of any express bar prohibiting the respondent No.1 COA from prescribing minimum standards for Post-Graduate qualifications, it would be so entitled. Reliance in this regard is placed on **P.M. Bhargava Vs. University Grants Commission** (2004) 6 SCC 661. Reference is also made to judgments of the Bombay, Allahabad and Kerala High Courts on the inter play of Architects Act and AICTE Act and all of which are also subject matter of proceedings before the Supreme Court. Reference lastly is made to **AICTE Vs. Surinder Kumar Dhawan** (2009) 11 SCC 726.

16. I am unable to accept any of the contentions of the respondent No.1 COA.

17. The respondent No.1 COA is a statutory body. It can exercise only such powers as are vested in it and none other. There is nothing to show that the respondent No.1 COA was intended to or is the sole repository of the education in the field of Architecture. As aforesaid, it has only been empowered to make recommendations in this regard to the Central Government. It has not been empowered to take any steps / action itself. Section 21 of The Architects Act, while empowering it to provide minimum standards, limits the said power to recognized qualifications only and non other. Reliance on **P.M. Bhargava** (supra) to contend that respondent No.1 COA in the absence of express prohibition would be entitled to prescribe minimum standards for qualifications other than recognized is misconceived. The said judgment is not found to be laying down any such proposition. Moreover, the Court in that case was concerned with UGC which was found to be empowered to take a decision on inclusion of courses for study. The respondent No.1 COA under the Architects Act is not found to be so empowered. Similarly, reliance on **Surinder Kumar Dhawan** (supra) is also misconceived. All that the said judgment lays down is that the Courts cannot sit as appellate authority to examine the correctness, suitability and appropriateness of a policy. However, this Court in the present case is not concerned with judicial review of policy but of the power of respondent No.1 COA and which power the respondent No.1 COA is not found to possess.

18. The Apex Court in **Morgan Stanley Mutual Fund v. Kartick Das** (1994) 4 SCC 225 held that in the absence of any provision in

Consumer Protection Act, 1986 empowering the Foras constituted, under the said Act to grant interim orders held the said Fora to be not entitled to grant (interim injunction). Recently in **Rajeev Hitendra Pathak v. Achyut Kashinath Karekar** 2011 9 SCC 541 it was again held that the District Forum and the State Commission under the said Act being creature of Statute derive their powers from the express provision of the statute and the powers which have not expressly been given by the statute cannot be exercised. Finding no power to set aside their own ex parte order or no power to recall / review their own order to have not been vested in District Forum and State Commission, they were held not entitled to exercise such powers.

19. This Court also in **Bhupinder Singh v. Delhi Commission for Women** 137 (2007) DLT 411 held that the Delhi Commission for Women constituted under the Delhi Commission for Women Act, 1994, in the absence of any provision in this regard had no power for issuing maintenance.

20. Similarly, recently in **Competition Commission of India vs. Steel Authority of India Ltd.** (2010) 10 SCC 744, it was held that the power under Section 33 of the Competition Act, 2002, to pass temporary restraint order can only be exercised when the conditions laid down for exercise of the said power were met and not otherwise. So also in **State Bank of Patiala vs. Vinesh Kumar Bhasin** (2010) 4 SCC 368, it has been held that the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 did not empower the Commissioner under the said Act to issue any interim order directing a person with disability to be continued in service beyond the age of retirement; it was held that an authority functioning under the Disabilities Act has no power or jurisdiction to issue a direction and the fact that the Act clothed the Commissioner with certain powers of Civil Court for discharge of its functions did not enable the Commissioner to assume other powers of a Civil Court which are not vested in him by the provisions of the Act and the powers of a Civil Court for granting injunctions - temporary or permanent, do not inhere in the Commission nor such a power can be inferred or derived.

21. The Supreme Court in **Maharashtra Electricity Regulatory Commission v. Reliance Energy Ltd.** (2007) 8 SCC 381 also held that the State Electricity Regulatory Commission constituted under the

Electricity Act, 2003 had no power to issue a direction for refund though was empowered to issue a general direction to the licencees to abide by the conditions of the licence and charge only as per the tariff fixed under the Act.

22. I have recently in judgment dated 23.12.2011 in W.P.(C) No.13647/2009 titled **NDMC v. Usha Gangaria** discussed several other judgments also in this regard and concluded that statutory bodies as respondent No.1 COA is, in the absence of specific provisions or anything to indicate that they are intended to be sole repository qua the matter for which they are constituted so as to enable them to exercise any power not expressly vested in them as ancillary or incidental to their functioning or necessary to enable them to discharge their function effectively, cannot exercise powers so not vested in them. I am unable to find in the Architects Act anything to show that respondent No.1 COA was intended to be the sole repository for education in the field of Architecture.

23. As far as the objection by respondent No.1 COA to the locus of the petitioner to maintain this petition is concerned, I find the petitioner the apex body of the professional Town and Country Planning to be sufficiently entitled to do so. For the same reason, the expiry of the terms of the MOU between the petitioner and the respondent No.2 AICTE is irrelevant.

24. The respondent No.1 COA having been found to be empowered to prescribe minimum standards of architectural education for recognized qualification mentioned in the Schedule of the Act only and which does not include the three qualifications qua which the petition has been filed, the question whether Town Planning is a part of the subject of Architecture or not need not be adjudicated. I may however mention that the clause supra in the 1983 Regulations relied upon by the respondent No.1 COA is also not found to be empowering COA to prescribe standards of education for any qualification other than recognized qualification mentioned in the Schedule to the Architects Act. In any case, the regulations framed under the Act, cannot expand the scope thereof, there being no ambiguity whatsoever with respect thereto.

25. I am also unable to accept the contention that laying down of minimum standards of education for post graduate qualifications, as the three courses aforesaid qua which the petition is filed are claimed to be,

is incidental or ancillary to the power vested under Section 21 of the Architects Act in the COA to prescribe Minimum Standards of Education required for recognized qualifications. Had the legislature intended to so empower the COA, it would not have restricted its power to recognized qualifications mentioned in the Schedule. On the contrary, Section 14(2) of the Architectural Act vests the power to grant recognition to any architectural qualification in the Central Government and which power is to be exercised after consultation with the COA. Thus, when COA is not even empowered to recognize any architectural qualification, it cannot certainly be held to be empowered to prescribe minimum standards therefor.

26. In the circumstances, there is found to be no lacuna in law, as contended. The question is not of whether COA is prohibited from doing so, but of its entitlement to do so.

27. The petition therefore succeeds. It is held that respondent No.1 COA is not empowered to lay down or prescribe minimum standards of education for qualifications other than recognized qualifications mentioned in the Schedule of Architects Act. Accordingly, the Guidelines insofar as prescribing the minimum standards of education for the courses of M. Arch. (Urban & Regional Planning), M. Arch. (Transportation Planning & Design) and M. Arch. (Housing) which are not mentioned in the Schedule to the Architects Act and thus not recognized qualifications are held to be beyond the powers of respondent No.1 COA and are quashed / set aside. The respondent No.1 COA is further prohibited / restrained from in future, in exercise of power under Section 21 of the Architects Act, prescribing minimum standards of education for any course other than the recognized qualifications mentioned in the Schedule. The respondent No.1 COA is not found to be empowered to, either itself or through its affiliates conduct any courses and thus the question of restraining it from doing so does not arise. However, though vide interim order aforesaid admissions were made subject to the outcome of this petition; but since the students likely to be effected are not before this Court, it is clarified that this judgment shall have prospective operation only and shall not effect students who were admitted during pendency hereof.

The petition is disposed of. No order as to costs.

ILR (2012) II DELHI 516
RFA

RATI RAM ....APPELLANT

VERSUS

D.C.M. SHRORAM CONSOLIDATD LTD. ....RESPONDENT

(VALMIKI J. MEHTA, J.)

RFA. NO. : 609/2003 DATE OF DECISION: 05.01.2012

Code of Civil Procedure, 1908—Respondent/plaintiff filed suit for recovery of advance tailoring charges—Appellant/defendant filed counter claim—appellant/defendant appointed as tailoring contractor vide agreement date 30.07.1976 for a period of one year—Contract Period extended for six months and thereafter twice for two months each—Appellant/defendant was paid Rs 14,70,459.08 against which bills for Rs. 13,20,533/- submitted—Credit for another bill for Rs. 18,662/- also given—Rs. 1,31,263.98 found to be paid in excess—Legal notice dated 07.08.1978 served—Did not pay—Suit filed for recovery—Defence taken the payments were made only length wise whereas under the agreement payment were to be made lengthwise as well as breadth wise—Held:- during the entire period of contracts appellant/defendant raised bills on the basis of length of the cloth and payments were made lengthwise—Parties understood the schedule rates in particular manner, payments received in the manner understood i.e. only lengthwise—Cannot claim payment lengthwise as well as breadth wise—Suit decreed and counter claim dismissed—Aggrieved by the order filed the present appeal—Held—Not open to say that the contract did not mean what the parties had acted upon under the contract—Appeal dismissed.

I may state that the Supreme Court in the case of **Godhra Electricity Company Ltd. & Anr. vs. State of Gujarat & Anr.,**(1975) 1 SCC 199 has held that the meaning of the contract is best understood by the parties who have entered into the contract, and have acted as per what they think is the interpretation of the contract. The Supreme Court has observed that even if the acting upon by the parties on such written contract may be possibly against wording of the contract, however, that would not mean that the contract can be interpreted differently later, inasmuch as, when the parties act as per particular interpretation of the contract, and which may not be the only interpretation, it can also be interpreted as if the parties have suo moto amended remade the contract. The relevant observations of the Supreme Court are contained in para 11 of the judgment in the case of **Godhra Electricity Company Ltd.** (supra) and the same read as under:-

> "In the process of interpretation of the terms of a contract, the Court can frequently get great assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or in receiving performances under it. Parties can, by mutual agreement, make their own contracts; they can also by mutual agreement remake them. The process of practical interpretation and application, however, is not regarded by the parties as a remaking of the contract; nor do the courts so regard it. Instead, it is merely a further expression by the parties of the meaning that they give and have given to the terms of their contract previously made. There is no good reason why the courts should not give great weight to these further expressions by the parties, in view of the fact that they still have the same freedom of contract that they had originally. The American Courts receive subsequent actings as admissible guides in interpretation. It is true that one party cannot build up his case by making an interpretation in his own favour. It is the concurrence therein that such a party can use against the other party. This concurrence may be evidence by the other party's express assent thereto, by his acting in accordance with it, by his receipt without objection of performances that indicate it, or by saying nothing when he knows that the first party is acting on reliance upon the interpretation."
>
> **(Para 4)**

I completely agree with the aforesaid findings and conclusions of the Trial Court inasmuch as obviously the appellant/ defendant was taking a convenient stand once refund was asked from him for the excess amount paid to him. It is not open to a person to work out a contract on a particular basis, claim payments on that basis, act not only for the original period of contract but also for extensions on a particular basis, and thereafter turn around to say that the contract did not mean what the parties had acted upon under the contract. **(Para 6)**

Important Issue Involved: Meaning of the contract is best understood by the parties who have entered into the contract and have acted as per what they think is the interpretation of the contract. Even if the acting upon by the parties on such written contract may be possibly against wording of the contract, however that would not mean that the contract can be interpreted differently later, in as much as, when the parties act as per particular interpretation of the contract, and which may not be the only interpretation, it can also be interpreted as if the parties have suo-motu amended remade the contract.

[Vi Gu]

APPEARANCES:

FOR THE PETITIONER : Mr. Rajiv Bahl, Advocate.

FOR THE RESPONDENT : None.

CASE REFERRED TO:

1. *Godhra Electricity Company Ltd. & An*r. vs. *State of Gujarat & Anr.,* (1975) 1 SCC 199.

RESULT: Appeal dismissed.

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal filed under Section 96 of the Code of Civil Procedure, 1908 is to the impugned judgment of the Trial Court dated 30.9.2002. By the impugned judgment, the Trial Court decreed the suit filed by the respondent/plaintiff for recovery of advance tailoring charges which were paid to the appellant/defendant. By the impugned judgment the counter claim which was filed by the appellant/defendant was also dismissed.

2. The facts of the case are that parties entered into an agreement dated 30.7.1976 whereby the appellant/defendant was appointed as a tailoring contractor for executing the work as stated in the schedule annexed with the agreement. The original agreement was for one year from 2.8.1976 to 31.7.1977, and whereafter, it was firstly extended for a period of 6 months and thereafter there were two extensions of 2 months each. The last extension of one month expired on 30.4.1998. The terms and conditions for all the agreements remained the same as were found in the first agreement dated 30.7.1976. A total sum of Rs.14,70,459.08 was paid to the appellant/defendant by the respondent/plaintiff, and for which period, the respondent/defendant had submitted bills worth Rs.13,20,533/-. After giving credit of this amount as also for another bill for Rs.18,662/-, a sum of Rs.1,31,263.98 was found to be paid in excess to the appellant/defendant, and for recovery of which the subject suit was filed after a legal notice dated 7.8.1978 was served upon the appellant/defendant, but which failed to yield any result. The defence of the appellant/defendant in the Trial Court was that with respect to item nos. 22, 23, 40 and 41 which are found in the schedule of rates annexed with the agreement, Ex.P14, payments which were made by the respondent/defendant were made only length-wise whereas payments were to be made both length-wise and breadth-wise and for the entire cloth.

3. The relevant issue in this regard was issue no. 2 which was

framed by the Trial Court and which was whether the bills which were prepared for the work done had been prepared in accordance with the agreement between the parties or not. While dealing with this issue, the Trial Court has noted that during the entire period of performance of the different contracts; which originally was for a period of one year, and 4 extensions thereafter for periods varying from 6 months to 2 months; payments which were made for the work done for the disputed items were only as per the length of the cloth. Accordingly, the Trial Court held that once for the entire period of the contract, parties understood the schedule of rates annexed to a contract in a particular manner, payments were received in the manner understood by the parties, i.e. only length-wise, therefore, it was not permissible for the appellant/defendant to claim that payments should also be made breadth-wise for the cloth as also other charges. The Trial Court has also noted that during the entire period of performance of the contract, the appellant/defendant raised bills on the basis of the length of the cloth only and therefore when the recovery of excess amount paid was asked, it was not permissible for the appellant/defendant to claim that he was an illiterate person and he did not know how the bills were issued.

4. I may state that the Supreme Court in the case of **Godhra Electricity Company Ltd. & Anr. vs. State of Gujarat & Anr.,** (1975) 1 SCC 199 has held that the meaning of the contract is best understood by the parties who have entered into the contract, and have acted as per what they think is the interpretation of the contract. The Supreme Court has observed that even if the acting upon by the parties on such written contract may be possibly against wording of the contract, however, that would not mean that the contract can be interpreted differently later, inasmuch as, when the parties act as per particular interpretation of the contract, and which may not be the only interpretation, it can also be interpreted as if the parties have suo moto amended remade the contract. The relevant observations of the Supreme Court are contained in para 11 of the judgment in the case of **Godhra Electricity Company Ltd.** (supra) and the same read as under:-

> "In the process of interpretation of the terms of a contract, the Court can frequently get great assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or in receiving performances under it. Parties can,

by mutual agreement, make their own contracts; they can also by mutual agreement remake them. The process of practical interpretation and application, however, is not regarded by the parties as a remaking of the contract; nor do the courts so regard it. Instead, it is merely a further expression by the parties of the meaning that they give and have given to the terms of their contract previously made. There is no good reason why the courts should not give great weight to these further expressions by the parties, in view of the fact that they still have the same freedom of contract that they had originally. The American Courts receive subsequent actings as admissible guides in interpretation. It is true that one party cannot build up his case by making an interpretation in his own favour. It is the concurrence therein that such a party can use against the other party. This concurrence may be evidence by the other party's express assent thereto, by his acting in accordance with it, by his receipt without objection of performances that indicate it, or by saying nothing when he knows that the first party is acting on reliance upon the interpretation."

5. Some of the relevant observations of the Trial Court for decreeing the suit and dismissing the counter claim are as under:-

"Defendant had time and again sought extension of the period of the contract. In his cross examination his stand is that he was forced to sign these request letters for the extension on the assurance that he would be paid all outstanding dues as per work done. These request letters were consider by the company and after considering the same, letters were issued to defendant whereby his request for extension was acceded. The extension were sought by defendant of his own. No protest was lodged during the currency of the Agreement and its respective extensions. The question of lodging verbal and written complaints which were alleged to have been destroyed by plaintiff, are in contradiction with stand of defendant in his written statement and counter claim where had had stated that he came to know about these discrepancies only after going through the documents filed on record by plaintiff in the suit. In his cross examination dated 25.5.1999 his version is that within 2-3 months of the date

of contract he came to know that he was losing in business with plaintiff company. He had further stated that he was told by some employee of plaintiff company that he was being paid only 1/3rd of the payment due to him for doing dressing work of towels. Now he changes his stand that he had never given any complaint regarding non-payment of the full dues of the dressing work as he h ad apprehended that whatever was due would also not be paid. He refused to disclose the name of the employee of plaintiff who had informed that he was being paid less. Again his statement that it came to his knowledge within 2-3 months of entering into the contract that he was losing money but he did not raise the objection on the ground that his remaining dues would be held back by plaintiff company is contrary to his pleading in his written would be held back by plaintiff company is contrary to his pleading in his written statement and counter claim. He has mentioned the period of 2-3 months, if t his period is stretched to three months, let us see the amount due to him on 31st October, 1976. During this period defendant had taken '2.01,500/- from plaintiff as advance and he has submitted bills worth '1,74,819.32 so it was rather plaintiff company's money which was held by defendant, hence there was no force in his contention that he kept on working at loss to his fear that his money would be struck with plaintiff company.

Further the contention of defendant is that all the bills were prepared by the employees of plaintiff and he was only signing the said bills without even checking the same. He has further stated that the bills were signed under a hurry on the last date when the payment was to be made. In his cross examination dated 14.5.1999 he had admitted that he was maintaining the record of the work done by his workers. During the tenure of the Agreement and extension thereof number of bills were submitted and it could not be said that all the bill were signed under a hurry, Ex.PW1/5 is the copy of the statement of account which shows that the dates for submission of the bills and in most cases the date of release of money as advance for wages are different. The Agreement Ex.PW1/3 also provide that it was the contractor who had to present h is bills every fortnightly or on monthly basis for the work done by him and the same was

to be approved by the Folding Manager. Plaintiff company was liable to make payment within one week from the date of the presentation of the bill. As per defendant he was not a very learned man and he can only sign in English but DW2 Sh. Satya Prakash was working with defendant as Supervisor during the tenure of the contract and the extensions thereof. Sh. Satya Prakash is a post graduate (M.Com). In his cross examination he had admitted that he was checking the work done by individual workers but he had denied the suggestion that the bills were verified by him. Once the work was done by the workers is checked by a person, the said work is to be consolidated in the form of the bill to be submitted to plaintiff company. It is beyond reasonable comprehension that a post graduate supervisor employed by defendant for taking proper care of the work being done by the workers employed by defendant but on the other hand he was not at all taking care of the bills being submitted to plaintiff company. DW2 had further admitted that defendant was capable of understanding about the dealings and work contracted for by defendant.

As per defendant the bills were prepared by Sh.O.P.Nagpal, PW2 who was in the employment of plaintiff company. Sh.O.P.Nagpal has stated in his evidence that the form for the work done were supplied by defendant and the details of the finally received goods from defendant were filed by him. The bills were verified by defendant as well as by Sh.Satya Prakash, supervisor employed by defendant and he has further stated that bills were signed by them after their due verification from the records. The witness has explained in detail the process by which the calculation regarding hemming, split bound and dressing were done for the purpose of preparing the bills. He has further stated that no objection was raised at any point of time by defendant with regard to the mode of calculation. This witness cross examined at length by the Ld. counsel for defendant. He admitted that the addressing of towel means the removal of loose thread of any side of the towel or on both sides and from any part of the towel. He had denied the suggestion that the bills were prepared by plaintiff at its own. He has reiterated that the bills were prepared at the instruction of defendant and his supervisor and

thereafter defendant and his supervisor used to verify the bills as per their own records and then sign the same. Inspite of number of questions put by the Ld. counsel for defendant in cross examination the testimony of this witness could not be shattered. He has specifically denied the suggestion that for the purpose of calculation, 2 lengths plus 2 width of the towels were to be added.

In view of the above defendant has failed to prove that the calculation of the work done by him was not in accordance with the Agreement between parties. It is a clear cut case of an after though as nothing has been brought on record to show that any complaint was every lodge with plaintiff company regarding the calculation of the work done. Moreover, there are inherent contradictions between the pleading and evidence of defendant regarding the point of time when he first came to know about alleged discrepancies in the bills. Under these circumstances defendant has failed to prove that the bills had not been prepared in accordance with the Agreement dated 2.8.1976. The issue is decided against defendant and in favour of plaintiff." (underlining added).

6. I completely agree with the aforesaid findings and conclusions of the Trial Court inasmuch as obviously the appellant/defendant was taking a convenient stand once refund was asked from him for the excess amount paid to him. It is not open to a person to work out a contract on a particular basis, claim payments on that basis, act not only for the original period of contract but also for extensions on a particular basis, and thereafter turn around to say that the contract did not mean what the parties had acted upon under the contract.

7. In view of the above, I do not find any merit in the appeal which is accordingly dismissed, leaving the parties to bear their own costs.

ILR (2012) II DELHI 525
CM (M)

DHOOTA PAPESHWAR INDUSTRIES LTD. ....PETITIONER

VERSUS

ATMA RAM & ANR. ....RESPONDENTS

(INDERMEET KAUR, J.)

CM. (M) NO. : 128/2007 & CM. NO. : 1091/2007 (FOR STAY) **DATE OF DECISION: 06.01.2012**

Delhi Rent Control Act, 1958—Sections 14 (1) (b) and 38—Eviction petition u/s 14 (1) (b) filed by landlord/ petitioner with regard to tenanted premises—Case of landlord that tenant had sub-let whole of premises with possession without consent in writing of landlord—Plea of tenant/respondent no.1 company that premises had been taken for residence of its employees and that its employees had been occupying tenanted premises—Respondent no. 2 (employee) had resigned from service and handed over vacant possession to respondent no. 1—ARC held no case of sub-letting and dismissed eviction petition—In appeal, judgment of ARC reversed on ground that retention of premises by respondent no. 2 even after his resignation amounted to sub-letting and eviction petition of landlord decreed—Held sub-letting means that owner has completed divested himself of the suit property and is in no manner connected with the same—Evidence established that there was *inter se* dispute between respondent no. 1 and respondent no. 2 relating to dues of respondent no. 2—Respondent no.2 had asked for clearance of dues and extension of time up to 6 months for vacating suit premises in

resignation letter—This not a case where respondent no.1 had lost control over tenanted premises—The wife of respondent no. 2 was admittedly employee of respondent no. 1 and tenanted premises was for use of employees of respondent no. 1—Not a case where respondent no.2 was claiming independent title qua suit property—Mischief of Section 14 (1) (b) not attracted—Impugned order set aside—Petition filed by landlord u/s. (1)(b) dismissed.

Even assuming that the respondent No. 2 had resigned from the services, the fact that his dues not having been paid to him he had not vacated the premises which dispute was pending before respondent No. 1; moreover his wife was also an employee of respondent No.1. It is not as if the respondent No. 2 was claiming any independent title or claim qua the suit property. The mischief of Section 14(1)(b) of the DRCA was not clearly attracted. The ARCT reversing these fact findings which were based on a cogent reasoning given by the Trial Court suffers from an infirmity. It is liable to be set aside. **(Para 16)**

The Apex Court in the case of AIR 1987 Supreme Court 2055 titled as **Dipak Banerjee vs. Lilabati Chakraborty** had inter alia noted as under:

> "But in order to prove tenancy or sub-tenancy two ingredients had to be established, firstly the tenant must have exclusive right of possession or interest in the premises or part of the premises in question and secondly that right must be in lieu of payment of some compensation or rent." **(Para 17)**

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Mr. Y.P. Ahuja, Advocate.

FOR THE RESPONDENT : Mr. Satya Prakash Gupta, Advocate.

CASES REFERRED TO:

1. *United Bank of India* vs. *Cooks and Kelvey Properties (P) Ltd.* AIR 1995 SC 380.
2. *Dipak Banerjee* vs. *Lilabati Chgakraborty* AIR 1987 Supreme Court 2055.
3. *Dipak Banerjee* vs. *Smt. Lilabati Chakraborty* AIR 1987 SC 2055.
4. *GiLL & Co.* vs. *Bimla Kumari* 1986 RLR 370.

RESULT: Petition filed by landlord u/s 14(1) (b) dismissed.

INDERMEET KAUR, J. (Oral)

1. Order impugned before this Court is the order dated 16.11.2006 passed by learned ARCT (Additional Rent Control Tribunal) which had reversed the findings of the ARC (Additional Rent Controller) dated 12.07.2001.

2. Record shows that the present eviction petition has been filed by Atma Ram & others under Section 14 (1)(b) of the Delhi Rent Control Act (hereinafter referred to as the 'DRCA'). The premises in dispute is property No.6517, Chand Bhawan, Plot No. 34-D, Ward No. XII, Kamla Nagar, Subzi Mandi, Delhi; tenancy was qua two rooms, one kitchen, one verandah, and balcony on the second floor of the said property as depicted in red colour in the site plan. Eviction petition had been preferred under Section 14 (1)(a)(b) and (j) of the DRCA but for the purposes of decision of this petition, ground under Section 14 (1)(b) is only relevant.

3. The case of the landlord was that respondent No. 1 M/s Dhootpapeshar Industries Ltd. (duly registered company) had sublet these premises to Ghandsham Das Chabra and this being a subletting/assignment/ parting with possession of whole of the premises without the consent in writing of the landlord amounts to a valid ground for eviction under Section 14 (1)(b) of the DRCA.

4. Written statement has been filed by both the respondents separately. Respondent No. 1 had filed an initial written statement which was subsequently permitted to be amended. In this written statement the plea of resignation of respondent No. 1 from the company or that the premises have since been handed back by respondent No. 1 to the

company had not been set up. In the amended written statement (relevant for the purposes of decision of the present eviction petition) it has been stated that the premises had been taken on rent by respondent No. 1 for the residence of its employees and respondent No. 2 being only an employee of respondent No. 1 had been permitted to occupy the said premises; prior to respondent No. 2, other employees were also occupying these premises. Respondent No. 2 has resigned from the services of the company and handed over the vacant and peaceful possession of the tenanted premises to respondent No. 1 who is in occupation of the said premises; contention being that there has been no subletting or parting with possession of the said premises. This amended written statement was filed on 04.05.2001.

5. Written statement filed by respondent No. 2 has also been perused. This is dated 12.08.1994. His contention is that respondent No. 2 being an employee of respondent No. 1 had been allotted this residence; respondent No. 2 had resigned from the services of respondent No. 1 on 08.06.1993 and he had surrendered the premises back to respondent No. 1; further contention being that his wife Santosh Chabra was also an employee of respondent No. 1 and after the resignation of respondent No. 2, it was mutually agreed that since the premises had been taken on rent by the company for its employees and since Santosh Chabara (wife of respondent No. 2) was also an employee of respondent No. 1, she could continue to occupy these premises in terms of the spirit of agreement dated 10.04.1967 and as such no case of subletting is made out.

6. Oral and documentary evidence was led by the respective parties. The landlord had produced one witness on his behalf namely AW-1. He had on oath deposed that respondent No. 1 was his tenant and rent receipts/counter foils had been proved on record as Ex. AW-1/2 and Ex. AW-1/3. This witness had come into the witness box on 20.02.1996. He had deposed that respondent No. 1 had since the last 3-4 years (i.e. 1992-1993) sublet these premises to respondent No. 2 who is in occupation of the same. In his cross-examination, he has admitted that respondent No. 1 was a tenant in the suit premises which had been let out in the year 1965-70 but he does not know the name of the person who was occupying the premises during the period 1965-70 to 1992; he did not know whether respondent No. 2 was an employee of the company or not; he did not know the status of respondent No. 2 in the respondent

company; he has further admitted in his cross-examination that as on date respondent No. 1 company is in possession of the suit premises; he did not know the date, month or year of subletting by respondent No. 2 to respondent No. 1 but may be it was 5-10 years back.

7. Two witnesses had been produced on behalf of the respondents. RW-1 was the Manager of the respondent company; he had deposed that the respondent company is still in possession of the suit premises and there has been no subletting; respondent No. 2 was the Manager in the company but he has since resigned. This witness had come into the witness box on 31.10.2000. In his cross-examination he has stated that the company might be maintaining the employment register of its employees but he has not seen the employment letter of respondent No. 2 and nor has he seen any appointment letter of wife of respondent No. 2 with respondent No. 1 company; he cannot say whether wife of respondent No. 2 ever remained in the service of respondent No. 1. He has admitted that there was a dispute between respondent No. 2 and the company but he cannot say for how long this dispute continued.

8. RW-2 was the Chief Executive Officer of respondent No. 1; he had brought the appointment letter of respondent No. 2; he had admitted that respondent No. 2 had resigned from the service on 08.06.1993; he had deposed that a suit had been filed by respondent No. 1 against respondent No. 2 restraining respondent No. 2 from parting with the possession of the suit premises which suit was compromised and after the settlement arrived at between the parties in 1997, the suit premises had been handed back to the company. He had deposed that the premises had been taken for the employees of respondent No. 1; the company has not parted with or sublet these premises to any person; he had proved on record Ex. RW-2/1 and Ex. RW-2/2 which were the two settlements arrived at between respondent No. 1 and respondent No. 2 dated 02.12.1994 and 17.10.1997 in interse suits preferred between the parties showing that there was a dispute between the parties i.e. respondent No. 1 company and his employee/Ex-employee (respondent No. 2) and vide settlement dated 17.10.1997, the premises in dispute had been handed back by respondent No. 2 to respondent No. 1. In his cross-examination, RW-2 had stated that respondent No. 2 was occupying the suit premises from 1992 to 1997 as an Ex-employee pending a settlement but he did not vacate the suit premises after his resignation inspite of requests; he

had stated that he would do so once the matter is fully and finally settled between respondent No. 2 and respondent No. 1; this witness has further admitted that the request of respondent No. 2 in his resignation letter for extension of time for a period of six months to vacate the suit premises was in fact being considered; he has further admitted that Santosh Chabra (wife of respondent No. 2) was an employee of respondent No. 1.

9. This was the sum total evidence both oral and documentary which was adduced before the ARC. The ARC had returned a finding that the factual context does not make out a case of subletting and the eviction petition filed by the landlord had been dismissed.

10. In appeal, the judgment of the ARC was reversed; the RCT was of the view that he continued retention of the premises by respondent No. 2 even after his resignation amounted to a subletting; eviction petition of the landlord stood decreed.

11. On behalf of the petitioner, vehement arguments had been addressed. It is submitted that the order of the RCT suffers from a manifest illegality and the RCT delving into the facts when it can only hear an appeal under Section 38 of the DRCA on a substantial question of law has committed a grave fallacy and by upsetting the findings of the ARC which were reasoned findings, he has committed an illegality which is liable to be set aside. To support his submission, learned counsel for the petitioner has placed reliance upon a judgment of the Apex Court reported as AIR 1987 SC 2055 **Dipak Banerjee Vs. Smt. Lilabati Chakraborty** as also another judgment of this Court reported as AIR 1995 SC 380 **United Bank of India Vs. Cooks and Kelvey Properties (P) Ltd.** Submission is that to attract the ingredients of subletting/parting with possession/assignment under Section 14 (1)(b) of the DRCA; it must be shown that the landlord has divested himself completely from the suit premises which is not so in the instant case.

12. Arguments have been countered. Learned counsel for the respondents per contra has submitted that the impugned judgment in no manner suffers from any infirmity. The impugned judgment had correctly noted that the two suits which had been compromised vide orders of compromise dated 02.12.1994 and 17.10.1997 Ex. RW-2/1 and Ex. RW-2/2 were filed during the pendency of the eviction petition and these were only to create and build up an evidence in their favour; impugned finding

in no manner calls for any interference. Learned counsel for the respondents has placed reliance upon a judgment of this Court reported as 1986 RLR 370 **Gill & Co. Vs. Bimla Kumari** as also another judgment of this Court reported as 1997 (2) RCR **K.K. Dhawan Vs. Dr. Promila Suri;** submission being that in the latter case where the premises had been taken on rent by a company for the residence of its employees and the employee had left the services but did not vacate the premises even on the asking of the company, it amounted to a case of subletting by the company and the employee was liable for ejectment under Section 14 (1)(b) of the DRCA; the said section being fully applicable in the instant case.

13. Record has been perused. Even as per the case of the petitioner the respondent No. 2 had resigned from the service of respondent No. 1 on 08.06.1993; eviction petition was filed on 01.07.1993. It is an admitted case of the parties that the premises had been let out by the petitioner/landlord to respondent No. 1 who is a Company which premises were to be used by the employees of the Company. AW-1 was the landlord; in his cross-examination, he has admitted that he does not know if the person in occupation of the premises is an employee of the Company or not; he had admitted that as on date the Company i.e. respondent No., 1 ("original tenant") is in occupation of the suit premises. RW1 the Regional Manager of the respondent No. 1/Company has admitted that the Company is in possession of the suit premises; on the date of the deposition which was on 31.10.2000, there was no dispute about this factum. RW2 the Chief Executive Officer of the respondent No. 1/ Company has stated that respondent No. 2 did not vacate the suit premises as his contention was that his dues are yet to be cleared and his request in his resignation letter for the grant of six months time to vacate the suit premises was under consideration; RW2 has further admitted that the Company was confident that respondent No. 2 would hand over the possession of the suit premises as soon as the matter was settled with him. He has further admitted that Smt. Santosh Chhabra the wife of the respondent No. 2 was also an employee of their Company. In view of the aforenoted evidence which has come on record, the ARC had correctly noted that the ground of sub-letting qua the suit property has not been made out by the landlord; sub-letting necessarily meaning that the owner has completely divested himself of the suit property and is in no manner connected with the same; this evidence as discussed supra was clearly

to the contrary. The evidence adduced has in fact established that there was an inter se dispute between respondent No. 1(Company) and respondent No. 2 who was the employee of respondent No. 1 and since this dispute related to the dues of the respondent No. 2 which he had to take from the Company; he had asked for clearance of his dues as also extension of time up to six months for vacating the suit premises; his request was being actively considered by the Company which request was contained in his resignation letter.

14. The ingredients necessary to be established by the landlord to make out a ground of sub-letting have been reiterated time and again. Section 14 (1) (b) is relevant; it reads as under:-

> "14. Protection of tenant against eviction. (1) Notwithstanding anything to the contrary contained in any other law or contract, no order or decree for the recovery of possession of any premises shall be made by any court or Controller in favour of the landlord against a tenant: Provided that the Controller may, on an application made to him in the prescribed manner, make an order for the recovery of possession of the premises on one or more of the following grounds only, namely:-
>
> (a) XXXXXXXXXXXXX
>
> (b) That the tenant has, on or after the 9th day of June, 1952, sub-let, assigned or otherwise parted with the possession of the whole or any part of the premises without obtaining the consent in writing of the landlord;"

15. This is clearly not a case where respondent No. 1 had lost control over the tenanted premises; Santosh Chhabra the wife of the respondent No. 2 was also admittedly an employee of the respondent No. 1. Tenanted premises were for the use of residence of the employees of respondent No. 1.

16. Even assuming that the respondent No. 2 had resigned from the services, the fact that his dues not having been paid to him he had not vacated the premises which dispute was pending before respondent No. 1; moreover his wife was also an employee of respondent No.1. It is not as if the respondent No. 2 was claiming any independent title or claim qua the suit property. The mischief of Section 14(1)(b) of the DRCA

was not clearly attracted. The ARCT reversing these fact findings which were based on a cogent reasoning given by the Trial Court suffers from an infirmity. It is liable to be set aside.

17. The Apex Court in the case of AIR 1987 Supreme Court 2055 titled as **Dipak Banerjee vs. Lilabati Chgakraborty** had inter alia noted as under:

> "But in order to prove tenancy or sub-tenancy two ingredients had to be established, firstly the tenant must have exclusive right of possession or interest in the premises or part of the premises in question and secondly that right must be in lieu of payment of some compensation or rent."

18. This is clearly not so in the instant case. Evidence is to the contrary.

19. In this scenario reliance placed by the learned counsel for the respondent upon the judgment reported in 1986 RLR 370 titled as **GiLL & Co. Vs. Bimla Kumari** is misplaced. This was a case where the court had noted that where an ex employee even after his termination retained the premises which have been given to him by his employer, the landlord may set up his claim under Section 14(1)(b) of the DRCA which then has to be proved as per evidence. As noted supra, the evidence adduced in this case clearly shows that the mischief of Section 14(1)(b) of the DRCA was not attracted. The impugned order is accordingly set aside. Petition filed by the landlord under Section 14(1)(b) of the DRCA is dismissed.

ILR (2012) II DELHI 534
CRL. A

RAM SARAN & ANR. ....APPELLANTS

VERSUS

STATE N.C.T. OF DELHI ....RESPONDENT

(SURESH KAIT, J.)

CRL. A. NO. : 763/2009 & CRL. M.B. NO. : 937/2011 **DATE OF DECISION: 09.01.2012**

Indian Penal Code, 1860—Sections 328, 376 & 34—As per prosecution case, appellants called prosecutrix and offered her could drink laced with substance which she consumed and became unconscious—After she regained consciousness, she realised appellants had raped her—Appellant Ram Saran left her at her jhuggi in naked condition—Next day appellant Ram Saran sent message to prosecutrix not to make complaint and offered to pay money which she refused, she was threatened to be killed—Case was registered and statement of prosecutrix recorded u/s 164 Cr.P.C.—Trial Court convicted appellants u/s 376/34—Held, PW5, husband of prosecutrix did not support story of prosecution—Contradictions in testimony of prosecutrix and PW5-PW8 who as per the prosecutrix had seen the appellant Ram Saran taking the prosecutrix to his jhuggi was declared hostile—No injury marks found on body of prosecutrix—No semen found on clothes or private parts—Delay of 9 days in lodging FIR—Appellants were acquitted u/s 328 IPC and not even charged u/s 506 IPC—Incident allegedly took place on Diwali, so highly impossible that there would be no public witness—Prosecutrix claimed 2-3 other persons being present at the time of offence,

who were neither made accused nor witnesses—Prosecution case doubtful—Appellants acquitted—Appeal allowed.

It is interesting to note the fact that incident took place on the Diwali day, a festival most celebrated in north India, even if an alarm raised by the prosecutrix was submerged beneath the noise of the fire crackers, it is highly impossible that there will be no public witness. In the FIR she has categorically named two persons who have committed rape on her, where as she states the presence of 2-3 persons, which creates a doubt in the prosecution version and same lay the foundation of doubt, the benefit of which must be given to the appellants and not otherwise. No external injury marks observed by the doctor concerned who prepared the MLC of prosecutrix, also there is delay of nine days in reporting the matter to police by prosecutrix, has made the case of the prosecutrix weak. Also, as stated by the prosecutrix of her being admitted in RML Hospital, and there is no documentary evidence in the form of MLC, admission ticket etc. of her being admitted in that hospital. Lastly, the place of incident was thickly populated as confirmed by PW5 in his deposition. **(Para 24)**

Further, PW5 Om Parkash, husband of the prosecutrix has given different version of facts whereby weakening the prosecution case. Firstly, he mentioned that on the day of incident, he was in his jhuggi when Ram Saran left prosecutrix in a naked condition, and a bucket of water was thrown on the prosecutrix, as narrated by her; this fact has no where been mentioned by the prosecutrix and neither was she found wet when she returned home to her jhuggi. However, while contradicting his earlier deposition, in the cross-examination, this witness categorically admitted that he was not present at that time when his wife was left by Ram Saran in the jhuggi. **(Para 25)**

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Mr. S.D. Singh, Advocate.

FOR THE RESPONDENT : Ms. Rajdipa Behura, APP for State.

RESULT: Appeal allowed:

SURESH KAIT, J. (Oral)

1. Vide instant appeal, the appellants preferred appeal against the impugned judgment dated 17.07.2009 wherein the appellants were held guilty under Section 376/34 Indian Penal Code however they were acquitted under Section 328 Indian Penal Code.

2. Vide order on sentence dated 12.08.2009, both the appellants were sentenced to undergo RI for ten years and pay fine of Rs.5,000/- each. Benefit of Section 428 of CrPC has been given.

3. The brief facts of the case are that on Diwali night, the appellants Ram Saran and Udai Raj called prosecutrix and offered her "Campa Cola" Cola' drink. Since she was known to Ram Saran for past 10 years, in good faith she consumed the 'Campa Cola' but after consuming the same she felt dizzy and soon became unconscious as some intoxicated substance was mixed in the drink. When she regained consciousness, she found herself in naked condition and Ram Saran, Udai Raj and two other persons were present there and had raped her. At about 10:00PM appellant Ram Saran left her at her jhuggi in the naked condition. The wife of one Hashmi namely Sapan Nisha, residing in her street had seen appellant Ram Saran taking her to his jhuggi. On the next day appellant Ram Saran had sent the message to the prosecutrix not to make a complaint with the police and had even sent a message to one person named Durga that he is ready to pay any amount to her but she flatly refused to the offer.

4. As per the prosecution, thereafter she was threatened to be killed. On the next day, some of the persons of the locality asked her to take action against the appellant whereas some persons advised to settle the matter and in this process her thumb impression was obtained on some documents. Earlier she had not disclosed this fact to anybody as she was ashamed of her husband and brother. Statement of prosecutrix was reduced into writing. Thereafter the complainant was sent for medical

examination alongwith lady Ct. Madhu Sharma and Rajender Tiwari to DDU Hospital. FIR under Sections 376/328/506 Indian Penal Code was registered at PS Moti Nagar.

5. During the investigation IO prepared site plan. Clothes worn by complainant on the day of incident were sized by IO. Statement of the complainant under Section 164 Cr.PC. got recorded.

6. Ld. counsel for the appellant has submitted that in the instant case both the appellants were admitted on anticipatory bail. He further submitted that as per the allegations of the prosecutrix some intoxicated substance was administered to her in ''Campa Cola' Cola' whereas the appellants have been acquitted under Section 328 of Indian Penal Code.

7. Ld. counsel further submitted that the FIR was lodged against the appellants under Section 506 of Indian Penal Code however the charges were not framed against the appellant under Section 506 Indian Penal Code.

8. Ld. counsel has further asserted that relating to incident occurred on 26.10.2000 the complaint was made to police on 04.11.2000 and the same was converted in the FIR in the instant case.

9. Ld. counsel has referred Ex.PW4/A, as on 27.10.2000 there was a compromise between the appellants and prosecutrix related to some quarrel took place between them. This fact has been proved by PW10 Durga Prasad and DW2 SI Azad Singh. It is further stated, in the instant case no medical evidence available though the lady is a grown up, married woman having children; however no injuries, no marks and no semen was found either on the clothes of the prosecutrix or in the vagina.

10. Ld. counsel has further argued that as per the statement of the prosecutrix and her husband PW5 Om Prakash who has stated that some intoxicated substance was administered in ''Campa Cola' Cola' and she became unconscious and thereafter four persons removed her clothes.

11. The prosecutrix in her deposition had stated that she found herself naked in the presence of the appellants. Both the appellants had committed rape upon her. Two or three other persons were also present whom she did not know. She has further deposed that those 2-3 persons did not commit rape upon her when she regained conscious. Appellant Ram Saran had brought her to her house. When appellant Ram Saran had

brought her to her house her neighbourer Sapan Nisha had seen her.

12. Ld. counsel has pointed out that in the instant case neither 2-3 persons were made witnesses nor were made accused as they were also liable for the prosecution.

13. PW8 Sapan Nisha has not supported the prosecution case, however she was further declared hostile. In her cross-examination she has not discussed anything to support the case of the prosecution.

14. PW5 Om Prakash, husband of the prosecutrix, has not supported the prosecution story however if we look into the deposition made by the prosecutrix and PW5 there are a lot of contradictions between the statements made by them. In the statement under Section 313 Cr.PC the appellant has stated their innocence.

15. On the other hand, ld. APP submits that there was delay in lodging the FIR however in the present matter, the prosecutrix is a married woman and she was ashamed of the society and without the support of her husband she could not report the matter to the police, therefore this cannot be fatal to the instant case.

16. Ld. APP has further stated that additionally she was being threatened that she and her families lives were at risk had she filed a complaint against the appellants.

17. Ld. APP further argued that there was no name suggested by the appellants against the prosecutrix for their false implication by levelling such serious allegations which also effect her own reputation.

18. Ld. APP has pointed out as per the statement of the defence of the appellants, a quarrel took place between them and she compromised the matter. However, the prosecutrix PW4 had denied this fact by stating that she only went to the Police Station on the said date and never put thumb impression on the said compromise.

19. However, DW2 SI Azad Singh falsify the evidence of this witness as he has submitted that PW4 Sharda came to police station on 27.10.2000 and compromise was effected between the prosecutrix and the accused persons and the prosecutrix had signed the compromise. Ld. APP for the State argued that if the compromise took place between the appellant and the prosecutrix there is no reason given by the appellants

on what pretext the quarrel took place and matter was compromised. Even the trial court has recorded that on perusal of the compromise it is not indicated as to in which context the quarrel took place. She further submits the minor discrepancy of the witnesses are natural therefore it does not affect the case of the prosecution against the appellants.

20. Ld. Counsel for the appellant has pointed out compromise Ex.DW1/A which took place on the incident of quarrel due to the non payment of the earlier dues by prosecutrix to the appellants against grocery items purchased by her from the shop of the appellants. Ld. Counsel for the appellant has also fairly considered regarding buying ration articles from Ram Saran; a suggestion was put to the witness to which she denied. She further submitted that a compromise had already taken place on this issue.

21. The trial judge has not considered the fact as under: (i) No injury found on her body; (ii) The semen was not found on the clothes or in her private parts.

22. There is delay of 09 days in lodging the FIR of the incident.

23. PW8 who happened to be the neighbourer and the witness of the naked condition did not support the case. Discrepancy in the deposition of PW5 Om Prakash and PW8 did not support the case. The prosecutrix denied any compromise arrived on 27.10.200 at police station. However the SI Azad Singh confirmed the same as well as DW1 Ct. Kamlesh Kumar. The links of the chain are totally broken because of the fact that the appellants were acquitted under Section 328 of IPC and they were not even charged under Section 506 IPC.

24. It is interesting to note the fact that incident took place on the Diwali day, a festival most celebrated in north India, even if an alarm raised by the prosecutrix was submerged beneath the noise of the fire crackers, it is highly impossible that there will be no public witness. In the FIR she has categorically named two persons who have committed rape on her, where as she states the presence of 2-3 persons, which creates a doubt in the prosecution version and same lay the foundation of doubt, the benefit of which must be given to the appellants and not otherwise. No external injury marks observed by the doctor concerned who prepared the MLC of prosecutrix, also there is delay of nine days in reporting the matter to police by prosecutrix, has made the case of the

prosecutrix weak. Also, as stated by the prosecutrix of her being admitted in RML Hospital, and there is no documentary evidence in the form of MLC, admission ticket etc. of her being admitted in that hospital. Lastly, the place of incident was thickly populated as confirmed by PW5 in his deposition.

25. Further, PW5 Om Parkash, husband of the prosecutrix has given different version of facts whereby weakening the prosecution case. Firstly, he mentioned that on the day of incident, he was in his jhuggi when Ram Saran left prosecutrix in a naked condition, and a bucket of water was thrown on the prosecutrix, as narrated by her; this fact has no where been mentioned by the prosecutrix and neither was she found wet when she returned home to her jhuggi. However, while contradicting his earlier deposition, in the cross-examination, this witness categorically admitted that he was not present at that time when his wife was left by Ram Saran in the jhuggi.

26. After hearing submission from both learned counsels, I am of the view the Trial Judge has not considered the fact raised by the counsel for the appellants, therefore, both appellants are acquitted.

27. In view of above, Criminal Appeal No.763/2009 is allowed and stands disposed of.

28. Consequently, Criminal M.B.No.937/2011 renders infructuous and stands disposed of as such.

29. The Superintendent of Jail is directed to release both the appellants, if not warranted in any other case.

30. Copy of order of this court be sent to Jail Superintendent, Tihar Jail for compliance.

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CRL. A.

DEEPAK KUMAR @ BITTOO ....APPELLANT

VERSUS

STATE ....RESPONDENT

(S. RAVINDRA BHAT & S.P. GARG, JJ.)

CRL. A. NO. : 1315/2011, 1381/2011, 1/2012, 2/2012 DATE OF DECISION: 09.01.2012

Indian Penal Code, 1860—Section 364-A & 34—As per prosecution case, PW-1 driving back from work when accused Mukesh dressed in police uniform accompanied by accused Rehan asked for lift—Rehan pointed country made pistol at PW1 and asked him to stop PW1 overpowered by them and was taken to Rehan's house—Complainant (PW2, son of PW1) filed complaint that his father PW1 left factory for house at 9.30 p.m. but did not reach home and that he received ransom call for Rs. 15 lakhs—PW2 made arrangement for ransom amount—Kidnapper did not disclose exact location where ransom was to be handed over—Currency notes after being marked handed over to PW4, PW8 and PW9 who assumed false identities and as directed by kidnappers, boarded Delhi-Saharanpur train—When train crossed New Ghaziabad Railway Station, they were asked to throw money bag containing ransom amount, which they did—Next day, PW1 released—Accused persons arrested—Mukesh got recovered police uniform, mobile and charger besides Rs.2,67,500—Accused Sukhram Pal got recovered from his house Rs. 10,000/- Accused Rehan got recovered Rs. 31000/- and belt of PW1—Trial Court convicted accused for committing offence u/s 364-A/34—On facts

held, PW1 had clearly identified Mukesh and Rehan—He also identified family members and location of Rehan's house—Chance-prints taken from Maruti car matched those of Rehan and Mukesh—Prosecution relied on tape-recordings of telephonic conversation made by PW2 and handed over to police during investigation, however, authenticity of recorded conversation not proved—Transcripts of tape-recordings not proved—Thus Trial Court erred in relying upon tape-recordings to conclude that they contained conversations with accused—Identification of Mukesh and Rehan by PW1, the arrest and disclosure statements leading to recovery of marked currency notes and finger print report only proved guilt of Mukesh and Rehan—Although huge amount of Rs. 9,49,500/- recovered pursuant to disclosure statement of accused Deepak, the prosecution allegation that his disclosure led to arrest of other accused or that his statements led to recoveries from Rehan's premises cannot be basis of concluding that he was guilty for offence u/s 364A—No charge for conspiracy framed against Deepak, therefore, he could not be convicted u/s 364A, however he owed duty to explain how he possessed cash u/s 106 IEA—U/s 114 IEA, act Deepak pointed to his culpable mind or atleast knowledge and awareness that money was obtained by unlawful means—On application of Section 222 Cr.P.C., held that though Deepak not guilty of offence u/s 364A he was guilty for offence u/s 365 and 411—As per prosecution, accused Sukh Ram Pal was guarding premises in which PW-1 held PW-1 did not depose about role of accused Sukh Ram Pal—PW1 did not mention about premises where he was detained being guarded by anyone—None of the currency notes recovered at instance of Sukh Ram Pal, contained signatures or markings—Although prosecution case was that he guarded the place where PW1 was kept in captivity and had been paid Rs. 10,000/-, the amount

recovered at his behest was Rs. 19,000/-—No charge u/s 120 B framed against accused Sukh Ram Pal—Appeals of accused Mukesh and Rehan dismissed—Conviction of Deepak modified to one u/s 365/34 IPC read with Section 411 IPC—Appeal of accused Deepak partly allowed and sentence reduced—Appeal of accused Sukh Ram Pal allowed and accordingly acquitted.

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Mr. K.B. Andley, Sr. Advocate with Mr. M. Shamikh, Advocate for appellant in Crl. A. Nos. 1315 and 1383/2011, Mr. Bhupesh Narula, Advocate for appellant in Crl. A. No.1/2012, Ms. Stuti Gujral, Advocate for appellant in Crl. A. 2/2012

FOR THE RESPONDENT : Mr. Sanjay Lao, APP for the state in all the matters.

CASES REFERRED TO:

1. *Vishwanath Gupta* vs. *State of Uttaranchal* 2007 (11) SCC 633.
2. *Suman Sood* vs. *State of Rajasthan* 2007 (5) SCC 634.
3. *Anil* vs. *Administration of Daman & Diu* 2006 (13) SCC 36.
4. *Malleshi* vs. *State of Karnataka,* (2004) 8 SCC 95.
5. *Sunil Kumar* vs. *State Govt. of NCT of Delhi* 2003 (11) SCC 367).
6. *Sunderbhai Ambalal Desai* vs. *State of Gujarat,* (2002) 10 SCC 283.
7. *Jagdish Prasad* vs. *State of M.P.* AIR 1994 SC 1251.
8. *Ram Singh* vs. *Col. Ram Singh,* AIR 1986 SC 3.

9. *Ziyauddin Burhanuddin Bukhari* vs. *Brijmohan Ramdass Mehra,* AIR 1975 SC 1788.
10. *R.M. Malkani* vs. *State of Maharastra,* AIR 1973 SC 417.
11. *Vadivelu Thevar* vs. *State of Madras* (AIR 1957 SC 614).

RESULT: Crl. Appeal Nos. 1381/2011 and 02/2012 dismissed., Crl. Appeal No.1315/2011 partly allowed. & Crl. Appeal No. 01/2012 allowed.

S. RAVINDRA BHAT, J.

1. In these appeals, common judgment and order on sentence dated 17.09.2009 of learned Additional Sessions Judge SC No.15/2009 has been challenged. The Appellants were convicted for committing offences punishable under Sections 364-A/34 IPC, and sentenced to undergo life imprisonment, with fine.

2. The prosecution case was that on 07.6.2002 Nitin Aggarwal (PW-2) lodged a complaint to ASI Phool Chand in P.S. Dilshad Garden regarding kidnapping of his father Jai Narayan Aggarwal. In this complaint, he mentioned that he resided with his parents at Model Town. His shop was in Sikriwalan, Delhi and their factory was at B 16/6, Jhilmil Industrial Area. He claimed, that, he had earlier informed the police of a call he had received on the factory telephone, on 31.12.2001, wherein the caller had threatened to kidnap him and had demanded Rs. 5,00,000/-. In the present instance, he stated that his father, Jai Narayan Aggarwal had left for the house from the factory in his Maruti Car (No. DL 6CD 2817) at around 09.30 PM. Since his father had not reached home even at 10.30 P.M., he had called him on his mobile phone, but the call was not answered. He called his father again, at about 12.30 A.M. but his call was answered by an unknown man who told him that his father was in their custody and their "Bhai" would talk to him in the morning. PW-2 further stated that the informer had warned him that in case the police was informed, the body of Lalaji (his father) would be found in the drain. He suspected that his father had been kidnapped by some gang. On the basis of this statement, a case under Section 365 IPC was registered and the investigation was marked to SI Brij Mohan.

3. It was alleged that the kidnappers had demanded Rs. 15 lakhs for the release of Lalaji. On 13.6.2002, for securing safe release of his

father, PW-2 arranged the ransom amount (30 bundles, with hundred notes of the denomination of Rs. 500 in each) and the I.O. and Nitin Aggarwal (PW-2) signed on some of the notes in ten of these bundles, and the currency notes in these bundles were then mixed up in the other twenty bundles. The kidnapper did not disclose the exact location where the ransom was to be handed over. The bag containing the ransom amount was given to Pramod Kumar Aggarwal (the uncle of PW-2 who deposed as PW-4), Surender Kumar (the brother-in-law of PW-2 who deposed as PW-9) and Kamal Kant (PW-2's friend who deposed as PW-8) who assumed false identities, and as directed by the kidnappers boarded the Delhi-Saharanpur train and sat in the last bogie of the train. When the train crossed the New Ghaziabad Railway Station they were asked to throw the bag containing the ransom money, which they did. On 14.06.2002, PW-2's father was released. Thereafter the investigation of the case was handed over to Inspector C.S. Rathi. In the course of the investigation, he got the telephone numbers used by the kidnappers for demanding ransom and the addresses, where these telephones were installed were traced. The I.O. also met the victim PW-1 Jai Narayan and obtained descriptions of the kidnappers. The IO, along with his staff, then visited the address from where these calls had been made, which turned out to be a house in Khatoli, Muzaffar Nagar (where Telephone No. 73119 was installed). There, they met one Rakesh who told them that Titu@ Mukesh Verma used to receive and make calls from that number to Deepak. They were also told that Deepak was related to Pradhan Ram Naresh. The IO met Pradhan Ram Naresh and enquired about Deepak after disclosing all the facts to him. He admitted that Deepak was his brother-in-law and resided in Lajpat Nagar, Ghaziabad. Thereafter, the IO along with the staff and the Pradhan reached Deepak's house, where they found him. On seeing the police party, Deepak tried to flee; however, he was nabbed and interrogated. During interrogation, Deepak confessed his involvement in the offence and his disclosure led to recovery of a sum of Rs. 9,49,500/ which was kept in a black colored suitcase lying in the almirah. The notes were sealed and seized; Deepak was arrested. At his instance, Sukram Pal was caught who led to recovery of a *desi katta* and two cartridges which were used in the commission of the offence. A sum of Rs. 9,000/- was also recovered from his possession; it was seized. Sukram Pal and Deepak led the police to Mukesh's house where a scooter was parked. Deepak allegedly revealed that the said scooter was

used to receive the ransom amount. The scooter was taken into possession; Mukesh, however was untraceable. Sukram Pal and Deepak also pointed out Rihan's house (No. 112, Devi Dass Mohalla, Khatoli) where Jai Narayan was kept captive, after his abduction. Rihan was not present in the house. However, his wife Samina was there. The police party searched the premises and recovered cash of Rs. 60,000/- in the denomination of Rs. 500/-. On 25.06.2002, accused Deepak was interrogated and he revealed that he had deposited Rs. 9000 in Citi Bank. He withdrew this amount using his ATM card in denominations of Rs. 100. This money was seized. On the same day Rihan and Mukesh Verma @ Titoo were arrested by the police; they made disclosure statements. On 26.6.2002 at the instance of Mukesh, one charger along with one mobile, a police uniform were recovered from his house. He also assisted in the recovery of Rs. 2,67,500/- which was taken into possession by the I.O. Sukram Pal assisted in recovery of Rs. 10,000/ from his house. Rihan's disclosure led to recovery of Rs. 31,000/- from his house which was also taken into possession.

4. After completion of investigation charge sheet for the offences punishable U/s 365/364A/34 IPC was filed against the accused before the Trial Court. Upon being charged, the accused claimed that they were not guilty. The Trial Court, after considering the evidence led by the prosecution – which included testimony of 25 public witnesses and the exhibits produced in the case, concluded that the Appellants were guilty as charged, and sentenced them, in the manner described above.

5. Crl. Appeals Nos.1315/2011 & 1383/2011, though filed in 2011, involved individuals who were in jail for about 9 years (Deepak and Mukesh); consequently the matters were set down for hearing. At the stage of final hearing, on 03.01.2012 it was noticed that the co-accused, Rihan and Sukhrampal had not preferred appeals. Consequently, the Court directed Delhi High Court Legal Services Committee to contact them, and ascertain if they wished to file appeal. The DHCLSC did contact them; their appeals were filed, as Crl. Appeal Nos. 1 and 2 of 2012. The appeals were admitted, and heard with the appeals of the co-accused (Cr. Appeals 1315 and 1383 of 2011) on 03-01-2012. At the outset, this Court wishes to record its appreciation and acknowledgement to counsel assigned by the DHCLSC, i.e., Shri. Bhupesh Narula, and Ms. Stuti Gujral (who appeared and argued on behalf of Shri Siddharth Agarwal).

They were fully prepared with the matter, and rendered meaningful assistance to the Court and, as shall be seen hereafter, their contribution was invaluable.

6. Counsel for Appellants urged that the findings in the impugned judgment are unsustainable. It was urged, on behalf of Deepak that there was no evidence to connect him with the crime. Arguing in his appeal, Mr. K. B. Andley, learned Senior counsel, submitted that Deepak was not identified by the victim PW-1, nor was the prosecution able to identify him as one of those who had either participated in his abduction, or demanded any ransom amount. It was submitted that the two individuals, through whom Deepak's role was ascertained, i.e., Rakesh and Pradhan Ram Naresh, were deliberately not examined during the trial. They could have given valuable information about the role, if at all, played by Deepak, in the episode.

6. It was urged that admittedly, according to PW-1's testimony, two individuals had abducted him; one pointed the *katta* at him, and later muffled his face with a towel, and the other was in a police uniform. Deepak was not among these two. Furthermore, Deepak was not shown to be connected with any of the co-accused. It was submitted by the learned senior counsel that the disclosure or confessional statement made by Deepak could not have been used, except to the extent that it supported recovery of an article, or knowledge of some fact. In this case, therefore, the alleged knowledge attributed to Deepak about the place where PW-1 had been kept captive-after his abduction, was inadmissible, as it did not fall within the excepted category, so as to be looked at by the court.

7. It was argued that the only substantial evidence led against Deepak was the alleged recovery of over Rs. 9 Lakhs. Here, it was urged by the learned senior counsel (for Deepak) that the entire story about the notes having been marked, as well as their being thrown from the train, according to a pre-arranged signal, was unbelievable. Learned counsel submitted that even though the prosecution claimed that the entire phone records were available, there was no proof about the conversation between PW-2 and the abductors, when the latter boarded the train, and was asked to throw the bags containing currency notes. Moreover, though the witness mentioned the currency notes, the prosecution had not proved their seizure, as the originals were not produced in court; only photocopies were relied on. This, according to the counsel was unacceptable, and did

not amount to proof of such fact.

8. It was argued that even if it was assumed that Deepak had currency notes which he could not explain or account for, that circumstance, in the absence of positive evidence linking him with the abduction, threat to PW-1's life, or apprehension of his bodily injury, and in the absence of any demand (by Deepak) could not have led the Trial Court to find his guilt for the offence under Section 364-A, IPC, especially when there was no charge of conspiracy under Section 120-B IPC.

9. Arguing for Mukesh, Shri Andley submitted that in his case too, the entire conviction was based on the testimony of PW-1. The recovery of notes from him, like in the case of Deepak, was of no consequence, because the original notes were not produced. Counsel also argued that the alleged ransom demand – which is an integral part of the ingredient for proving the offence punishable under Section 364-A IPC had not been established. Here it was urged that the Trial Court fell into error in accepting the evidence of PW-2 with regard to the tape recording of the demands made through mobile phone calls. The tape recordings were not proved in accordance with established norms; even the transcripts were not produced. The Trial Court, urged counsel, assumed that the document – i.e., the tape recordings were admissible, and proceeded to act on them, without ensuring that the safeguards necessary to bring them on record, had been satisfied. For all these reasons, urged counsel, Mukesh's conviction deserves to be set aside.

10. Mr. Bhupesh Narula, Advocate (appearing for the Delhi High Court Legal Services Committee) on behalf of appellant Sukh Rampal submitted that the impugned findings against that appellant cannot be sustained. Elaborating, it was urged that the said appellant was not even mentioned by PW-1 in the statement recorded by him, under Section 161, immediately after he was freed. He did not ascribe any special role, i.e. his standing guard over him, when he was held captive, after abduction. Mr. Narula argued that unlike in the case of other co-accused, the victim was not sure about the role played by Sukhram Pal. It was urged in this regard, that the victim had been confined after his abduction for quite some time; had this accused been keeping guard over him, all the while, PW-1 would have named him, or mentioned his role, in the statement recorded during investigation, immediately after he was set free. Such was not the case. Furthermore, the possibility of Sukhram Pal having

visited the family (of Rihan) as an acquaintance once during that period, in such capacity could not be ruled out. If that were the position, in the absence of more clinching material, about his involvement in the kidnapping, threat to life or body of PW-1, or in the demand, he could not have been convicted of any offence at all. It was argued that as far as recovery of the *katta* from his house was concerned, there was no question of its being linked with any offence. Besides, this Appellant was not even charged with committing any offence under the Arms Act. Mr. Narula lastly argued that Sukhram Pal could not be said to have been a party to the crime, merely because of the recovery of Rs. 19,000/- at his behest. Most importantly, urged Mr. Narula, none of the notes recovered were marked, or signed, as alleged by the prosecution.

11. Ms. Stuti Gujral (appearing for Mr. Siddharth Aggarwal, assigned the case by the DHLSC) on behalf of Rihan submitted that the prosecution version was full of serious gaps and inconsistencies which the Trial Court ought to have been wary of accepting. Elaborating on this aspect, she argued that the prosecution's inability to link Rihan with any demand for ransom is fatal to the conviction recorded against him. Even though the Trial Court believed the story about notes having been marked after their production by PW-2, as a bait to nab the abductors, there was no explanation why the police did not accompany PW-2 in the train, and attempted to nab the offenders at the spot, after the currency notes were thrown down. Furthermore, the prosecution could not explain why it took about a week after the notes were thrown, and after release of PW-1, to gather vital clues, and arrest Deepak, who in turn allegedly led to the arrest of others. It was also argued that the prosecution version about Titu going and using a phone, (which was registered in the name of one Angoori Devi) and its story that the police contacted Rakesh and later, Pradhan Ram Prakash, was unbelievable; they were pure fiction. In fact, there was no story; the entire sequence of its events commenced with Deepak's arrest.

12. Counsel for Rihan also argued that the prosecution version about recovery of ' 31,000/- from him, in two lots was unbelievable. Here, it was argued that none of the notes bore any markings or signatures, as alleged during the trial. The entire conviction hinged on the testimony of PW-1 who could not have identified the appellant, as he saw him fleetingly at night.

13. Learned APP for the State, Sh. Sanjay Lao argued that the impugned judgment does not call for interference. He contended that the omission to examine Rakesh and Pradhan Ram Naresh was not fatal; on the contrary, they merely assisted the police, during the course of investigation to arrest the accused in this case. Learned counsel highlighted that PW-2 had deposed about a threat six months prior to the incident, i.e. 31.12.2001 whereby a call demanding Rs. 5 lakhs as ransom and a further threat to kidnap had been made-out. The complainant had alerted the police about this fact. The threat was not an empty one as later events proved; his father, PW-1 was in fact abducted on 06.06.2002. The truthfulness of the testimonies of PWs-2 and 19, Inspector Brij Mohan was evident from the fact that Ex. PW-2/B, which is prepared on 13.06.2002, clearly described the currency notes which were marked. Learned counsel submitted that the relative series on the currency notes were noted and countersigned by PW-2 and PW-19. PW-4 deposed having witnessed that 30 packs of cash in denominations of Rs. 500/- each, totaling Rs. 15 lakhs had been seen and that the police official, PW-19 had signed on the 10th, 20th and 30th note of each of ten bundles and that ten bundles were then mixed with 20 bundles. The signed currency notes were in 10 bundles. The recoveries made pursuant to the disclosure statement of Deepak, (who was arrested on 20.06.2002) established that several of those signed notes were taken into custody; these were evidenced by the Memo, Ex. PW-12/E. Deepak failed to explain these and merely denied having possessed them, in his reply to the queries put under Section 313 Cr.PC. Learned APP argued that the case was in fact solved after Deepak's arrest since he led to the place where PW-1 had been confined, i.e., Rihan's house. Further, currency notes were seized from that place. They were the subject matter of Ex. PW-12/Q.

14. It was argued that the involvement of Mukesh and Rihan was proved beyond reasonable doubt because the abducted man, PW-1 positively identified them. Learned APP urged here that the these accused were in fact arrested much later on 25.06.2002; they had refused to participate in the Test Identification Parade (TIP) proceedings as deposed to by PW-18, who recorded his observations in the documents marked during the trial as Ex. PW-18/A to PW-18/D. It was argued that besides the recoveries made on 20.06.2002 from Rihan's house, aggregating Rs. 60,000, a further amount of Rs. 31,000/-was recovered pursuant to his

disclosure statement, after his arrest. Furthermore, the belt which belonged to the abducted person, PW-1 was also recovered and produced during the trial; it was seized under Memo Ex. PW-11/E.

15. Like in the case of Rihan, Mukesh too was identified by PW-1; he too was arrested on 25.06.2002; his disclosure statement, assisted the police in the recovery of currency notes to the tune of Rs. 2,69,500/-. These also contained some marked notes; photocopies of all the notes and some of the original notes were produced during the trial. Apart from these two, urged the learned APP, the chance prints lifted from the Maruti Car DL 6CD 2817 were seized by PW-13 on 14.06.2002. Another chance print was seized from the house of Rihan on 21.06.2002. It was urged that during the course of investigation, specimen finger prints of the accused were taken. The specimen print, S-2 (belonging to Mukesh), part of Ex. PW-22/B-3 matched with the specimen of left thumb, designated as chance prints Q-2 and marked as S-2 in the report, which was produced as Ex. PW-22/L. Similarly, the chance print developed by the finger print expert, PW-22, i.e. Q-3 was identical with the right thumb mark, S-3 from the finger print specimen of Rihan, according to the report, Ex. PW-22/F and 22/M. These recoveries, coupled with the positive identification by PW-1, of Mukesh and Rihan established beyond reasonable doubt that they were involved in the offence alleged against them.

16. It was submitted that as regards Sukhram Pal, two recoveries of Rs. 9,000/- and Rs. 10,000/- (Ex. PW-12/L and Ex. PW-11/C), and the recovery of *katta*, Ex. PW-12/N proved his involvement. Furthermore, the evidence of PW-1 revealed that Sukhram Pal guarded the premises when the victim was in custody of the abductors.

17. The above discussion shows that PW-2 had deposed to having received a threat sometime in end December 2001. At that time, the callers had threatened to resort to abduction and demanded Rs. 5 lakhs. On the day of the incident, i.e. on 06.06.2002, the witness was worried since his father did not return at the scheduled time from his factory. At 12.30 AM, he made a telephone call to his father's mobile; it was received by someone else, who stated that his father had been abducted; a ransom demand was made thereafter. PW-2 reported the incident immediately to the police which lodged the FIR on 07.06.2002, Ex. PW-2/J; it was registered at 02.30 AM in the morning of 07.06.2002. PW-

1 further deposed having received another call at his residence, later on 07.06.2002, by which the caller asked him to arrange Rs. 25 lakhs. He was thereafter allowed to talk to his father at 10.00 PM that night. Apparently there was a lull after this and on 13.06.2002, PW-2 arranged for Rs. 15 lakhs and had them marked by the police; PW-4, his uncle, Pramod Kumar supports this statement. After 30 bundles containing Rs. 500/- denomination notes, aggregating to Rs. 15 lakhs, (of which 10 bundles were marked and signed by PWs-19 and PW2 at serial numbers 10, 20 and 30 of each bundle), all currency bundles were mixed. PWs-4, 8 and 9 went along with the bundles, on the last bogie of the train from Shahdara Railway Station. According to a pre-arranged plan with the abductors, the bundle was thrown near the New Ghaziabad Railway Station. This latter event happened on 13.06.2002. The next day, i.e. on 14.06.2002, PW-1, Jai Narayan was released. The investigation thereafter proceeded and the police traced the calls somewhere to Khatoli in U.P. According to the prosecution version, initially Rakesh and subsequently Pradhan Ram Naresh were questioned; this led to the arrest of Deepak and Sukhram Pal on 20.06.2002 and subsequent arrests on 25.06.2002, of Mukesh and Rihan, and the recoveries alleged in this case.

18. Now, as far as the testimony of PW-1 is concerned, he is consistent with the version recorded immediately after his release on 14.06.2002. During the trial, all the accused had refused to participate in the TIP (testified by the concerned Magistrates – PW-18 and 21). However, the victim, PW-1 was able to identify Mukesh and Rihan during the trial, without any difficulty. The role attributed to Mukesh was that he initially asked PW-1 to give him a lift till a turning (bend in the road). Mukesh was dressed in a police uniform which too was also seized pursuant to the disclosures made by him after his arrest. Rihan, who too was identified by PW-1, accompanied Mukesh. Both of them had approached PW-1's car. Rihan sat at the back. Mukesh sat apparently along-side PW-1. When the car reached the turning, the accused were asked to get-down; they, however, requested PW-1 to cross the bridge. PW-1 further stated that when the car reached the middle of the bridge, Rihan pointed a country made pistol to his temple and asked him to stop. Jai Narayan snatched the pistol and threw it on the road. Mukesh took out a knife and pointed it at his abdomen and pushed him. Rihan, in the meanwhile, took-out a towel and threw it on Jai Narayan's face. Both of them pulled him out and kept him in the back seat of the car; Mukesh

took over the wheel and drove it for about 2-2 + hours. It is also stated that Rihan lifted the country made pistol which had been thrown down by Jai Narayan. He further deposed being taken to the accused's house, and identified Rihan's wife as Shamina and his eldest daughter's name as Shibbo. PW-1 could recount all the events which took place when he was in the custody of the abductors. Apparently, his statements was recorded on 16.06.2002 and 21.06.2002. He had led the police to the house where he had been confined.

19. It can be seen from the evidence of PW-1 that he was clear as regards the identification of Mukesh and Rihan. He was also well oriented at the time of his abduction and conscious of his surroundings at the time of his captivity, i.e. between 06.06.2002 to 14.06.2002. He could identify the family members as well as the location of Rihan's house. The police was taken there on 21.06.2002. This, in the opinion of the Court, is direct evidence by a victim about the incident itself. Though PW-1 was cross-examined, on the behalf of the accused, nothing significant could be elicited to discredit his testimony.

20. A submission on behalf of Mukesh was that the prosecution could not establish how the investigation in fact commenced. It was strongly urged that the omission to summon and record the testimonies of Rakesh as well as Pradhan Ram Naresh were serious omissions which the Court should take into consideration. Added to these were two other circumstances, according to counsel, which falsified the prosecution story. One was the ownership of the telephone which was used to communicate with PW-2. Here it was urged that the police witnesses deposed to having having ascertained the call details as well as the ownership of the telephone number and yet omitted to bring that material evidence during trial, on record. Two, the entire story about the currency notes being handed-over to the police for marking on 13.06.2002 and being dropped at a pre-arranged destination on that day itself is unsupported by any objective material. It was urged that no call details were proved, to establish that in fact any of the witnesses, who had boarded the train were contacted at the relevant time, signaling them to throw the bags of currency. Furthermore, argued counsel, the easiest thing that the police could have done was to follow the train or try and nab those who tried to pick-up the currency notes. These omissions, according to the counsel for Mukesh and Rihan, are fatal to the prosecution story.

21. This Court is conscious that the prosecution did not examine Rakesh and Pradhan Ram Naresh, though, according to its version, the case could be solved after the arrest of Deepak. The prosecution has no doubt urged that Deepak could be traced after clues were secured from the two individuals. The question is whether their absence during their trial is fatal and undercuts the entire prosecution story. As far back as in the decision reported as **Vadivelu Thevar v. State of Madras** (AIR 1957 SC 614)- and subsequently followed in other later decisions (**Jagdish Prasad v. State of M.P.** AIR 1994 SC 1251 and **Sunil Kumar v. State Govt. of NCT of Delhi** 2003 (11) SCC 367) the Supreme Court had categorized witnesses as either wholly reliable; or wholly unreliable, or neither reliable nor unreliable. That being the standard of judicial scrutiny, ultimately the court has to satisfy itself with the evidence presented whether the accused standing trial before it, is guilty beyond reasonable doubt. It is quite possible that in a given case, despite availability of an individual, he is not cited as a witness and that may become fatal to the prosecution; in another given case, though the witness may be material, there may be other evidence, oral or circumstantial, to establish the guilt of the accused beyond reasonable doubt. Therefore, the omission to examine a given witness cannot invariably result in the entire prosecution story getting vitiated. Here, having regard to the clear and unambiguous identification of Mukesh and Rihan, by PW-1, the omission to examine two witnesses, or even explain why the police did not adopt a particular course during investigation to solve the crime, cannot be determinative. In hindsight, it is possible to fault a line of investigation; yet, one has to keep in mind that as on 13-06-2002, no one was sure that PW-1 would actually return safely. Possibly, in order to avoid any complication or harm to him, the investigators did not pursue the abductors immediately after the currency notes bag was dropped, on 13-06-2002.

22. As far as the recoveries from Rihan and Sukh Ram Pal are concerned, the witness who primarily deposed about it is PW 11 HC Anil Kumar. He deposed that on 26.6.2002 accused Mukesh led the police to a house; this led to recovery of a police uniform, Panasonic make mobile phone and a charger. Mukesh's statement also led to the recovery of Rs. 2,67,500/-. PW-11 testified that currency notes as well as the articles were seized by Memo Ex. PW 11/A and PW 11/B. He also stated that Sukhram Pal led them to his own house and assisted in recovery of Rs. 10,000/- which was taken into possession Memo Ex.PW 11/C. He further

deposed that accused Rihan also led to the recovery of ' 31,000/- as well as a belt which belonged to victim PW-1; these were taken into possession by Memos Ex. PW 11/D and PW 11/E.

23. PW 13 HC Sushil Kumar lifted five chance prints from the Maruti Car, bearing No. DL-6CD -2817. He deposed that the rear view mirror had been taken out, and seized through Memo Ex. PW 13/A. He proved his detailed report Ex. PW 13/B. He deposed that on 21.06.2002 he and other crime team members went to House No. 112, Devidas Mohalla, Khatauli; the premises were checked. A chance print from a mirror was lifted and handed over to Inspector C.S. Rathi. He proved his report in this regard as Ex. PW 13/C. PW 22 N.K.Sharma is the finger print expert who examined the chance prints and gave his detailed report Ex. PW 22/C. The report states that one of the chance print matched the specimen signature of Rihan, and another print matched the specimen print of Mukesh, taken during the investigation.

24. This court notices that the impugned judgment had relied upon the tape recordings made by PW-2 and handed over to the police during investigations. The Appellants, particularly Mukesh and Rihan, had argued that this evidence was inadmissible, because the safeguards mandated by law, had not been complied with. In this regard, it has to be noticed that the judgments reported as **R.M. Malkani v. State of Maharastra,** AIR 1973 SC 417; **Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra,** AIR 1975 SC 1788 and **Ram Singh v. Col. Ram Singh,** AIR 1986 SC 3 show what are the material tests for a tape recording to be admissible, as evidence. The Court had indicated that the fulfillment of the following preconditions was essential for a tape recording to be admissible in a trial:

> (a) the voice of the speaker must be duly identified by the maker of the record or by others who recognize his voice. Where the maker has denied the voice it will require very strict proof to determine whether or not it was really the voice of the speaker.
>
> (b) The accuracy of the tape recorded statement has to be proved by the maker of the record by satisfactory evidence direct or circumstantial.
>
> (c) Every possibility of tampering with or erasure of a part of a tape recorded statement must be ruled out otherwise it may

> render the said statement out of context and, therefore, inadmissible.
>
> (d) The statement must be relevant according to the rules of Evidence Act.
>
> (e) The recorded cassette must be carefully sealed and kept in safe or official custody.
>
> (f) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbance.

25. In the present case, the testimonies of no witness – PW-2, PW-19 or any other police witness, reveals that any thought was given about the need to comply with the above safeguards. Moreover, the proceedings before the Trial Court also show that even transcripts of contents of the tape-recordings were not produced. In view of these facts, the Trial Court could not have relied on the tape recordings to conclude that any of those contained conversations with the Appellants.

26. It has been urged – on behalf of the Appellant Mukesh – that the evidence regarding marked notes and their recovery is inadmissible, since original notes were not produced in court, during the trial. We notice that when the articles were produced in court, photocopies of the notes, containing the relevant series, were shown to the witnesses; furthermore, some notes (Ex. P-3, Ex. P-5, Ex. P-11 to Ex. P-33) were original currency notes produced during the trial. In this context, it would be useful to notice that during criminal trials, courts are called upon to release movables particularly jewelry and valuables, even perishable commodities. If such a course were not adopted, the party – most often the victim, would be exposed to undue hardship. To balance the interests of the victim and the accused, the Supreme Court devised some useful safeguards in this regard. They have been indicated in the decision reported as **Sunderbhai Ambalal Desai v. State of Gujarat,** (2002) 10 SCC 283 in the following terms:

> **"Valuable articles and currency notes**
>
> 11. With regard to valuable articles, such as, golden or silver ornaments or articles studded with precious stones, it is submitted that it is of no use to keep such articles in police custody for years till the trial is over. In our view, this submission requires

to be accepted. In such cases, the Magistrate should pass appropriate orders as contemplated under Section 451 CrPC at the earliest.

12. For this purpose, if material on record indicates that such articles belong to the complainant at whose house theft, robbery or dacoity has taken place, then seized articles be handed over to the complainant after:

(1) preparing detailed proper panchnama of such articles;

(2) taking photographs of such articles and a bond that such articles would be produced if required at the time of trial; and

(3) after taking proper security.

13. For this purpose, the court may follow the procedure of recording such evidence, as it thinks necessary, as provided under Section 451 CrPC. The bond and security should be taken so as to prevent the evidence being lost, altered or destroyed. The court should see that photographs of such articles are attested or countersigned by the complainant, accused as well as by the person to whom the custody is handed over. Still however, it would be the function of the court under Section 451 CrPC to impose any other appropriate condition.

14. In case, where such articles are not handed over either to the complainant or to the person from whom such articles are seized or to its claimant, then the court may direct that such articles be kept in bank lockers. Similarly, if articles are required to be kept in police custody, it would be open to the SHO after preparing proper panchnama to keep such articles in a bank locker. In any case, such articles should be produced before the Magistrate within a week of their seizure. If required, the court may direct that such articles be handed back to the investigating officer for further investigation and identification. However, in no set of circumstances, the investigating officer should keep such articles in custody for a longer period for the purposes of investigation and identification. For currency notes, similar procedure can be followed."

In this case, the Trial Court correctly adopted the procedure indicated by the Supreme Court. We therefore, find no infirmity in its approach, in allowing the currency notes to be released to the complainant, and keeping photocopies, and allowing them to be produced during the trial. Also, some original currency notes were produced during the trial. They were marked, and signed by PW-2 and PW-19, and recovered pursuant to disclosure statements made by Mukesh, Deepak and Rihan.

27. The above circumstances – identification of Mukesh and Rihan by PW-1; the arrest and disclosure statements leading to the recovery of marked currency notes (in the case of Mukesh) and the finger print report – PW-22/F, are proved. The report proved that the finger prints on the Maruti car matched with the specimen finger prints of Mukesh and Rihan. Apart from bald and general denials, these Appellants could not give any reasonable explanation to these incriminating circumstances. In the opinion of this court, the prosecution was able to prove PW-1's abduction, and circumstances under which he was forcibly taken away – by threat of bodily harm or injury-at the instance of Mukesh and Rihan. It also established that the victim was held in captivity in Rihan's house, till he was released on 14-06-2002. Although the prosecution cannot be said to have proved the tape –recordings, yet the depositions of PW-2, PW-4 and PW-19 prove that ransom was demanded, and marked notes were used to satisfy the demand. Many such marked notes were also recovered. In view of these findings, the prosecution proved all the ingredients necessary to convict Mukesh and Rihan, for the offence punishable under Section 364A/ 34 IPC.

28. So far as appellant Deepak is concerned, no doubt a huge amount Rs. 9,49,500/-was recovered pursuant to his disclosure statement. However, the prosecution allegation that his disclosure led to the arrest of the other accused, or that his statements led to recoveries from Rihan's premises, cannot be the basis of concluding that he too was guilty for the offence under Section 364-A IPC. It is a fact that some of the notes recovered pursuant to his disclosures, were marked and signed by the prosecution witnesses. However, these, without further material, are insufficient to lead to his guilt for the offence. In this context, it would be useful to notice that Section 364-A talks of "Kidnapping" as well as "Abduction". Section 359 defines Kidnapping. It envisions two types of kidnapping i.e. (1) kidnapping from India; and (2)

kidnapping from lawful guardianship. Abduction (defined by Section 362) envisages two types of abduction i.e. (1) by force or by compulsion; and/or (2) inducement by deceitful means. The object of such compulsion or inducement must be the removal of the victim from any place by force (involuntarily) or by deceit (voluntarily, through false promises or representations).

29. In the judgment reported as **Vishwanath Gupta v State of Uttaranchal** 2007 (11) SCC 633, the Supreme Court held that for the prosecution to prove the offence, three facts had to be established. The court held that:

> "According to Section 364A, whoever kidnaps or abducts any person and keeps him in detention and threatens to cause death or hurt to such person and by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, and claims a ransom and if death is caused then in that case the accused can be punished with death or imprisonment for life and also liable to pay fine.
>
> 6. The important ingredient of Section 364A is the abduction or kidnapping, as the case may be. Thereafter, a threat to the kidnapped/abducted that if the demand for ransom is not made then the victim is likely to be put to death and in the event death is caused, the offence of Section 364A is complete. There are three stages in this Section, one is the kidnapping or abduction, second is threat of death coupled with the demand of money and lastly when the demand is not made, then causing death. If the three ingredients are available, that will constitute the offence under Section 364A of the Indian Penal Code. Any of the three ingredients can take place at one place or at different places...."

In the decision reported as **Suman Sood v State of Rajasthan** 2007 (5) SCC 634, it was held that:

> "57. Before the above section is attracted and a person is convicted,
>
> the prosecution must prove the following ingredients;
>
> (1) The accused must have kidnapped, abducted or detained any person;

> (2) He must have kept such person under custody or detention; and
>
> (3) Kidnapping, abduction or detention must have been for ransom. [see also **Malleshi v. State of Karnataka,** (2004) 8 SCC 95]
>
> 58. The term 'ransom' has not been defined in the Code.
>
> 59. As a noun, 'ransom' means "a sum of money demanded or paid for the release of a captive". As a verb, 'ransom' means "to obtain the release of (someone) by paying a ransom", "detain (someone) and demand a ransom for his release". "To hold someone to ransom" means "to hold someone captive and demand payment for his release". (Concise Oxford English Dictionary, 2002; p.1186).
>
> 60. Kidnapping for ransom is an offence of unlawfully seizing a person and then confining the person usually in a secrete place, while attempting to extort ransom. This grave crime is sometimes made a capital offence. In addition to the abductor a person who acts as a go between to collect the ransom is generally considered guilty of the crime.
>
> 61. According to Advanced Law Lexicon, (3rd Edn., p.3932); "Ransom is a sum of money paid for redeeming a captive or prisoner of war, or a prize. It is also used to signify a sum of money paid for the pardoning of some great offence and or setting the offender who was imprisoned".
>
> 62. Stated simply, 'ransom' is a sum of money to be demanded to be paid for releasing a captive, prisoner or detenu."

The prosecution's duty to establish all the ingredients, particularly the use of force, or threat to do so, to cause death or bodily injury, to the victim, coupled with the demand for ransom, was highlighted in an earlier decision, reported as **Anil v Administration of Daman & Diu** 2006 (13) SCC 36. In this case, this court also notices that no charge was framed under Section 120-B, for conspiracy; instead, the charge under Section 34 IPC, as a participant, was made. There is nothing to link Deepak, either with the demand, or the use of force, or threat of use of force, which led to PW-1 apprehending threat to his life, or bodily injury. Therefore, clearly, he could not have been convicted for the offence punishable under

Section 364-A IPC. At the same time, the court is not oblivious to the fact that an unduly large amount, which included marked notes were recovered pursuant to Deepak's arrest, and disclosure statement. He owed a duty to explain how he possessed the cash, by virtue of Section 106 Evidence Act. The court would also be justified in taking aid of Section 114 of the Evidence Act, and saying that this omission was glaring, and pointed to his culpable mind, or at least knowledge and awareness that the money was obtained by unlawful means. On an application of Section 222 Cr PC, the court can hold that though Deepak was not guilty for the offence punishable under Section 364-A, IPC, on the facts proved, he would be punishable under Section 365 IPC, as well as under Section 411, IPC.

30. As far as Sukrampal is concerned, this court finds merit in his appeal. The argument that he was not named in the initial statement, by PW-1, is entirely correct; the witness conceded as much in the course of his cross examination, in court. Apparently, there was no mention of someone guarding the premises when PW-1 was detained after his abduction, in his statement recorded by the police, during investigation. Furthermore, none of the currency notes recovered at his instance contained signatures or markings; what is more, the prosecution case was that he acted as a guard, during the time PW-1 was kept in captivity, and had been paid Rs. 10,000/-. Yet Rs. 19,000/- was recovered at his behest. He was not a party to any covert or overt act, threatening PW-1; nor was he a party to his abduction and illegal confinement. There is some merit in his submission that even if he visited the family of Rihan, at the relevant time, unless he was present during a major part of the day, and guarded the abducted person, he could not be convicted for the offence.

31. As in the case of Deepak, no charge under Section 120-B was framed against Sukram Pal. The Trial Court, in our opinion, got carried away by the recovery of cash at his instance. There also appears to be some prejudice against him, because of the recovery of a *katta* at his instance. That, in the opinion of this court, is of no consequence, because no charge under the Arms Act, was framed against this appellant. Further, it is not the prosecution's case that this *katta*, was used to abduct PW-1. On the other hand, it is alleged that Rihan was armed with such a weapon. Having regard to the distinct requirements of Section 364-A, none of which was proved by the prosecution, during the trial, this court

is of the opinion that Sukhram Pal's conviction and sentence for the offence has to be set aside.

32. In view of the above discussion, the impugned judgment is affirmed so far Mukesh and Rihan are concerned. Their appeals, Crl.A. Nos. 1383/2011 and 2/2012 are consequently dismissed. The conviction of Deepak, is, for the reasons discussed above, modified to one under Section 365/34 IPC read with Section 411 IPC. He is sentenced to undergo RI for seven years, for the offence under Section 365/34 IPC. The sentence of fine, is left undisturbed. He is further sentenced to undergo 3 years RI for the offence under Section 411 IPC. Both sentences shall run concurrently. Deepak shall be entitled to set off the period of detention undergone as an undertrial, as well the period undergone by him, after his conviction, during pendency of his appeal. Deepak's appeal, Crl.A. No.1315/2011 is allowed partly, to this extent. Sukhram Pal, is, for the reasons mentioned above, acquitted of all charges; his appeal Crl. A. No.1/2012 is allowed.

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CRL. A.

PURAN @ MANOJ & ORS. ....PETITIONER

VERSUS

THE STATE (GOVT. OF N.C.T. OF DELHI) ....RESPONDENT

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

CRL. A. NO. : 444/2011 & CRL. M. (B) NO. : 1431/2011 **DATE OF DECISION: 09.01.2012**

Indian Penal Code, 1860—Section 302, 324, 323 & 149—As per prosecution PW1 and deceased were brothers—Their minor sister Rekha eloped with one Latoori—PW2 told them that the appellant Puran might be able to give some clues regarding whereabouts of

their sister—PW2 went to appellant Puran's house and gave him deceased's telephone no—Puran telephoned deceased to go to him as he had found his sister's whereabouts—PW1 took PW2 and the deceased with him on his motorcycle to where appellant lived—PW1, PW2 and the deceased saw appellant Puran along with his associates—The appellants stated that the deceased was a police informer and would inform about their activities and therefore he should be done to death—Raja (P.O.) took out sword and attacked PW1 and PW2 who got injured—accused Kalia and Minte held deceased by both his arms and appellant gave several knife blows to deceased—Deceased started bleeding profusely and fell down—All five assailants escaped while PW1 and PW2 rushed to Police station—Police accompanied them to the spot—By that time deceased removed to DDU hospital by PCR—Appellant Pooran was arrested and he got recovered knife—Appellants Deepak and Ajay @ Minte were also arrested—Trial Court convicted appellants u/s 302/324/323/149 IPC—Held, as per PW1 and PW2, they were attacked by a sword by Raja (P.O) in concert with accused persons—However, medical evidence showed nature of injury as being abrasion and bruises caused by blunt object—Delay of six hours in lodging FIR—Contradictions in statements of PW1 and PW2 with regard to who held whom and how injuries were inflicted—Prosecution version doubtful PW31 (second IO) or PW30 did not depose about appellants being involved in any criminal activity making them suspicious about deceased's conduct as a police informer—Although prosecution claimed that number of public persons present at the spot, no person examined as witness—Normal human conduct would have induced PW1 to immediately remove his brother to the hospital who was seriously injured without waste of time instead of going to police station—Grave doubt in prosecution version—Appellants given benefit of

doubt—Acquitted—Appeal allowed.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANTS : Thakur Virender Pratap Singh Charak, Advocate with Ms. Shubhra & Mr. Pushpender Charak, Advocates for Appellants No.1 & 2. Mr. Bhupesh Narula, Advocate for Appellant No.3.

FOR THE RESPONDENT : Mr. Sanjay Lao, APP.

RESULT: Appeal allowed.

G.P. MITTAL, J.

1. This Appeal is against a judgment dated 06.08.2010 and an order on sentence dated 09.08.2010 (in Sessions Case No. 36/2009, FIR No.224/2004, Police Station (P.S.) Dabri) whereby the Appellants Puran, Manoj and Deepak were held guilty for committing offences punishable under Sections 302/324/323/149 IPC and were sentenced to undergo imprisonment for life apart from various sentences for other offences.

2. The prosecution version is as follows: Prempal (PW1) and Lakhan (the deceased) were brothers. Sometime before 20th March, 2004, their minor sister Rekha eloped with one Latoori. They were told by Pramod (PW2) that Puran (the Appellant) might be able to give them some clue regarding the whereabouts of Rekha and Latoori. It is alleged that on 25.03.2004, Pramod went to Puran's house and gave him Lakhan's telephone number. On 26.03.2004, Puran telephoned Lakhan to go to him as he had found Latoori and Rekha's whereabouts.

3. According to the prosecution, on 26.03.2004 at about 8:00PM Prempal (PW1) took Pramod (PW2) and the deceased with him on his motor cycle to the house of Banwari in Dabri Extension where Puran lived as a tenant. Puran was not available in his house. Then these three persons proceeded further and noticed Puran along with his associates Deepak, Kalia, Minte and Raja. All of them were known to PW1 Prempal. Before Prempal could enquire from Puran regarding Rekha's whereabouts, the latter exclaimed that Lakhan was a police informer and considered

himself to be a *dada*. Puran allegedly stated that he (Lakhan) would inform the police about their activities and, therefore, should be done to death. Raja (the proclaimed offender) took out a sword from his *dub* and attacked Prempal and Pramod. As a result, Prempal's trouser back pocket got cut and he suffered injuries on his left wrist. Pramod also got an injury on his right knee. It is alleged that thereafter Raja captured Prempal and Deepak overpowered Pramod. Kalia and Minte held Lakhan by both his arms and Puran gave several knife blows to Lakhan. Lakhan started bleeding profusely and fell down. All the five assailants escaped while Prempal and Pramod rushed to P.S. Dabri which was just 1 km away from the spot. According to Prempal (PW1), the incident was immediately reported to the police; the police accompanied them to the spot. By that time Lakhan had already been removed to DDU Hospital. (as per SI Ishwar Singh the first IO, the version is different as he reached the spot on his own and did not find any eye witness which we shall advert to a little later)

4. It is alleged that Lakhan was removed to DDU Hospital by ASI Khyali Ram of PCR and was admitted as an unknown person. Lakhan was declared unfit to make any statement and he succumbed to the injuries at about 1:00 PM. SI Ishwar Singh (according to IO's version), returned to the spot and found the eye witnesses. He recorded the statement of Prempal, lifted blood stained earth, control earth, summoned the crime team, got Prempal and Pramod medically examined and handed over further investigation to Inspector Y.K. Tyagi (PW31) SHO P.S. Dabri.

5. On 02.04.2004, the Appellant Puran was arrested from Mangla Puri bus stand. It is alleged that he made a disclosure statement Ex.PW22/A and got recovered a buttondar knife. It (*buttondar* knife) was shown to PW5 Dr. L.K. Barua, who opined that the injuries found on Lakhan could be inflicted with a *buttondar* knife, recovered at Puran's instance. Subsequently, Appellants Deepak and Ajay @ Minte too were arrested. All the three Appellants allegedly made disclosure-cum-confessional statements. There were no discoveries in pursuance of such statements. The same are, therefore, inadmissible in evidence. Discovery of *buttondar* knife at the instance of Puran is also not of any consequence as this would not come within the meaning of 'fact-discovered' under Section 27 of the Evidence Act. The doctor (PW5) merely gave an opinion that

the injuries could be inflicted by the knife. He did not say that the injuries present could not be caused by any similar or perhaps even dissimilar knife. No blood stains matching the deceased's blood group was found. Thus, the alleged recovery of knife does not connect Appellant Puran with the commission of the crime. On completion of the investigation, a report under Section 173 of the Code of Criminal Procedure was presented against the Appellants.

6. On Appellants' pleading not guilty to the charge, the prosecution examined 32 witnesses. Prempal(PW1), Pramod (PW2) are eye witnesses; PW4 Ram Snehi reached the spot immediately after the incident and noticed the deceased lying on the ground with stab injuries; PW29 ASI Khyali Ram of PCR reached the spot on receipt of information regarding the incident and moved the deceased Lakhan to DDU Hospital; PW 30 SI Ishwar Singh(the first IO) reached the spot when DD No.12A regarding the incident was handed over to him, he went to the Hospital and returned to the spot and carried out initial investigation in the case. PW31 Inspector Y.K. Tyagi (second IO) carried out the investigation after the death of Lakhan. Rest of the witnesses provided various links in the prosecution case.

7. Prempal (PW1) deposed that he used to reside with his parents, brothers and sisters. When he was away to his village (in March 2004), he got information that his sister had eloped with Latoori. He returned to Delhi and searched for her till 21st March, 2004. Pramod informed him that Puran was Latoori's friend. On 25.03.2004, Lakhan and Pramod went to Puran's house in Dabri. Puran was not present at his house. His (Puran's) mother gave his telephone number. On 25.03.2004, Puran invited them, through a telephone call. He, Pramod and Lakhan, reached Puran's house at about 8:00 AM; it was locked. They decided to return to home. On the way, Puran together with his four associates met them. He took them to the nulla. Without asking anything they started assaulting them. Puran exhorted that Lakhan was a police informer and that he should be finished. The Appellants, Manoj and Deepak, caught hold of Lakhan. Puran attacked Lakhan with a knife, which was with him. He (the witness) was assaulted by a person (the PO) who was not present in the Court. The Appellant Ajay caught hold of him, with the other person who was not present (PO). Pramod was also caught hold of by Ajay and was assaulted by the unknown accused (PO). Lakhan ran to

save himself. He was chased by Ajay and another accused (PO). Lakhan fell down and they (PWs 1 and 2) rushed to the police station to lodge a report. He deposed that his statement Ex.PW1/1 was reported by the police which was signed by him. They returned to the spot where blood-stained earth etc. was seized by the police.

8. Pramod (PW2) deposed that on 20.03.2004, Prempal's sister Rekha went missing. A report in this regard was lodged with Police Station Matiala by Rekha's brother Prempal and Ram Bhagwan. Prempal, Lakhan and he tried to search for Rekha, but in vain. On 25.03.2004, he went to Dabri to contact Puran to find out Latoori's whereabouts. Puran (the Appellant) asked him to give his telephone number to him and assured him that whenever he would hear anything about Latoori, he would intimate him (PW2). He gave his telephone number to him. He also gave Lakhan's telephone number to Puran (on his asking). He (PW2) contacted Prempal and conveyed the development to him. According to this witness, on 26.03.2004 Lakhan received a telephone call from Puran and thereafter all three of them (Lakhan, Prempal and Pramod) went to Dabri to meet Puran on Prempal's motor cycle. Puran was not at home. When they were returning, and had reached Shop No.100, Dabri, they saw Puran and his associates. The witness identified Puran, Minte, Deepak and Kalia out of the five associates; (Raja PO was not present in the Court). On seeing them, Puran exclaimed that Lakhan was a police informer and that he should be killed. At this Kalia and Minte caught hold of Lakhan. He (PW2) was overpowered by Deepak. Raja (PO) took out a sword and attacked him and Prempal. Puran inflicted knife blows on Lakhan after he (Lakhan) was caught by Minte and Kalia. Lakhan fell down due to injury. Raja (PO) escaped in one direction and the remaining four assailants fled in different directions. Raja also gave blows to Prempal with a sword, as a result of which he suffered injuries on his buttocks. They (he & PW1) ran to the police station to lodge a report. By the time they returned to the spot, Lakhan had already been removed to DDU Hospital by the police.

9. Ram Snehi (PW4) deposed that on 26.03.2004 at about 8:30 AM, while he was in the bathroom, he heard the noise of quarrelling coming from outside. He went out of the bathroom and saw several persons standing there. One boy lay injured on the floor outside his shop. Two boys were standing with a red coloured motor cycle. He heard people

standing there saying that Puran had assaulted the injured with a knife. Two boys with the motor cycle i.e. Pramod and Prempal also said that Puran along with his friends Minte, Deepak, Raja and Kalia had caused injuries to Lakhan.

10. In their examination under Section 313 Cr.P.C. the Appellants denied the prosecution's allegation and pleaded false implication. They stated that PWs 1 and 2 had caused injuries on Lakhan. They declined to produce any evidence in defence.

11. By the impugned judgment, the Trial Court concluded that the prosecution case was established beyond all reasonable doubt. The Trial Court held as under:-

> "30. PW1, PW2 and PW4 are natural and truthful witnesses. No justification has been given by the accused persons for their false implication in the present case. The stand taken by them in their statement u/s 313 Cr.P.C. does not inspire confidence. Knife Ex.P1 was recovered on the disclosure statement made by accused Puran and at his instance. Accused have not alleged that police officers were previously known to them or they carried a grudge against them. No reason has been assigned by the accused persons as to why police officers would have falsely implicated them in the present case. Accused did not examine any witness in their defence to prove their innocence. Version of PW1 and PW2 is corroborated by MLCs, post-mortem and FSL reports. The subsequent opinion Ex.PW5/B which was taken regarding the weapon of offence favours the prosecution story. It corroborates the version of PW1 and PW2. The judgment relied upon by Ld. Counsel for the accused are not applicable to the facts of the present case."

12. It is urged by the learned counsel for the Appellants that although the prosecution claimed that injuries were caused on PW1 and PW2's person by Raja (PO) with a sword held by him and thus PWs 1 and 2 are stamped as natural witnesses, yet absence of any incised wound or injury with any sharp weapon on their person falsifies their presence at the spot. It is urged that the testimonies of PWs 1, 2 and 4 are contradictory on material points making the prosecution version doubtful. It is argued that the Trial Court fell into error in relying on their testimonies

to return a finding of guilty against the Appellants and holding that the Appellants had not produced any evidence to prove their innocence.

13. On the other hand, the learned APP contended that some discrepancies and contradictions do occur in every criminal case because the witnesses are not expected to have a photographic memory to retain and reproduce minute details. The prosecution witnesses bore no ill-will nor any grudge against the Appellants and, thus there was no reason for them to falsely implicate the Appellants.

14. Before we advert to the various contradictions in the testimonies of the prosecution witnesses, we would refer to the MLCs of PW1 and 2. As per PWs 1 and 2, they were attacked with a sword by Raja (the PO) in concert with the Appellants and the juvenile accused. PW1 Prempal was examined by Dr. Nishu Dhawan (PW6). She proved his MLC as Ex.PW6/A. The Doctor found an abrasion over the upper part of the left forearm of the size 1.5 x 0.5 cms and another abrasion on the right leg medially at junction of lower 2/3 and upper 1/3 of the size 2 cm x 1 cm. The injuries were opined by the Doctor to be simple and caused by a blunt object. In cross-examination, PW6 deposed that such injuries could be caused if a person falls on a hard substance.

15. Similarly, the MLC Ex.PW9/A of injured Pramod (PW2) and PW9 Dr. Vineta Mittal's testimony reveal that he suffered some bruises caused by a blunt object. Thus, the prosecution version that PWs 1 and 2 were attacked by Raja (the PO) with a dangerous weapon like a sword (*talwar*) is falsified. Therefore, their testimonies require greater scrutiny before they can be relied upon to base the Appellants' conviction.

16. According to the prosecution, PW1 Prempal and the deceased Lakhan wanted to meet Puran (the Appellant) so as to get some clue of their sister Rekha who had eloped with Latoori. It was Pramod (PW2) who told PW1 and the deceased that Puran could give them some information. There are different versions in the statement of PW1 Prempal Ex.PW1/1, on the basis of which the present case was registered and also in the testimonies of PW1 and PW2. In Ex.PW1/1, Prempal said that in the evening on 25.03.2004 Pramod went to Puran's house and had given Lakhan's telephone number to him. In his testimony in Court as PW1, Prempal deposed that at the time of the first visit to Puran's house by Pramod and him, Puran's mother only met them and gave Puran's

telephone number to them. When PW2 Pramod entered the witness box, he deposed that on 25.03.2004, it was only he who went to Puran to know about Latoori's whereabouts. Puran had a talk with him; he gave his and Lakhan's telephone number to Puran. Thus, there are three different versions available in respect of Puran's meeting with PWs before the date of the incident.

17. There is no material on record that a copy of the FIR Ex.PW10/A was sent to the Magistrate immediately on registration of the case in compliance with Section 157 Cr.P.C. PW10 SI Adith Lily duty officer who recorded the FIR is completely silent if a copy of the FIR was sent to the Ilaqa Magistrate. Admittedly, the stabbing incident took place at about 8:30 AM and, according to the prosecution, the FIR was recorded only at 2:30 PM. Thus, there was delay of six hours in recording the FIR. SI Ishwar Singh (PW30) tried to explain this delay by stating that when he reached the spot, no eye witness was available. PW1 Prempal, the author of the FIR as well as PW2 Pramod, another eye witness, deposed in their examination-in-chief that the statement Ex.PW1/1 (on the basis of which the FIR was registered) was made by PW1 immediately upon reaching the police station. PW2's testimony also is that Police Station Dabri was just 1km away. If PWs 1 and 2 travelled to the police station on the motor cycle, it would have hardly taken them a few minutes to reach there. Thus, the FIR could have been recorded even before 9:00 AM in order to avoid introduction of any coloured version. It goes without saying that the FIR in a criminal case, particularly in a heinous crime like murder is a valuable material for the purpose of appreciating the evidence led at the time of trial. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR is not only bereft of the advantage of spontaneity, there is also danger that there may be introduction of a coloured version or on exaggerated story. (**Mehraj Singh v. State of U.P.,** AIR 1999 SC 324).

18. PW4 Ram Snehi claims to have reached the spot within a few minutes of the incident. He went out in the street from the house and noticed Lakhan lying in a pool of blood. He saw two boys (PWs1 and 2) with a red motor cycle; they claimed that they were assaulted by Puran. Although the prosecution draws support from PW4's testimony, on the ground that whatever was stated to him by PWs1 and 2 and the

bystanders, is relevant under Section 6 of the Evidence Act, yet he makes a dent in the prosecution version as according to him the two boys on a motor cycle were present at the spot after the incident and did not leave for the police station immediately after the incident as was claimed by PWs 1 and 2. If we believe PW4, there is no explanation for delay of five hours in recording the FIR.

19. There are contradictions in the statement Ex.PW1/1 and PW1 and 2's testimony as to who i.e. the Appellant, the juvenile and Raja (PO) held whom, and how the injuries were inflicted. We would have not attached much importance to them, as the witnesses may not remember minute details after lapse of sufficient time, yet in view of the fact that there was an inordinate delay in recording the FIR and that there were contradictions as to how Appellant Puran or his mother were approached before the incident, who had approached them and how the incident had occurred, the contradictions about which Appellant held whom and the sequence of events create further doubt about the prosecution version.

20. When there is direct evidence about the commission of offence, motive pales into insignificance. In view of the contradictory versions, the motive also assumes importance. The motive for commission of the offence was that Lakhan (the deceased) was a police informer. PW30 SI Ishwar Singh was cross-examined on this aspect. Neither he nor PW31 (the second IO) uttered a word that the Appellants were involved in any criminal activity making them suspicious about Lakhan's conduct.

21. On a question put up by the Court, PW4 testified that when he went out of his house, he saw the injured lying outside the shop. 20/25 persons of the locality were standing there. Similarly, PW2 deposed that a number of public persons were present at the spot. The incident lasted for about 15 minutes. Unfortunately, none of them (20/25 persons) have been cited as a witness by the prosecution. If we accept the version which has been given by SI Ishwar Singh (PW30 the first IO), neither PW1 and 2 went to the police station to lodge a report nor were they present at the time of his first visit at the spot after 9:00 AM. They were available to him only at the time of his second visit at about 1:30 PM. Prempal was Lakhan's real brother. He was not under threat of injury when the assailants had escaped. Normal human conduct would have induced him to remove his brother Lakhan, who was seriously injured, to the hospital without any waste of time. It is possible that due to fear,

he would have gone to the police station to report the matter immediately. However, it defies logic that he would vanish from the spot and would reappear after a couple of hours without even attending to his brother (Lakhan) who was battling for his life.

22. It is well-settled that the burden of proof is always on the prosecution to prove its case beyond all reasonable doubt. The presumption of innocence and the right to a fair trial are twin safeguards available to an accused under our criminal justice system. The Trial Court fell into error in holding that the accused did not examine any witness in their defence to prove their innocence.

23. It cannot be said that the incident took place in the manner alleged by the prosecution, neither can it be determined who out of the Appellants was involved in the incident. PWs1 and 2 admitted that they were detained in the police station for three days, although PW30 SI Ishwar Singh denied this. The Appellant Puran in his examination under Section 313 Cr.P.C. took the plea that the assault on Lakhan was the handiwork of PWs 1 and 2. In any case, it was for the prosecution to prove its case beyond all reasonable doubt which it has failed. In our view there are grave doubts in the prosecution case. The Appellants are entitled to be given the benefit of doubt. The order of conviction and sentence is accordingly set aside and the Appellants are ordered to be acquitted.

24. The Appeal is allowed in above terms.

ILR (2012) II DELHI 573
CRL. A.

SUKHPAL ....APPELLANT

VERSUS

STATE ....RESPONDENT

(S. RAVINDRA BHAT AND S.P. GARG, JJ.)

CRL. A. NO. : 831/2011 DATE OF DECISION: 11.01.2012

Indian Penal Code, 1860—Sections 302 & 309—Arms Act, 1959—Section 27—Case of prosecution that accused was fighting with deceased (his wife) when both were working in the factory and threatened to kill her—He stabbed her on her neck and stomach, taking out chura from underneath his shirt—He also stabbed himself with chura and fell down—PW3 sister-in-law of accused who witnessed incident raised alarm and police telephonically called by owner of factory PW6—Trial Court convicted accused u/s 302, 309 IPC and Section 27 Arms Act—Held, accused did not dispute his presence at the site of occurrence—Although defence taken was that accused objected to the deceased having illicit relations with one Debu and the incident took place because of Debu in his presence, none of the prosecution witnesses, including owner of factory (PW6), testified about the presence of Debu—No suggestion put to any of the witnesses regarding any altercation between appellant and Debu—PW5, daughter of accused and deceased an eye-witness of incident testified against father—No motive imputed to PW5 for deposing falsely against father—PW3 sister-in-law of accused supported case of prosecution on all material facts and implicated appellant for causing stab injuries on vital organs of

deceased in her presence—Appellant named by PW3 in her statement recorded at earliest point of time—No major deviation in version given by PW3 in her statement and testimony before court—PW6 supported prosecution and corroborated deposition of PW3—Injury sustained by accused at the spot lends credence to prosecution case—Oral evidence coupled with medical evidence, proved that accused caused injuries to deceased—However no evidence to infer that prior to incident accused attempted to cause serious injuries to deceased or threatened the deceased with weapon—No injuries were ever caused by accused to deceased prior to incident with any sharp object—Cannot be ruled out that knife Ex. P-1 was picked up by accused from the spot, as PW5 disclosed that deceased was doing tailoring job of rexine—No evidence on record pointing to any serious quarrel between appellant and deceased before incident, prompting appellant to commit murder—Evidence revealed that quarrel had started between appellant and deceased at about 11.30 a.m. and in that quarrel, appellant stabbed deceased—Appellant did not abscond from spot but attempted to commit suicide by stabbing himself—This reaction shows that quarrel/fight/altercation between appellant and deceased took place suddenly for which both the parties were more or less to be blamed—No previous deliberation or determination to fight—Circumstances rule out that appellant planned to murder deceased and had intention to kill her—Occurrence took place all of a sudden on trivial issue in which appellant in heat of passion on account of deprivation of self control stabbed deceased—Considering nature of injuries, how they were caused, weapon of assault and conduct of accused whereby he caused himself grievous hurt to commit suicide, this not a case u/s 302—However, number of injuries inflicted by appellant on vital parts of deceased proved commission of offence punishable

u/s 304 Part I—Appeal partly allowed—Conviction modified from Section 302 to 304 Part I, IPC.

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Ms. Anu Narula, Advocate.

FOR THE RESPONDENT : Mr. Sanjay Lao, APP.

CASES REFERRED TO:

1. *Maruti Shamrao Wadkar* vs. *State of Maharashtra* 2004 (4) Crimes 140 Bombay High Court (DB).
2. *Kalu Ram* vs. *State of Rajasthan* 2000 (10) SCC 324.
3. *Hari Ram* vs. *State* AIR 1983 SC 185.

RESULT: Appeal Partly Allowed.

S.P. GARG, J. (Oral)

1. Appellant Sukhpal has preferred the present appeal against the judgment and order on sentence dated 21.03.2011 and 02.04.2011 respectively passed by Ld. Addl. Sessions Judge, whereby he was convicted for committing the offence punishable under Section 302 IPC and sentenced to undergo life imprisonment with fine of '1000/-. The appellant was also convicted under Section 309 IPC and sentenced to undergo simple imprisonment for one year. Further, he was held guilty under Section 27 of the Arms Act and was sentenced to undergo imprisonment for three years with a fine of Rs. 500/-. All the aforesaid sentences were directed to run concurrently. In brief, facts of the prosecution case are as under :

2. On 07.05.2004 the appellant Sukhpal, his wife Salelta, daughter Pinki and sister-in-law Sulochna were in the factory of one Shabbir, their work place. At about 11.55 A.M. the police control room received information that two individuals had died near Swaroop Nagar, Kushik Road, Gali No.2, Near Masjid. DD entry No.9A was recorded in PS S P Badli and assigned to ASI Satpal for investigation. On reaching the spot ASI Satpal Singh found the body of a woman lying at the house of Shabbir i.e. at Gali No.2, Khadda Colony, Swaroop Nagar. He recorded the statement of Sulochna who was present at the spot. In her statement,

Sulochna disclosed to the police that at about 11.00 A.M. Sukhpal was abusing his wife Salelta and threatening to kill her. Thereafter, Sukhpal pinned down Salelta and stabbed her on her neck and stomach taking out 'chura' from underneath his shirt. The appellant also stabbed himself with the said 'chura. and fell down. She raised an alarm and many people gathered there. Shabbir telephonically called the police. ASI Satpal Singh prepared rukka and got the present case registered. Necessary proceedings were conducted at the spot. Appellant was arrested and sent to hospital for his medical examination. The 'chura' was seized and a seizure memo Ex.PW6/A was prepared.

3. During investigation police recorded statements of concerned witnesses, sent the exhibits to FSL; collected the FSL report and MLCs as also post-mortem report of the deceased. After completion of the investigation, challan was filed against the appellant for the commission of offence punishable under Section 302/309 IPC in the court of Ld. M.M.

4. After appraisal of evidence proved on record and duly considering submissions of the parties, the Ld. Trial Court convicted the appellant for the aforesaid offences. Hence this appeal.

5. Ld. Counsel for the appellant urged that the prosecution failed to prove motive to commit his wife's murder. No finger prints were lifted from the handle of the knife used in the incident. In his statement recorded under Section 313 Cr.P.C. the appellant specifically stated that one Debu had an illicit relationship with the deceased Salelta. On 07.05.2004 at about 10.00 A.M. he saw deceased talking to Debu at his work place. When he dragged his wife, Debu attacked him on the neck and other parts of his body. When the deceased tried to save him, Debu also attacked her and she succumbed to the injuries. Ld. Counsel further urged that this was not a case of murder as the incident had taken place all of a sudden, in a heat of passion.

6. Ld. Addl. PP for the State submitted that there is cogent evidence on record to establish guilt of the appellant. PW-3 Sulochna and PW-5 Pinki close relatives of the appellant and the deceased named former as perpetrator of the crime. The number of injuries inflicted by him upon vital organs of the deceased, with sharp weapon proved beyond doubt that it is a case of murder.

7. We have considered rival contentions of the parties and have examined the testimonies of prosecution witnesses minutely. The appellant did not dispute his presence at the spot at the time of occurrence. During the course of arguments, Ld. Counsel for the appellant fairly did not press the defence taken during the trial, alleging that the injuries on the deceased were inflicted by one Debu. We also do not find any substance in that defence as nothing on record shows if the deceased had any objectionable relationship with Debu or that Debu was at the spot at the time of incident. None of the witnesses including owner of the factory (Shabbir) has testified the presence of Debu at that time. No such suggestion was put to any of the witnesses regarding any altercation between the appellant and Debu.

8. We find clinching evidence against appellant to have caused injuries on the person of the deceased. PW-5 Pinki, his daughter aged about 13 years, testified against him and categorically deposed that he had stabbed her mother with a knife. No motive was imputed to the child witness for deposing falsely against her father. PW-3 Sulochna, sister in law of the appellant, also supported the prosecution case on all material facts and implicated the appellant for causing stab injuries on the vital organs of the deceased in her presence. No material contradictions have emerged from her cross-examination. The appellant was named by this witness in her statement Ex.PW-3/A recorded at the earliest point of time. There was no major deviation in the version given by the witness in her statement Ex.PW-3/A and the one testified before the Court. The presence of this witness at the spot was not challenged. PW-6 Shabbir also supported the prosecution and corroborated the deposition of PW-3 Sulochna regarding her presence in the factory. The injuries sustained by the appellant at the spot further lends credence to the prosecution case.

9. Oral testimonies of trustworthy prosecution witnesses coupled with medical evidence on record fully prove that the appellant caused injuries to the deceased. We find no valid reason to interfere in the findings recorded by Trial Court against the appellant on this aspect.

10. The moot question involved in the case is if it is a case under Section 302 IPC or under Section 304 Part-I IPC. The evidence on record is that the deceased was the appellant's wife and had seven children out of the wedlock. The appellant used to consume liquor and

quarrel often with the deceased. However, there is nothing in the prosecution case if prior to the incident he had attempted to cause serious injuries to the deceased. There is no evidence on record to infer if the appellant used to keep any deadly weapon or used to threaten the deceased that he would kill her with that weapon. Apparently, no injuries were ever caused by the appellant to the deceased prior to the incident with any sharp object. Only on the day of incident, the appellant stabbed the deceased with knife Ex. P-1. The prosecution however failed to collect evidence as to from where the appellant had procured the knife Ex.P-1. Ld. Counsel for the appellant argued that the appellant picked up knife Ex.P-1 from the spot as such knives were used in performing the work at the factory of PW-6 Shabbir. We find substance in this plea as PW-5 Pinki disclosed in her deposition that her mother was doing tailoring job of rexine work. Availability of knife for tailoring rexine at the spot, thus, cannot be ruled out.

11. PW-3 Sulochna admitted that on the day of the incident the appellant was in the factory attending to his duties. Deceased and the appellant along with PW-5 Pinki had reached the factory much prior to the incident and no such stabbing incident took place just on reaching the factory. There is no evidence on record pointing to any serious quarrel between the appellant and the deceased before the incident prompting appellant to commit murder. The evidence reveals that a quarrel had started between the appellant and the deceased at about 11.30 A.M. and in that quarrel the appellant stabbed the deceased. In the statement Ex.PW-3/A, PW-3 Sulochna informed the police *"Aaj din main karib 11 baje main apne ghar se kam per aayi thi aur Sukhpal aur Salelta pahle se hi kam per maujood the kam karte-karte Sukhpal Salelta ko galiyan de raha tha aur kah raha tha ki tujhe jan se mar dunga aur dono main kafi garma garmi ho rahi thi.*"

12. Appellant did not abscond from the spot after inflicting injuries. He, on the contrary stabbed himself with that knife and sustained grievous injuries. He attempted to commit suicide by stabbing himself as he uttered "why he should live after death of his wife." This reaction shows that a quarrel/fight/altercation between the appellant and deceased took place suddenly for which both the parties were more or less to be blamed. There was no previous deliberation or determination to fight. The appellant was remorseful after inflicting injuries on the deceased. It also shows his

frustration/anger in which he inflicted injuries on the deceased.

13. All the above circumstances rule out that the appellant had planned the murder of the deceased and had intention to kill her. The circumstances reveal that the occurrence had taken place all of a sudden on some trivial issue in which the appellant in a heat of passion on account of total deprivation of self control stabbed the deceased.

14. In the case of **'Maruti Shamrao Wadkar Vs. State of Maharashtra'** 2004 (4) Crimes 140 Bombay High Court (DB), the appellant therein was convicted for the murder of his son and then for stabbing himself. The appellant wanted the custody of his son and in a fit of anger stabbed him and then tried to kill himself. It was held that there was no intention of the appellant to kill his son in the said overt act and the evidence on record was sufficient to show that the act by which the death was caused was done to cause bodily injury as was likely to cause death but without intention to cause death and therefore, the overt act of the appellant would be covered by provision of Section 304 Part-I IPC.

15. In the case of **'Kalu Ram Vs. State of Rajasthan'** 2000 (10) SCC 324, the Supreme Court held that conduct of the accused can not be seen divorced from the totality of the circumstances. Very probably he would not have anticipated that the act done by him would have escalated to such a proportion that she might die. Para No.7 of the aforesaid judgment is as follows :-

> "7. But then, what is the nature of the offence proved against him? It is an admitted case that the appellant was in a highly inebriated stage when he approached the deceased when the demand for sparing her ornaments was made by him. When she refused to oblige he poured kerosene on her and wanted her to light the matchstick. When she failed to do so he collected the matchbox and ignited one matchstick but when the flames were up he suddenly and frantically poured water to save her from the tongues of flames. This conduct cannot be seen divorced from the totality of the circumstances. Very probably he would not have anticipated that the act done by him would have escalated to such a proportion that she might die. If he had ever intended her to die he would not have alerted his senses to bring water

> in an effort to rescue her. We are inclined to think that all that the accused thought of was to inflict burns to her and to frighten-her but unfortunately the situation slipped out of his control and it went to the fatal extent. He would not have intended to inflict the injuries which she sustained on account of his act. Therefore, we are persuaded to bring down the offence from first degree murder to culpable homicide not amounting to murder".

16. In the case of **'Hari Ram Vs. State'** AIR 1983 SC 185, where in the heat of an altercation between the deceased and the appellant, the appellant in order to chastise the deceased had seized a jelly and thrusted into the chest of the deceased causing instantaneous death to the latter, it was held that as the evidence did not show any intention on the part of the appellant to kill the deceased and since only one blow had been struck by the appellant upon the deceased, his conviction was altered from one under Section 302 to one under Section 304, Part-II.

17. In the present case, considering the nature of injuries and how they were caused, the weapon of assault employed in the commission of the offence and conduct of accused whereby he caused himself grievous hurt with intent to commit suicide, we are of the opinion that this is not a case of murder punishable under Section 302 IPC. However, number of injuries inflicted by the appellant on the vital parts of the deceased prove commission of offence punishable under Section 304 Part-I IPC.

18. We thus, partly allow the appeal and modify the conviction of the appellant from 302 IPC to 304 Part-I IPC. The appellant is sentenced to undergo RI for ten years for the commission of offence punishable under Section 304 (firstly) IPC.

19. The sentence of the appellant for the offence under Section 309 of the Indian Penal Code is not disturbed and stands confirmed. Both the sentences shall run concurrently.

20. The appellant shall also be entitled to set off under Section 428 of the Criminal Procedure Code.

ILR (2012) II DELHI 581
CRL. M.C.

SUKHDATA CHITS PVT. LTD. & ORS. ....PETITIONER

VERSUS

RAJENDER PRASAD GUPTA ....RESPONDENT

(M.L. MEHTA, J.)

CRL. M.C. NO. : 3089/2011 & 3090/2011 DATE OF DECISION: 11.01.2012

Negotiable Instruments Act, 1881—Sections 138, 143, 144, 145, & 147—Cross examination of complainant by accused—Complaint filed by respondent u/s 138 alleging that petitioner/accused one of the directors of M/s. Sukhdata Chits Pvt. Ltd. had issued cheque of Rs.50,000/- in his favour which was dishonoured with remarks "funds insufficient"—Petitioners told to honour cheque but refused—Despite legal notice dated 28.01.2010, petitioner did not make payment—Complaint filed—Application filed by petitioner u/s 145 (2) NI Act for cross-examination of respondent—Vide impugned order dated 07.02.2011, MM permitted cross-examination of complainant confined to para 4 and 6 of the application, holding that rest of the paras of the application were legal or within personal knowledge of petitioners u/s 106 Evidence Act and hence do not require any cross-examination—Order challenged in revision before ASJ—Order of MM upheld by ASJ—Held, limiting the right of petitioner, to cross-examine only with regard to para 4 and 6 of the complainant's application may cause prejudice to the petitioners-Objective of 138 NI Act is to enhance acceptability of cheques in settlement of liabilities—Considering legislative intent of summary trial and expeditious disposal of cases, particularly 139 of NI Act and Section 118 of Evidence Act providing presumption in favour of complainant that issue was cheque was towards debt or liability and Section 145 providing that evidence could be led by the complainant by way of affidavit, accused does not have unlimited and unbridled right of subjecting complainant to usual and routine type of examination—Phraseology "as to the facts contained therein" in Section 145 (2) cannot be read to mean that complainant can be subjected to cross-examination of everything that he has stated on affidavit—However unjust to say that in all cases cross-examination would only be confined to defences of accused—Accused would be entitled to cross-examine complainant as done in summary trial but at the same time, not be precluded from putting certain questions that would be relevant and essential for just decision—Impugned order modified to the extent that cross-examination of the complainant would not remain limited to contents of Para 4 and 6 of application of complainant but shall also extend to facts in addition to their defences, as may be deemed essential by MM which are relevant in the facts and circumstances of the case keeping in view the object and scheme of the Act and particularly, provisions of Section 139, 143 of the Act and Section 106 of Evidence Act—Petition accordingly disposed of.

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Mr. Diwan Singh Chauhan, Advocate in both the petitions.

FOR THE RESPONDENT : None.

CASES REFERRED TO:

1. *M/s. Mandvi Co-Op. Bank Ltd.* vs. *Nimesh S. Thakore,* I (2010) SLT 133.

2. *K.N. Beena* vs. *Maniyappan,* 2001 Cr.L.J. 4745(SC).

3. *Shailesh Kumar Aggarwal* vs. *State of U.P.* 2000 Crl. L.J. 2921 (All.).

4. *B. Mohan Krishna* vs. *Union of India* 1996 Crl.L.J. 638 (Andh. Pra.) (D.B.).

RESULT: Petitions disposed of .

M.L. MEHTA, J.

1. Present petitions have been filed under Article 227 of the Constitution of India read with Section 482 Cr. P.C. against impugned order dated 27.07.2011 passed by learned ASJ in Crl. Revision No. 66/ 2011 and order dated 07.02.2011 of the learned MM in Complaint Case No. 883/A/2010 under section 138 of Negotiable Instrument Act (hereinafter referred to as 'the Act').

2. In his complaint filed by the respondent Rajendra Prasad Gupta under section 138 of the Act, it was alleged that the petitioners/accused, who is one of the Directors of M/s. Sukhdata Chits Pvt. Ltd., having its registered office at D-14/140, Sector-8, Rohini, Delhi-110 085, had issued a cheque of Rs. 50,000/- in favour of the respondent towards discharge of its liability, which cheque got dishonoured on presentation with remarks "funds insufficient..

3. It is averred by the respondent/complainant that petitioners were informed about the fate of the cheque and requested to honour it, but they refused to do so. Consequently, legal notice dated 28.01.2010 was sent to the petitioners through registered AD post which was duly served on them. However, inspite of the service of the legal notice upon the petitioners, they did not make any payment to the respondent/complainant. Thereupon, a complaint was filed by the respondent in the Court of learned MM and summons were served upon the petitioners. Complainant adduced his evidence by way of affidavit.

4. An application was filed by the accused/petitioners under Section 145(2) of the N.I.Act for cross examination of the respondent which came to be disposed by MM vide order dated 7.2.2011. The learned MM permitted cross examination of the complainant confined to Para 4 & 6 of the application and held that the rest of the paras of the application

were legal or within the personal knowledge of the accused/petitioners under section 106 of Indian Evidence Act and hence do not require any cross examination. The said order was challenged by the petitioners in revision in the court of learned ASJ, who upheld the order of the M.M. The above mentioned orders of the MM and the learned ASJ are challenged by way of the present petitions.

5. I have heard learned counsel for the petitioners and the respondent.

6. The only legal issue that arises for consideration is as to whether the petitioners/accused were not entitled to cross examine the complainant as regard to the entire facts contained in the affidavit of evidence of the complainant or their (petitioners.) right of such a cross examination of the witness of the affidavit was limited to certain facts or their defences. The submission of the learned counsel for the petitioners was that the learned MM as also the learned Revision Court erred in limiting the right of the petitioners/accused to cross examine the complainant only to the facts stated in Para 4 and 6 of his applications. In other words, the submission was that the petitioners were prejudiced in case they were not allowed to cross examine the complainant as regard to the contents of the affidavit of evidence and were confined to their defences or limited facts. On the other hand, the submission of the learned counsel for the respondent was that the nature of the proceedings under Section 138 being of summary trial, there was certain presumptions, which arise against the petitioners under Section 139 of the Act and so, the right of cross examination of the complainant by the petitioners was confined to his defences or in any case to the limited facts.

7. Before adverting to the submission of the parties, it would be pertinent to consider the ideology behind the provisions provided in the Act in cases of dishonouring of cheque. Section 138 was enacted in public interest. Its objective is to "enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in certain cases while at the same time providing 'adequate safeguards' to prevent harassment of honest drawers. As the evil practice of issuing cheques in settlement of liabilities without there being adequate amount in the accounts became rampant, the Union Parliament thought it fit to curb the same effectively by enacting a stringent law while at the same time taking care to safeguard the interests of honest drawers: **B. Mohan Krishna v. Union of India** 1996 Crl.L.J. 638 (Andh. Pra.) (D.B.). In

case of **K.N. Beena vs. Maniyappan,** 2001 Cr.L.J. 4745(SC), it has been held that under section 139 of the Act the Court has to presume, in a complaint under section 138 of the Act, that the cheque has been issued for a debt or liability. There is presumption in favour of the complainant that the cheque is towards the discharge of the debt or liability and it is for the applicant to prove the contrary and to rebut this presumption. This can be rebutted by the applicant by evidence only. **Shailesh Kumar Aggarwal Vs. State of U.P.** 2000 Crl. L.J. 2921 (All.)

8. Section 143, 144, 145 and 147 of the Act expressly depart from and override the Criminal Procedure Code. Section 143 provides the complaints under Section 138 of the Act to be tried in the summary manner except where the Magistrate felt that the sentence of imprisonment for a term exceeding one year may have to be passed or that for any other reason, it is undesirable to try the case summarily. Number of such type of cases would be relatively smaller and insignificant. The fact remains is that Section 143 mandates, in general, to follow the summary trial procedure in such cases as far as possible. Section 145 of the Act, which is the subject of the interpretation in the present cases reads thus:

> **"145. Evidence on affidavit.**
>
> (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, (2 of 1974.) the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.
>
> (2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein.]"

9. Section 145 starts with the non abstante clause meaning thereby that notwithstanding the provisions of the Code of Criminal Procedure, the evidence of the complainant may be given by him on affidavit though taking of evidence by this mode would be subject to all just exceptions, which would mean that anything that was inadmissible in evidence or irrelevant or hearsay would not be taken in evidence though the same may be stated in the affidavit.

10. The provisions of Section 145 came for interpretation before the Hon'ble Supreme Court in a recent judgment titled **M/s. Mandvi Co-Op. Bank Ltd. Vs. Nimesh S. Thakore,** I (2010) SLT 133. Though the controversy before the Supreme Court in the said case was not directly similar to what is in the instant case, but observations which were made and are relevant to the issue involved in the instant case can be reproduced as under:

> "What section 145(2) of the Act says is simply this. The court may, at its discretion, call a person giving his evidence on affidavit and examine him as to the facts contained therein. But if an application is made either by the prosecution or by the accused the court must call the person giving his evidence on affidavit, again to be examined as to the facts contained therein. What would be the extent and nature of examination in each case is a different matter and that has to be reasonably construed in light of the provision of section 145(1) and having regard to the object and purpose of the entire scheme of sections 143 to 146. The scheme of sections 143 to 146 does not in any way affect the judge's powers under section 165 of the Evidence Act. As a matter of fact, section 145(2) expressly provides that the court may, if it thinks fit, summon and examine any person giving evidence on affidavit. But how would the person giving evidence on affidavit be examined, on being summoned to appear before the court on the application made by the prosecution or the accused? The affidavit of the person so summoned that is already on the record is obviously in the nature of examination-in-chief. Hence, on being summoned on the application made by the accused the deponent of the affidavit (the complainant or any of his witnesses) can only be subjected to cross-examination as to the facts stated in the affidavit. In so far as the prosecution is concerned the occasion to summon any of its witnesses who has given his evidence on affidavit may arise in two ways. The prosecution may summon a person who has given his evidence on affidavit and has been cross-examined for "re-examination". The prosecution may also have to summon a witness whose evidence is given on affidavit in case objection is raised by the defence regarding the validity and/or sufficiency of proof of some document(s) submitted along with the affidavit. In that

event the witness may be summoned to appear before the court to cure the defect and to have the document(s) properly proved by following the correct legal mode. This appears to us as the simple answer to the above question and the correct legal position".

11. As observed by the Hon'ble Supreme Court in the aforesaid case, on being summoned on the application of the petitioner/accused, the deponent of the affidavit could be subjected to the cross examination as to the facts stated in the affidavit. The question as to whether the accused would have the right to cross examine the deponent of affidavit as to the entire facts stated in the affidavit or his right of cross examination was limited to his defences or certain facts did not directly arise before the Supreme Court in the said case. It was however observed that what would be the extent and nature of examination in each case would be a different matter and that has to be reasonably construed in the light of the provision of Section 145(1) of the Act and having regard to the object and purpose of the entire scheme of Section 143 to 146 of the Act. It has already been seen above that the scheme of Section 143 was that ordinarily, every case under Section 138 of the Act was to be tried as summary trial and the scheme of Section 145 was also to expedite the trial of such cases. The entire scheme of Section 143 to 146 was designed to lay down a much simplified procedure for the trial of dishonoured cheque cases with the sole object that the trial of those cases should follow a course even swifter than a summary trial.

12. With the legislative intent being not only of summary trial, but of swifter and expeditious disposal of dishonoured cheques cases, particularly Section 139 of the Act as also Section 118 of the Evidence Act providing presumption in favour of the complainant that issue of cheque was towards the debt or liability and Section 145 providing that the evidence could be led by the complainant by way of the affidavit, the petitioner/accused could not be said to have unlimited and unbridled right of subjecting the complainant to the usual and routine type of cross examination. If that was so, that would apparently be not only against the scheme and object of the provisions of summary trial, but would be contrary to the provisions of Section 139, 143 and 145 of the Act.

13. Thus it can be said that the phraseology "as to the facts contained therein" in Section 145(2) of the Act cannot be read to mean that the

complainant can be subjected to be cross-examination of everything that he has stated on affidavit. If sub section (2) of Section 145 is interpreted to mean that in every case where the accused applies to the court to summon the complainant or his witness who has given evidence on affidavit under sub section (1) and the court is obliged to summon him to tender oral examination-in-chief or to allow him to be subjected to cross examination as in summons or warrant trial cases, then the object of inserting such provision would be defeated. The Sub-Section (2) of Section 145 cannot be interpreted in a manner that would render Sub-Section (1) thereof or Section 139 & Section 143 redundant.

14. From the above discussion, it can be said that there cannot be any hard and fast rule as to what part of evidence tendered by way of affidavit could be eligible for cross examination. It was to be decided by the Magistrate depending upon the facts and circumstances of each case and also keeping in mind the scheme and objective of the Act, particularly Section 139, 143, 145 of the Act as also Section 106 of the Evidence Act.

15. The affidavits of evidence which have been filed in these cases are not only as regard to the averments of the complaint, but contained detailed facts attributing liability to the petitioners/accused. Some of those facts would not be required to be proved because of Section 139 of the Act as also Section 106 of the Evidence Act. It would also be unjust to say that in all cases, the cross examination would only be confined to the defences of the petitioners/accused. The petitioners would be entitled to cross examination of complainant as is done in the summary trial case, but at the same time, they could not be precluded from putting certain questions which would otherwise be relevant and essential for the just decision of the case. Limiting the right of the petitioners to cross examine only with regard to Para 4 and 6 of complainant's application may cause prejudice to the petitioners.

16. In view of my above discussion, the impugned orders are modified to the extent that the cross examination of the complainant would not remain limited to the contents of Para 4 and 6 of the applications of the complainant, but shall also extend to the facts in addition to their defences, as may be deemed and essential by the learned Magistrate relevant in the facts and circumstances of the case keeping in view the

object and scheme of the Act and particularly, provisions of Sections 139, 143 of the Act and Section 106 of Evidence Act.

17. Petitions are disposed accordingly.

ILR (2012) II DELHI 589
CM.(M)

PUSHPA BUILDER LTD. ....PETITIONER

VERSUS

DR. VIKRAM HINGORANI & ORS. ....RESPONDENT

(INDERMEET KAUR, J.)

CM. (M) NO. : 29/2012 & CM NOS. : 426-27/2012 **DATE OF DECISION: 13.01.2012**

Code of Civil Procedure, 1908—Order 23, Rule 3 (Proviso)—Compromise—Order XLIII Rule 1A—Suit for partition, injunction and rendition of accounts—Plaintiffs nos. 1 to 6 and defendant no.1 successors in interest of the original owner vide decree dated 25.11.1975 in suit no. 640-A/1974—Both were recognized as 50% co-owners of the property—Collaboration agreement with defendant nos. 4 and 5 and predecessors of defendant no.2 to construct flats—Collaborators to receive 50% of the sale proceeds—Construction not completed within the stipulated period—defendant no.2 terminated the agency of defendants nos. 4 and 5 vide legal notice dated 17.10.1992 and public notice dated 24.03.1994—Defendants nos. 4 and 5 inducted defendant no.6 as licencee and parted with possession to defendant no. 6—Suit instituted by defendant nos. 4 and 5 for breach

of collaboration agreement—Dismissed in default—No steps taken for its restoration—Compromise amongst 6 plaintiffs and defendant nos. 1 to 3—Final decree of partition determining their rights and shares and preliminary decree for rendition of accounts passed in presence of counsel for defendant nos. 4 to 6 defendants nos. 4 to 6 moved application under proviso to Order 23 Rule 3 challenging the compromise—Compromise stated to be collusive and against the interest of defendant no. 4 to 6 under the terms of collaboration agreement—Held—Defendants nos. 4 and 5 were acting only as agent of defendant no. 2—Agency stand terminated by notice and public notice—Agent has no right to remain in possession after termination of his agency—Termination of contract would be challenged by an independent claim party to the compromise alone can challenge the compromise under proviso to Order 23 Rule 3—Defendants nos. 4 to 6 not party to compromise—Cannot challenge the compromise under proviso to Order 23 Rule 3—Only remedy available is by way of appeal—Application dismissed.

The Apex Court in AIR 1990 SC 673 **Southern Roadways Ltd. Vs. S.M. Krishnan** while dealing with the concept of an agent's possession in the suit land had noted herein as under:- *"The respondents possession of the suit premises was on behalf of the company and not on his own right. It is, therefore, unnecessary for the company to file a suit for recovery of possession. The agent has no right to remain in possession of the suit premises after termination of his agency."* In 43 (1991) DLT 719 **Master Builder Vs. U.S.A.,** a Division Bench of this Court had noted that where a contract agreement of the builder has been terminated, the said builder/contractor could not be allowed to remain in possession of the property and could not hold on to the property; a wrongful termination of his contract would be challenged by an independent claim i.e. an action for damages or breach of contract which in the instant case had

been done by defendants No. 4 & 5 who had filed the suit No. 740/1994 against predecessor of defendant No. 2 which had thereafter been dismissed in default. **(Para 8)**

Learned counsel for the respondent submits that the application under Order 23 Rule 3-A of the Code was not maintainable and in fact he had raised this objection before the trial Court as well. Attention has been drawn to the statutory provision as contained in the proviso to Order 23 Rule 3 of the Code which clearly speaks of a party to the compromise alone who can challenge the said compromise and the decree. In **National Small Industries Corporation Ltd. Vs. Industrial Textile Products (P) Ltd.** 2001 (60) DRJ 144 a Bench of this court had noted that where a compromise is either refused or allowed under the proviso of Order 23 of the Code it is an appealable under Order XLIII Rule 1-A of the Code. The statutory mandate of proviso of the Order 23 Rule 3 of the Code as also in view of the pronouncement of this Court reported as **H.C. Shastri Vs. Dolphin Canpack P Ltd.** 67 (1997) DLT 652 where a Bench of this court has noted that a person who is not a party to the compromise cannot seek a setting aside of the said compromise under the proviso of Order 23 Rule 3 of the Code; only remedy would be by way of an appeal. **(Para 9)**

In AIR 1993 SC 1139 **Banwari Lal Vs. Smt. Chando Devi (through L.R.)** the Apex Court has enunciated that the remedy available for such a person is a remedy under Order XLIII Rule 1-A of the Code and the bar of Section 93 (3) would also not come in the way. Not only such an application in the present form was not maintainable but even on its merits there is no case made out in favour of the petitioner to have the compromise decree dated 24.04.2008 set aside. This compromise decree was a sharing of rights in the suit property between the co-owners; the present petitioners on the basis of their collaboration agreement have no such rights. Nothing precluded some of the parties to the suit i.e. the plaintiffs and defendants No. 1 to 3 to

enter into a compromise; the law permits it. The judgment reported as 1970 (3) SCC 124 **Bai Chanchal & Others Vs. Syed Jalaluddin and others** enunciates this position. **(Para 12)**

Important Issue Involved : (A) The agent's possession of the premises is no behalf of the principal and not in his own right and the agent has no right to remain in possession of the premises after termination of his agency.

(B) Where a compromise is either refused or allowed under the proviso to Order 23 of the Code it is an appealable order under order XLIII Rule 1A of the code.

(C) The proviso to Order 23 Rule 3 of the Code clearly speaks of a party to the compromise alone who can challenge the said compromise and the decree. And a person who is not a party to the compromise cannot seek a setting aside of the said compromise under the proviso of order 23 Rule 3 of the Code; only remedy would be by way of an appeal, and the bar of Section 93(b) would not come in the way.

[Vi Gu]

APPEARANCES:

FOR THE PETITIONER : Mr. Ravi Gupta, Sr. Advocate with Mr. Ashish Aggarwal and Ms. Basli Kala, Advocate.

FOR THE RESPONDENTS : Mr. Aman Higorani, Advocate.

CASES REFERRED TO:

1. *National Small Industries Corporation Ltd.* vs. *Industrial Textile Products (P) Ltd.* 2001 (60) DRJ 144.
2. *H.C. Shastri* vs. *Dolphin Canpack P. Ltd.* 67 (1997) DLT 652.

3. *Banwari Lal* vs. *Smt. Chando Devi (through L.R.)* AIR 1993 SC 1139.
4. *Master Builder* vs. *U.S.A.,* 43 (1991) DLT 719.
5. *Southern Roadways Ltd.* vs. *S.M. Krishnan* AIR 1990 SC 673.
6. *Smt. Kiran Arora and others* vs. *Ram Prakash Arora and others* AIR 1980 Delhi 99.
7. *Bai Chanchal & Others* vs. *Syed Jalaluddin and others* 1970 (3) SCC 124.

RESULT: Petition Dismissed.

INDERMEET KAUR, J.

1. Order impugned is the order dated 23.09.2011 vide which the two applications filed by defendants Nos. 4, 5 & 6 under the proviso to Order 23 Rule 3 of the Code of Civil Procedure (hereinafter referred to as the 'Code') as also a third application filed by defendant Nos. 4 & 5 under Section 151 of the Code had been dismissed.

2. Record shows that the present suit is a suit for delivery of legacy/shares in immovable property with the consequential reliefs of partition, perpetual and mandatory injunction as also for rendition of accounts. There were 6 plaintiffs and 5 defendants; subsequently defendant No. 6 i.e. ING Vysya Bank was also added as a party. Averments in the plaint disclose that plaintiffs No. 1 to 6 and defendant No. 1 were the successors in interest of the original owners i.e. Mr. Hardasmal Banasing Hingorani and Mrs. Sati Tahilramani; vide a decree dated 25.11.1975 passed in suit No. 640-A/1974, both the aforenoted persons were recognized as 50% co-owners in the suit property. The suit property is a bunglow situated at 13, Patel Road, West Patel Nagar, Delhi. On 20.09.1998 a collaboration agreement, in terms of which defendant Nos. 4 & 5 (hereinafter referred to as the collaborators) had to construct flats/units on the suit land and thereafter were to receive 50% of the sale proceeds, this collaboration agreement had been entered into by the predecessor of defendant No. 2 i.e. Sati Thilramani with the collaborators; contention in the plaint is that in terms of this collaboration agreement the collaborators were not to get any title in this property; at best they were entitled to 50% of the sale proceeds of the flats/units which were to be

constructed within a period of 20 months from the date of the sanctioned plan and these sale proceeds were to be shared equally by Sati Thilramani and the collaborators. Admittedly, the construction of the property was not completed within the stipulated period. Further contention being that the collaborators had in contravention of the terms of the collaboration agreement inducted defendant No. 6 as a licensee in the suit land and have illegally parted with possession of the property to defendant No. 6; as noted supra relief of partition and delivery of possession of property as also rendition of accounts had been sought against defendants No. 1 to 5; defendant No. 6 was added subsequently i.e. after filing of the original plaint.

3. During the course of the suit proceedings on 18.03.2008, a compromise was entered into between the six plaintiffs and defendants No. 1 to 3; pursuant to this compromise, a final decree of partition was passed on 24.04.2008 wherein the rights and shares in the suit land of the plaintiffs and defendants No. 1 to 3 were determined. A preliminary decree has been passed for rendition of accounts as well. Record further shows that on this date i.e. on 24.04.2008, defendants No. 4 to 6 were also represented by the counsel.

4. The impugned order has been assailed by defendants No. 4 to 6. Learned counsel for the petitioners/defendants No. 4 to 6 has submitted that on 24.04.2008, they had reserved their right to file their objections to the aforenoted compromise pursuant to which the present application under Order 23 Rule 3-A of the Code as also the application under Section 151 of the Code had been filed; this is disputed by learned counsel for the non-applicant who states that the submission noted in the last few lines of the order dated 24.04.2008 only related to the right of the petitioners to file objections/reply to the pending application under Order XXXIX Rule 10 of the Code. This submission of the respondent is substantiated as record shows that there were three applications which were pending on 24.04.2008 i.e. one application under Order XXXIX Rules 1 & 2 of the Code and two applications under Order XXXIX Rule 10 of the Code of which reply had been filed by defendants No. 4 to 6 only on two applications and they were yet to file reply/objection to the third application under Order XXXIX Rule 10 of the Code and the order dated 24.04.2008 had recorded their right to file their reply only to this application under Order XXXIX Rule 10 of the Code and not on any

other count.

5. Be that as it may, the application under Order 23 Rule 3-A of the Code was filed on 21.08.2008 i.e. after a lapse of almost about four months.

6. The averments contained in the said application are largely to the effect that the compromise between the plaintiffs and defendants No. 1 to 3 is collusive and against the interest of defendants No. 4 to 6 who have been prejudiced as their rights in terms of the collaboration agreement dated 20.09.1998 gives a right to the collaborators/defendants No. 4 & 5 to take possession of the property, to demolish it and without any interference by the first party (defendant No. 2) to make a construction on the basement, ground, mezzanine, first and second floors as per the building bye laws and on completion of this building, the sale proceeds shall be shared between the two parties.

7. A scrutiny of this agreement shows that the only right given to defendants No. 4 & 5 was to take possession of property for the purpose of construction and after completion of construction to share 50% of the sale proceeds along with defendant No. 2. This agreement clearly shows that defendants No. 4 & 5 were only acting as an agent of defendant No. 2 and their agency having been terminated by defendant No. 2 by a legal notice dated 17.10.1992 as also by a subsequent public notice dated 24.03.1994, it is clear that right of the agent to remain in the suit premises and thereafter to handover the possession of the same to defendant No. 6 when admittedly this was in contravention of a status quo order which had been passed in suit No. 740/1994 dated 06.04.1994 was negatived. Relevant would it be to state at this stage that this suit i.e. Suit No. 740/1994 had been filed by defendants No. 4 & 5 challenging the termination of their contract against defendant No. 2 in which this status quo order dated 06.04.1994 had been passed; this suit had thereafter been dismissed in default on 24.09.1998.

8. The Apex Court in AIR 1990 SC 673 **Southern Roadways Ltd. Vs. S.M. Krishnan** while dealing with the concept of an agent.s possession in the suit land had noted herein as under:- *"The respondents possession of the suit premises was on behalf of the company and not on his own right. It is, therefore, unnecessary for the company to file a suit for recovery of possession. The agent has no right to remain in possession*

of the suit premises after termination of his agency." In 43 (1991) DLT 719 **Master Builder Vs. U.S.A.,** a Division Bench of this Court had noted that where a contract agreement of the builder has been terminated, the said builder/contractor could not be allowed to remain in possession of the property and could not hold on to the property; a wrongful termination of his contract would be challenged by an independent claim i.e. an action for damages or breach of contract which in the instant case had been done by defendants No. 4 & 5 who had filed the suit No. 740/1994 against predecessor of defendant No. 2 which had thereafter been dismissed in default.

9. Learned counsel for the respondent submits that the application under Order 23 Rule 3-A of the Code was not maintainable and in fact he had raised this objection before the trial Court as well. Attention has been drawn to the statutory provision as contained in the proviso to Order 23 Rule 3 of the Code which clearly speaks of a party to the compromise alone who can challenge the said compromise and the decree. In **National Small Industries Corporation Ltd. Vs. Industrial Textile Products (P) Ltd.** 2001 (60) DRJ 144 a Bench of this court had noted that where a compromise is either refused or allowed under the proviso of Order 23 of the Code it is an appealable under Order XLIII Rule 1-A of the Code. The statutory mandate of proviso of the Order 23 Rule 3 of the Code as also in view of the pronouncement of this Court reported as **H.C. Shastri Vs. Dolphin Canpack P Ltd.** 67 (1997) DLT 652 where a Bench of this court has noted that a person who is not a party to the compromise cannot seek a setting aside of the said compromise under the proviso of Order 23 Rule 3 of the Code; only remedy would be by way of an appeal.

10. Reliance by learned counsel for the petitioner on the judgment of a Bench of this Court reported as AIR 1980 Delhi 99 **Smt. Kiran Arora and others Vs. Ram Prakash Arora and others** to support his submission that such an application would be maintainable is misplaced. This was a case for dissolution of partnership and accounts wherein a compromise had been entered into between the plaintiff and defendants No. 1 & 2; contention of defendant No. 3 all along was that he is also a partner; his right was yet to be adjudicated and the compromise effected between the plaintiff and defendants No. 1 & 2 ousting defendant No. 3 was unlawful and illegal in terms of Section 23 of the Indian Contract

Act; court had noted that the object of the agreement was to deprive defendant No. 3 of his right in the immoveable property and this compromise was thus hit by Section 23 of the Indian Contract Act. Facts of the said case are distinct and decipherable. In the instant case, the compromise decree dated 24.04.2008 passed between the plaintiffs and defendants No. 1 to 3 has adjudicated their rights and shares in the suit property; admittedly in terms of collaboration agreement dated 20.09.1988, defendants No. 4 & 5/petitioners did not have any right, title or interest in the property; in terms of said collaboration agreement, they at best had to get 50% of the sale proceeds and that too only after the sale of the suit property. It is also relevant to state that on the date when the compromise decree was passed, presence of counsel for the said respondents has been noted and it was in their effective presence that the said compromise decree was recorded; it is also a matter of record that the application under Order 23 Rule 3 of the Code had been filed on 18.03.2008 pursuant to which a final decree dated 24.04.2008 had been passed on this application. In these circumstances, the ratio of this judgment does not come to the aid of the present petitioners; the submission of the learned counsel for the respondent that the application was not maintainable under Order 23 Rule 3 of the Code is thus an objection which carries weight. It is only on the allegation by one party which is denied by the other party that the question has to be decided as to whether the compromise arrived at under Order 23 Rule 3 of the Code on the adjustment and satisfaction has been arrived at or not which has then to be answered; a person who is not a party to this compromise is not covered by this provision.

11. The present petitioner being only an agent of the predecessor in interest of defendant No. 2 (Sati Thilramani) and being aggrieved by that fact that defendant No. 2 has not honoured the collaboration agreement (on the basis of which their claim is based), had in fact challenged the termination of this contract in suit No.740/1994 which had subsequently been dismissed in default on 24.09.2009 and admittedly no steps had been taken by the petitioner thereafter to get that suit revived. The claim of the petitioner in terms of the collaboration agreement was only to share 50% of the sale proceeds of the suit land after its sale; admittedly the construction of the suit land is yet to be completed; the question of sale did not arise; rightly or wrongly this collaboration agreement had been terminated by Sati Tahilramani against which the suit filed by the

petitioner had been dismissed. In this factual scenarios, the petitioner was well within his right to file an appeal against this compromise decree dated 24.04.2008 under Order XLIII Rule 1-A of the Code but he has not done so; application filed under Order XXIII Rule 3 of the Code after a lapse of four months would also be hit by latches.

12. In AIR 1993 SC 1139 **Banwari Lal Vs. Smt. Chando Devi (through L.R.)** the Apex Court has enunciated that the remedy available for such a person is a remedy under Order XLIII Rule 1-A of the Code and the bar of Section 93 (3) would also not come in the way. Not only such an application in the present form was not maintainable but even on its merits there is no case made out in favour of the petitioner to have the compromise decree dated 24.04.2008 set aside. This compromise decree was a sharing of rights in the suit property between the co-owners; the present petitioners on the basis of their collaboration agreement have no such rights. Nothing precluded some of the parties to the suit i.e. the plaintiffs and defendants No. 1 to 3 to enter into a compromise; the law permits it. The judgment reported as 1970 (3) SCC 124 **Bai Chanchal & Others Vs. Syed Jalaluddin and others** enunciates this position.

13. Impugned judgment in no manner suffers from any infirmity.

14. Petition is without any merit. Dismissed.

ILR (2012) II DELHI 599
CRL. A.

SURJIT KUMAR @ SHAKIR ALI @ GANJA ....APPELLANT

VERSUS

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

(S. RAVINDRA BHAT AND S.P. GARG, JJ.)

CRL.A. NO. : 67/2012 DATE OF DECISION: 18.01.2012

Indian Penal Code, 1860—Sections 302, 201 and-120B—Indian Evidence Act, 1872—Section 27—Circumstantial Evidence—As per prosecution case, gunny bag containing deadbody of teenaged male found in Railway Coach—On same day, PW16 (who was assigned case) met Mohd. Najim who furnished information about offenders—At his instance two accused arrested (one of them is appellant), later two more accused arrested—Police received secret information about involvement of another person who was also arrested—On disclosure statement of appellant, blood stained ustra recovered from tin-shade of platform—One of the accused Raj Kumar had received burn injuries during incident and died—Deposed by Autopsy Surgeon that deceased had 13 c.m. long cut injury on his neck and 9.5 cm. long injury in occipital region which was sufficient to cause death—Trial Court convicted accused u/s 302, 201 and 120B IPC—Held, prosecution case based on direct eye-witness account of Mohd. Najim—However eye-witness Mohd. Najim did not depose in court—Incriminating circumstances largely based on recovery from place which was public and accessible to all—The recovery of ustra not much consequence—Prosecution made no attempt to link recovery with accused—Prosecution made no attempt to prove motive—Prosecution failed to prove offences against appellant—Accused acquitted—Appeal allowed.

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Ms. Anu Narula, Advocate.

FOR THE RESPONDENT : Mr. Sanjay Lao, APP for the State.

CASES REFERRED TO:

1. *Pradeep @ Allahabadi & Balmukund* vs. *State* (Crl. Appeal No. 704 & 705/2011.
2. *Pulukuri Kottayya* vs. *Emperor* AIR 1947 PC 67).

RESULT: Appeal allowed.

S. RAVINDRA BHAT (OPEN COURT)

1. Appeal admitted; the learned APP accepts notice. It was submitted at the outset that the co-accused, Balmukund and Pradeep @Allahabadi, had appealed to this court, and that this Court, by judgment and order dated 15th November, 2011 in Crl. Appeal Nos. 704-705/2011, set aside their conviction and sentence. This fact was not disputed by counsel for the State. Learned Counsel for the Appellant in this case also submitted that the role attributed to him is no worse than that attributed to Balmukund and Pradeep. With consent of counsel for the parties, the Court heard the Appeal finally. The court also had the benefit of the Trial Court records, and the previous judgment of this court, in Crl. A. Nos. 704-705/2011, as well as the records of the other appeal, which were called for today.

2. The appellant impugns a judgment and order dated 31.07.2010 and 09.08.2010 respectively whereby he was convicted for the offence punishable under Section 302 read with Sections 201 and 120B IPC. He was sentenced to undergo life imprisonment and also fined for various amounts, in default of payment of which he was directed to undergo simple imprisonment for further term.

3. The prosecution alleged that on 25.09.2005, the Station Master of New Delhi Railway Station was informed by the guard of the Frontier

Mail that a bag lay in Coach No.5 of the train, which was inspected by the security service of the railway station, who discovered that it contained the dead body of a teenaged male. The concerned Police Station was informed and SI Avinash Yadav, PW-16 was assigned the matter. He also became the I.O. PW-16 went to the scene of occurrence and collected the physical evidence such as blood stained clothes, blood samples as well as the body -which was sent for post mortem. A case was registered under Sections 302, 201/ 120B IPC. It was alleged that in the course of investigation, on the same day, PW-16 met with Mohd. Najim; he furnished information about the offenders. It was further alleged that at his instance two individuals i.e. Chandan @ Chikna and Surjit @ Shagir @ Ganja (the present Appellant) nabbed by the police; taken into custody and arrested on 30-09-2005. It was further alleged that Mohd Najim also informed that Raj Kumar, Rajesh Bihari and Bal Mukund were involved in the murder. The police stated that the accused Rajesh and Balmukund were arrested later. It was alleged that on 23.11.2005 the Police received secret information about involvement of another person i.e. Rajesh Allahabadi @ Pradeep (one of the appellants) who was also arrested upon his being identified by the said Mohd. Nazim. On the basis of information and materials collected, a charge sheet was filed. The Trial Court was of the opinion that a prima facie case was made out and charged the accused for committing crime. They claimed to be not guilty and sought trial. The Trial Court examined 26 witnesses and also considered the materials and exhibits produced before it. On the basis of these it concluded that the present appellants were guilty as charged. They were accordingly convicted and sentenced in the manner described above.

4. It was argued that the Appellant Surjit too, was sought to be implicated on the testimony of Najim, who was not joined in the investigation or produced as a witness in Court. Surjit's arrest, and the alleged recovery of an ustra, on 30-092005, in the circumstances, could not have been the basis of his conviction.

5. Learned counsel for the appellant argued that the entire prosecution was based on circumstantial evidence. Counsel urged that in such cases the prosecution's duty is to prove each circumstance and also prove that each link which bound all the circumstances formed a chain so complete as to eliminate the possibility of anyone, other than the accused being the author of the crime. It was urged that the prosecution's entire story

relied on the information provided by Mohd. Najim; it was also their case that the appellants were arrested at his instance. Counsel emphasized that the most important element in the entire prosecution was the story or version of Mohd. Najim. However, he was not examined during trial. In these circumstances, the case could not be said to have been proved at all.

6. The appellant's counsel urged that his arrest was not proved objectively since no public witness was joined in the proceedings at that time. It is urged that the Trial Court has in this case relied upon the recoveries allegedly made by the Police at the instance of the present appellant. An ustra was allegedly recovered from a public place i.e. Railway Platform and that much after the incident. Having regard to the entirety of the circumstances i.e., that the appellant was arrested on 30-09-2005 for an incident which occurred on 25.09.2005, and the prosecution's inability to produce the key witness and inability to even explain or link the recoveries with the appellant; the entire story is a falsified one. It was alleged that an ustra is a fairly common object and in the absence of special mark, or even a finger print analysis on the article, the Trial Court could not have concluded that such recoveries were incriminating circumstances. Counsel also urged that two other ustras were allegedly recovered about a month later, after the arrest of other accused. No attempt was made to show how these fairly commonplace articles were used by three individuals, upon the deceased.

7. The learned APP argued that though Mohd. Najim was cited as a witness, he could not be produced during trial because despite all efforts it was not possible to trace his whereabouts. The counsel urged, however, that the deposition of PW-16 who recorded Mohd. Najim's statement could be relied upon as it was not shown to be motivated. It was urged that PW-16 in his deposition narrated the entire sequence about having received information on 25.09.2005 at around 7.45 PM and seeing the blood seeping from Coach S-5 of the Frontier Mail Train and discovering that the source of this blood was a gunny bag. Later, Inspector Ishwar Singh went to the spot, he deposed that since the wires above the train were electrified, it was disconnected by one Jagdish Shah. Upon opening the gunny bag they discovered a body of a young boy aged 13-14; this was wrapped in a blanket. The body was gagged with a cloth, neck was slit and there were injuries on the face and head. The body was

identified on 27.07.2005 by one Jamila Khatoon and her son Mohd. Irfan. It is stated that on the same day, he went to RML Hospital to enquire about Raj Kumar @ Chandal (another assailant) who had been admitted for treatment of electric burn injuries. His blood samples were taken.

8. On 30.09.2005 at about 12.30 PM he and three other police-men went to Platform No.1 of the station where he met Mohd. Najim; the latter pointed to Chandan @ Chikna and the Appellant and said that they and the other co-accused had committed the murder. Chandan and Surjit (the present appellant) were arrested. Pursuant to their disclosure statements, blood samples from earth control room were recovered. At the instance of Surjit one ustra which was blood stained was recovered from the Central bridge, Tin shed pillar, Platform No. 8 of the railway station. All these were seized. On 05.10.2005 the witness, PW-16 was entrusted with proceedings under Section 174 in respect of Raj Kumar who had been injured and was admitted to RML hospital on 25.09.2005. Raj Kumar passed away on 30.09.2005.

9. Learned APP contends that on 03-10-2005, Bal Mukund was arrested at the instance of Mohd. Najim. He submitted that on 23.11.2005, Mohd. Najim met the police party at Platform No.1, they further went to Platform No.2 where he identified the accused Pradeep @ Allahabadi, who was arrested; who lead them to Platform No.2 from where they recovered a blood stained ustra at his instance. The learned APP argued that testimonies of PW-16 and PW-22 were corroborated by those of PW-4 and PW-26. Reliance was also placed upon the deposition of some witnesses such as Shagir who testified that Mohd. Najim was his son and that he had left his residence four years ago and had not been heard of since then. Similarly, the post mortem report Ex. PW-13/A, and the deposition of Dr. Kulbhushan Goyal was relied upon. It was urged that having regard to this, it was clear that the deceased Sonu had a 13 cm long cut injury and another throat injury of 9.5 cm, over his occipital region both of which were sufficiently serious to have caused death. The learned APP urged that disclosure statements made in this case were corroborated by the injuries received by the deceased Raj Kumar, who got electrocuted and died subsequently on 30.09.2005. Having regard to all these facts, it was urged that the role played by the accused appellant in killing Sonu on top of the train had been established. The accused-including the Appellant, were also responsible for stuffing his body along

with other co-accused in the gunny bag and subsequently hiding the weapons of offence i.e., ustras. Though these articles were kept in public places, yet it were hidden and could not be discovered by normally searching the place. The knowledge of these articles also incriminated the appellant.

10. In the previous judgment of the Court, in the case of the co-accused **Pradeep @ Allahabadi & Balmukund v State** (Crl. Appeal No. 704 & 705/2011, decided on 15th November, 2011), it was held that:

> 9. In this case, the prosecution version was that the crime was witnessed by Mohd. Najim. However, he was not produced to testify in court, in support of its case. The State contends nevertheless, that his statement was recorded by PW-16, who deposed to having done so, and that he had implicated the Appellant and the co-accused for the crime. We are afraid that such reasoning is unfeasible. PW-16 can testify to what he saw and observed; his deposition regarding what someone else – who did not later depose in court-said, is clearly inadmissible, under the hearsay rule. At best, what was stated by Najim could be useful to help in the investigation. What however, is admissible in court, and permissible for the court to look into, is whether the witness who deposes about a fact seen or experienced by him, can be relied on. Therefore, this court is of opinion that PW-16's testimony about what was recorded by him, on the basis of Najim's statement, is inadmissible in law.
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> 9. The next question is whether the prosecution was able to prove the arrest, and involvement of the present Appellants in respect of the crime. The testimonies of various prosecution witnesses is that the accused – except the present Appellants were arrested on 30th September, 2005; one of the attackers died and his inquest and post-mortem examination was done in the first week of October, that year. However, the Appellants were arrested on 3rd October 2005, and 23November, 2005. The witness to this arrest is alleged to have been the same Najim. PW-22 and PW-26 deposed in this regard. PW-22 mentioned how the Appellant Pradeep was pointed out, and nabbed. He further stated that upon questioning, the accused

made disclosure statements which led to the recovery of articles, such as the ustra, blood stained clothes, etc. from some places in the Railway station. Though recoveries cannot by themselves constitute strong incriminating circumstances, what is recovered, pursuant to disclosure statements, and where they are recovered, often assumes significance. It has been held repeatedly that recovery of common objects – even weapon like articles, such as knives, or sticks, etc. do not clothe the prosecution version with any special significance, unless their location naturally points to special knowledge. Also if such objects are recovered from open areas, or places accessible to all, the courts have ruled that the manner of recovery, or the recovery itself, does not assume any significance. On the other hand, if articles are recovered from some hidden places, or remote or inaccessible places, or the articles themselves are not common objects, and have some special link with the crime or the victim, the matter, and the knowledge of its location, assumes some significance. It can become an admissible piece of evidence, by virtue of Section 27 of the Evidence Act. (Ref **Pulukuri Kottayya v. Emperor** AIR 1947 PC 67).

10. The weapons allegedly recovered from the accused and the appellants were from a place as open and crowded as the New Delhi Railway Station. Despite the fact that traces of blood group 'A' were found on the Ustra belonging to Sujit Kumar (the blood group of the deceased), the fact that they were recovered from an open place renders this evidence highly unreliable. However, the Learned Trial Court only considered the fact that these weapons were recovered in pursuance of disclosure statements and therefore admissible as evidence under Section 27. It paid no heed to the fact that they were recovered from the open and without any public witnesses other than Mohd Najim. Further, in the case of these appellants, the recoveries were made nearly two months after the incident. Strangely, Mohd. Najim was around, to help the police; when it was his turn to depose about all these in court, mysteriously – and perhaps conveniently for the prosecution-he went missing. This aspect has to be kept in mind, because there is a singular lack of any public witness, despite the area being crowded at almost all times of the day (i.e.

a Railway Station, frequented by almost 3,00,000 visitors each day). The sheer improbability of this story, and the further aspect that such common objects could remain hidden, for nearly two months, undermines the credibility of the prosecution story in this regard."

11. It is also noteworthy, in addition to the above reasoning, that there is a vital discrepancy in the testimonies of PW-22, and that of PW-16, the latter, according to the prosecution had been associated with recoveries, PW-16 himself was however, silent on this aspect. This aspect persuaded the Court, in the previous appeal, to hold that the prosecution evidence was unsafe and not credible.

12. The burden of proving that the accused alone committed the crime, and that no one else was involved in it, is always upon the prosecution. The question of the accused having to explain incriminating circumstances arises only when all those are proved beyond reasonable doubt. In this case, the prosecution sought to present the court with a case based on direct eyewitness account. However, the eyewitness to the crime did not depose in court. The prosecution's attempt to set up an alternative case based on circumstantial evidence, never really "took off" because the so-called incriminating circumstances, largely based on recoveries, were as noticed earlier-from a place, which by any account, would be deemed public, accessible to all. Though an ustra was recovered, that fact is not of much consequence; the prosecution made no attempt to link these articles with the Appellant. Furthermore, motive – which assumes little or no importance in prosecutions based on ocular evidence, should be proved in cases based on circumstantial evidence. Here, the prosecution made no attempt to prove motive.

13. For the above reasons, this Court is of the opinion that the prosecution failed to prove that the present Appellant was guilty of the offence of murder, and other offences, punishable under Section 302/201 and 120-B IPC. The impugned judgment cannot be sustained, as far as the present appellant is concerned. The appeal consequently succeeds, and is allowed. The Appellant shall be released forthwith, if not required in any other case.

ILR (2012) II DELHI 607
RFA

SEWA INTERNATIONAL FASHIONS & ORS. ....APPELLANTS

VERSUS

MEENAKSHI ANAND ....RESPONDENT

(VALMIKI J. MEHTA, J.)

RFA NO. : 40/2012 DATE OF DECISION: 18.01.2012

Code of Civil Procedure, 1908—Order 20 Rule 12—Delhi Rent Control Act, 1958—Section 6A and 8—Transfer of Property Act, 1882—Section 106—Appellant/defendant a tenant from 1979 at a monthly rent of Rs.1161.60—Rent increased from time to time under section 6A and 8—Rent Rs.2489.30 w.e.f 23.04.2004—legal notice dated 07.05.2007 enhancing rent to Rs. 3618.23 inclusive of maintenance charges Rs.880/- w.e.f. 23.04.2007—tenancy terminated by legal notice dated 07.09.2007—failure to vacate the premises—Suit for possession and mesne profits—Plea taken, notice dated 07.05.2007 defective as sought to increase the rent retrospectively—Notice dated 07.05.2007 not served—Held, even if language defective it will operate to increase the rent by 10% after 30 days of service of notice—Notice was served—Suit decreed—Aggrieved by the judgment the appellant/defendant preferred the regular first appal—Held—Notices were sent at seven addresses by registered AD post and UPC—The addresses were correct—Notice deemed to have been served—Notice has a necessary legal effect of increasing rent 30 days after receipt of notice—Order 20 Rule 12 does not mandate that the court shall first take evidence only an aspect of illegality of possession and decree the suit for possession and only thereafter will go for trial with respect of mesne profits—Appeal dismissed.

I am unable to agree to any of the arguments as raised on behalf of the appellant. So far as the first argument is concerned, it is absolutely misconceived in law inasmuch as the present is a case where notices were sent to as many as seven addresses of the appellant/defendant. Notices were sent at these addresses both by registered AD post and UPC. It is not the case of the appellant in the written statement filed before the trial Court that the addresses at which notices were sent were not the addresses of the appellant. In fact, this is also recorded in the impugned judgment. The trial Court has thereafter held with respect to the service of notices that in view of the judgment of the Supreme Court in **M/s Madan & Co. v. Wazir Jaivir Chand,** 1989(1) SCC 264, once notices are sent at the correct address, even if they are received back, such notices are deemed to be served upon the tenant. I am, therefore, of the opinion that the trial court has rightly held that notice dated 7.5.2007, Ex. PW1/2 was duly served upon the appellant/defendant. **(Para 7)**

The second argument raised on behalf of the appellant with respect to the illegality in the notice because a notice given under Sections 6A and 8 of the Delhi Rent Control Act cannot increase the rent retrospectively is also an argument which only sounds correct at the first blush, but the trial Court has rightly dealt with this issue by observing that the notice can surely be taken in terms of Section 6A to have a necessary legal effect of increasing rent 30 days after receipt of the notice. I agree with these finding and conclusion of the trial Court because surely once a notice increasing rent is sent, no doubt to the extent of the same demanding an illegal increase the same would not be legal, however, that cannot take away the correct legal effect of the notice and which is that rent will be increased by 10% after thirty days of service of such notice. **(Para 8)**

Important Issue Involved: (A) Once notices are sent at the correct address, even if they are received back, such notices are deemed to be served upon the tenant.

(B) The notice given under Section 6A and 8 of the Delhi Rent Control Act cannot increase the rent retrospectively; however, notice can be taken in terms of Section 6A to have necessary legal effect of increasing rent 30 days after receipt of notice.

(C) Order 20 Rule 12 CPC is only one of the methods of passing of a judgment in a suit for possession and mesene profits, however, it is not mandatory that the court shall first decree the suit for possession by taking evidence only on the aspect of illegality of possession and thereafter will set out the case for trial with respect to mesne profits.

[Vi Gu]

APPEARANCES:

FOR THE PETITIONER : Md. Rashid, Advocate.

FOR THE RESPONDENTS : Mr. Naveen Kumar Chaudhary, Advocate.

CASES REFERRED TO:

1. *Ramrameshwari Devi and Others* vs. *Nirmala Devi and Others,* (2011) 8 SCC 249.
2. *D.N. Kalia* vs. *R.N. Kalia* 178(2011) DLT 294.
3. *Salem Advocate Bar Association* vs. *Union of India,* (2005)6 SCC 344.
4. *M/s Madan & Co.* vs. *Wazir Jaivir Chand,* 1989(1) SCC 264.

RESULT: Appeal dismissed.

VALMIKI J. MEHTA, J. (ORAL)

1. The challenge by means of this Regular First Appeal (RFA) filed under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 17.9.2011 decreeing the suit of the respondent/landlord for mesne profits and possession.

2. The facts of the case are that the appellant/defendant was a tenant of premises being Flat No. 308, third floor, Laxmi Bhawan, 72, Nehru Place, New Delhi measuring 352 sq. ft. The lease originally commenced in October, 1979 at a monthly rent of Rs. 1161.60/-. Thereafter, pursuant to the provision of Sections 6A and 8 of the Delhi Rent Control Act, 1958, which allows enhancement of rent by 10% every three years, rent was regularly increased and the last undisputed enhancement was of Rs. 2489.30/- per month with effect from 23.4.2004. The respondent/plaintiff, thereafter, got issued another legal notice dated 7.5.2007 enhancing the rent to Rs. 3618.23/- with effect from 23.4.2007. This amount of rent includes maintenance charges of Rs.880/- per month. With the rent being more than Rs. 3,500/- per month, the premises no longer enjoyed the protection under the Delhi Rent Control Act, 1958. The tenancy of the appellant was, thereafter, terminated by a legal notice dated 7.9.2007, under Section 106 of the Transfer of Property Act, 1882 and on failure of the appellant/defendant to vacate the suit premises, the subject suit for possession and mesne profits came to be filed.

3. The appellant contested the suit and raised several defences. One defence was that the notice dated 7.5.2007 increasing the rent to Rs. 3618.23/- per month was not served. Another defence was that the notice was defective because this notice sought to increase the rent retrospectively.

4. Before proceeding further, I may note that whereas the respondent/plaintiff led evidence in the trial Court, however, no evidence was led on behalf of the appellant/defendant. Since in spite of imposition of costs, no evidence was led, the evidence of the appellant/defendant was closed by the trial Court, and which order has become final. This order of closing evidence was not challenged and nor were the costs imposed paid. This order of closing of evidence has also not been challenged in the present appeal.

5. The trial Court has held that the notice dated 7.5.2007 which was sent to as many as seven addresses is held to be served. It has also been held by the trial Court that although the language of the notice may be defective by which rent was sought to be increased retrospectively, however, even if the illegal demand seeking retrospective enhancement is taken away yet in any case the notice will statutorily operate to increase the rent by 10% after the expiry of 30 days from the date on which notice is given as per Section 8 of the Delhi Rent Control Act, 1958. The trial Court has thereafter considering the evidence led on behalf of the respondent/plaintiff, decreed the suit for possession and mesne profits.

6. Learned counsel for the appellant argued the following points before this Court:-

(i) The notice dated 7.5.2007 increasing the rent to Rs. 3618.23/- per month (inclusive of amount of Rs. 880/- payable as maintenance charges) was not served. While on this argument, I must note that the appellant accepted before the trial Court that an amount of maintenance charges is included in rent and this fact is noted in para 9 of the judgment at internal page 16.

(ii) The notice dated 7.5.2007 was illegal because the notice given under Sections 6A and 8 of the Delhi Rent Control Act, 1958 cannot increase the rent retrospectively.

(iii) In the present case no preliminary decree was passed under Order 20 Rule 12 CPC and therefore impugned judgment and decree is liable to be set aside.

7. I am unable to agree to any of the arguments as raised on behalf of the appellant. So far as the first argument is concerned, it is absolutely misconceived in law inasmuch as the present is a case where notices were sent to as many as seven addresses of the appellant/defendant. Notices were sent at these addresses both by registered AD post and UPC. It is not the case of the appellant in the written statement filed before the trial Court that the addresses at which notices were sent were not the addresses of the appellant. In fact, this is also recorded in the impugned judgment. The trial Court has thereafter held with respect to the service of notices that in view of the judgment of the Supreme Court in **M/s Madan & Co. v. Wazir Jaivir Chand,** 1989(1) SCC 264, once

notices are sent at the correct address, even if they are received back, such notices are deemed to be served upon the tenant. I am, therefore, of the opinion that the trial court has rightly held that notice dated 7.5.2007, Ex. PW1/2 was duly served upon the appellant/defendant.

8. The second argument raised on behalf of the appellant with respect to the illegality in the notice because a notice given under Sections 6A and 8 of the Delhi Rent Control Act cannot increase the rent retrospectively is also an argument which only sounds correct at the first blush, but the trial Court has rightly dealt with this issue by observing that the notice can surely be taken in terms of Section 6A to have a necessary legal effect of increasing rent 30 days after receipt of the notice. I agree with these finding and conclusion of the trial Court because surely once a notice increasing rent is sent, no doubt to the extent of the same demanding an illegal increase the same would not be legal, however, that cannot take away the correct legal effect of the notice and which is that rent will be increased by 10% after thirty days of service of such notice.

9. The third argument raised on behalf of the appellant is also equally misconceived that it was necessary for the Court to pass a preliminary decree under Order 20 Rule 12 CPC before deciding the issue of mesne profits. Order 20 Rule 12 CPC is only one of the methods of passing of a judgment in a suit for possession and mesne profits, however, it is not mandatory that the Court shall first decree the suit for possession by taking evidence only on the aspect of illegality of possession and thereafter will set out the case for trial with respect to the mesne profits. In the present case the evidence has been led on behalf of the respondent/plaintiff/landlord, simultaneously both with respect to the issues of possession and mesne profits and the suit has thereafter been decreed after the final arguments were addressed. No illegality can therefore be found in the judgment of the trial Court decreeing the suit for possession and mesne profits. Reliance placed by learned counsel for the appellant on the judgment of this Court titled as **D.N. Kalia v. R.N. Kalia** 178(2011) DLT 294 is totally misconceived inasmuch as evidence has very much been led in the present case on the issue of mesne profits.

10. Finally I may note that the defence that the maintenance charges were not '880/- per month has rightly been rejected by the trial Court by giving its findings/conclusions in para 11 of the impugned judgment

which reads as under:-

"11. PW 6 Kali Charan, is the Assistant Manager of Skyway Construction Co. who brought the record pertaining to the maintenance charges of the property in question and placed on record the bill dated 13.07.2009, with respect to the claim of maintenance charges w.e.f. May, 2005 to 31.07.2009, amounting to Rs. 54,144/- inclusive of service tax which document was Ex. PW 6/1. It was argued by Counsel for defendants that in terms of deposition of this witness, the society was issuing quarterly bills but no such quarterly bills were placed on record by any of the PWs. The two bills which have been placed on record as Ex. PW 1/D-1 and PW 6/1 are not for the quarterly period which makes it clear that the society had not issued any bill upon the defendants claiming the maintenance charges at Rs. 880/- per month, besides the fact that PW 6 had not produced carbon copy of the alleged bills which were allegedly issued upon the defendants on quarterly basis. However, I find sufficient justification for the above in deposition of PW 6 whereby he stated that the bill is issued on quarterly basis but in this case, particular bill till 31.07.2009, was prepared only for court purpose. He also corroborated the testimony of PW 1, that sometime, intimation with regard to the maintenance charges is also sent to the respective flat owner of the building. According to this witness, rate of common maintenance charges was Rs. 2.50 per sq. feet per month w.e.f. April, 2007. Since, the bills were sent through ordinary post, therefore, no record was maintained and because of this reason, this witness as stated was not in position to produce the document of delivery of maintenance bill issued to the defendant number 1 or the owner of the flat. It was also deposed by PW 6 that w.e.f. May, 2005 to March, 2007, maintenance charges were at Rs. 2/- p.s.f. per month and with respect to the increase in maintenance charges, they had given the notice to the occupants or owners of the flat of the building including the defendants which notification was also affixed on the notice board of the building. The said intimation dated 17.03.2007, was also placed on record which was exhibited as Ex. PW 6/D-1. Besides the claim of the plaintiff that the defendant did not pay maintenance charges w.e.f April, 2005 to November,

2007, PW 6 rather proceeded ahead to say that the maintenance charges in fact had not been paid w.e.f. May 2005 to July, 2009 though admitted that the latest bill dated 30.07.2009, had not been sent to defendant number 1. It is correct that the original ledger book was not brought by this witness whereas the photocopies of the ledger maintained for the property in question was Mark A where the last two entries were admitted to be inserted by PW 6 in the court itself, which were pertaining to the period after 04.07.2009, it was clarified that the said entries had been inserted in the photocopy because the photocopy was prepared earlier when he appeared as a witness on the last date of hearing. Subsequent to which, those two entries were mentioned in the original ledger and he wanted to update the photocopy to be filed before the Court. Be that as it may, what is relevant for arriving at conclusion with respect to the computation of maintenance charges, is only after April, 2007 but prior to the period for which those two entries were inserted. The maintenance charges as reflected w.e.f.s March, 2007, were also Rs. 880/- per month. The contention of Counsel for defendant that PW 6 was posted with Skyway Construction having its office at Barakhamba Road, New Delhi and also at Manglam Building, Vikas Marg, New Delhi, whereas the document i.e. Ex. PW 6/D-1 and other documents have been received from the office of Skyway Construction at Nehru Place, New Delhi, therefore, PW 6 was not a witness authorised to place on record those documents. As per the record, the designation of this witness has been mentioned as Manager with Skyway Construction having its office at many places and it is not necessary that Manager of the said Co. would remain seated at Nehru Place office of the Skyway Construction Co. There is no suggestion also to this witness that he was not competent to depose on behalf of Skyway Construction Co. and only because of this reason that he was not sitting at Nehru Place office would not render the documents filed on record as negated. The bills as placed on record by PW 1 and PW 6 and more particularly, the circular of the society which was affixed on the notice board of the society as deposed by PW 6 i.e. Ex. PW 6/D-1 makes it clear that maintenance charges were enhanced to Rs. 880/- per

month w.e.f. 01.04.2007. PW 6 is an official witness who has deposed as per the records of the society & I do not find any reason to disbelieve the version of this official witness whose deposition is supported by documents placed on record. The plea that the carbon copies of the bills raised upon the defendant number 1 have not been filed by PW 6 on record, does not help the defence of the defendants if the maintenance charges were Rs. 704/- per month as claimed by defendants and were also paid by them to the society, the defendants themselves could have produced such bills raised upon them or the receipt for the payment of the maintenance to the society. Accordingly, having been established on record, the rate of rent at Rs. 2,738.23/- after June, 2007 and by adding maintenance charges at Rs. 880/- per month, the total rent works out to Rs. 3,618.23/- per month, which is above the amount of Rs. 3,500/- and thereby the suit filed by the plaintiff comes out of the purview of Delhi Rent Control Act, and is accordingly held to be not barred under the Provisions of DRC Act."

(underlining added)

To the aforesaid I may add that the amount of maintenance charges of Rs. 880/- per month are payable not only by the appellant but also by all persons similarly situated as the appellant in the subject multi-storeyed building.

11. No other issue is pressed or urged on behalf of the appellant.

12. The Supreme Court in the case of **Ramrameshwari Devi and Others v. Nirmala Devi and Others,** (2011) 8 SCC 249 has held that it is high time that actual and realistic costs be imposed in order to pre-empt and prevent dishonesty in litigation. Earlier, a Division Bench of three Judges in the case of **Salem Advocate Bar Association Vs. Union of India,** (2005)6 SCC 344 in para 37 has also observed that it is high time that actual costs be awarded. I am also entitled to impose actual costs by virtue of Volume V of the **Punjab High Court Rules and Orders (as applicable to Delhi) Chapter VI Part I Rule 15.**

13. I find that the present matter is a fit case for imposition of actual costs inasmuch as a tenant has blatantly overstayed in the suit premises and has kept on in one way or the other seeking to prevent

payment of lawful dues in addition to failing to vacate the suit premises. The respondent/landlord has unnecessarily been dragged in litigation. The Supreme Court in the case of **Ramrameshwari Devi** (Supra) has made the following pertinent observations with regard to imposition of costs:-

"43. We have carefully examined the written submissions of the learned Amicus Curiae and learned Counsel for the parties. We are clearly of the view that unless we ensure that wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that court's otherwise scarce and valuable time is consumed or more appropriately wasted in a large number of uncalled for cases.

47. We have to dispel the common impression that a party by obtaining an injunction based on even false averments and forged documents will tire out the true owner and ultimately the true owner will have to give up to the wrongdoer his legitimate profit. It is also a matter of common experience that to achieve clandestine objects, false pleas are often taken and forged documents are filed indiscriminately in our courts because they have hardly any apprehension of being prosecuted for perjury by the courts or even pay heavy costs. In **Swaran Singh v. State of Punjab** (2000) 5 SCC 668 this Court was constrained to observe that perjury has become a way of life in our courts.

52. The main question which arises for our consideration is whether the prevailing delay in civil litigation can be curbed? In our considered opinion the existing system can be drastically changed or improved if the following steps are taken by the trial courts while dealing with the civil trials.

A. ...

B. ...

C. Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of

heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

54. While imposing costs we have to take into consideration pragmatic realities and be realistic what the Defendants or the Respondents had to actually incur in contesting the litigation before different courts. We have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter affidavit, miscellaneous charges towards typing, photocopying, court fee etc.

55. The other factor which should not be forgotten while imposing costs is for how long the Defendants or Respondents were compelled to contest and defend the litigation in various courts. The Appellants in the instant case have harassed the Respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts. The Appellants have also wasted judicial time of the various courts for the last 40 years.

56. On consideration of totality of the facts and circumstances of this case, we do not find any infirmity in the well reasoned impugned order/judgment. These appeals are consequently dismissed with costs, which we quantify as Rs. 2,00,000/- (Rupees Two Lakhs only). We are imposing the costs not out of anguish but by following the fundamental principle that wrongdoers should not get benefit out of frivolous litigation."

(underlining added)

14. Accordingly, in the facts of the present case, there is no ground to interfere with the impugned judgment and decree, therefore, the present appeal is dismissed with costs of Rs. 50,000/-, which I quantify to be actual costs in the facts of the present case. Costs be paid within four weeks from today.

15. Appeal is disposed of accordingly.

ILR (2012) II DELHI 618
RCR

DAYAL CHAND AND ANR. ....PETITIONERS

VERSUS

GULSHAN KUMAR & ANR. ....RESPONDENTS

(INDERMEET KAUR, J.)

RCR. NO. : 16/2005 & CM. NOS. 2144/2005 & 4036/2007 **DATE OF DECISION: 18.01.2012**

Delhi Rent Control Act, 1958—Section 14(1) (e)—Bonafide requirement—Petitioner landlord of tenanted property comprising one room, kitchen with common use of latrine and bathroom at ground floor—Petitioner in occupation of three rooms on ground room with common courtyard and one room on first floor—Petitioner's family comprised of himself, one married son and his three children—Petitioner's contention that he was 80 years of age and needed separate room for himself—His son aged 45 years had two daughters aged 21 years and 15 years and a son aged 10 years—They were living together in said property—His other son resided in Germany and visited them, however there was no space for him to stay—The accommodation presently available was not sufficient for them—RCT dismissed petition—Held, Landlord only had three rooms, out of which one was occupied by him, one by his son Inderjeet and third was used by the two daughters and son of Inderjeet—There was no space available with the children to take tuitions or to sleep and meet their friends—The second son of the landlord who visited his father from Germany had to stay at the house of a neighbour

PW3—Testimony of maid servant PW2 has corroborated the testimony of PW1 landlord—During pendency of petition landlord died and family of Inderjeet living in premises—Even assuming that two daughters can be accommodated in a single room, son required one room and Inderjeet and his wife also required a room—He also required one guest room to accommodate his brother who was co-owner of said premises as it cannot be expected that all the time he will continue to live in the house of a neighbour—Bonafide requirement proved—Impugned order set aside—Eviction petition of landlord decreed.

It has come on record that the family of PW-1 comprised of himself, his wife, three children of whom two were adults and his father; his father i.e. the landlord being 80 years of age and requiring constant medical attention; accommodation available with the landlord at the relevant time i.e. on the date of filing of the eviction petition were three rooms only of which one was occupied by the landlord himself, one by Inderjeet Singh and third room was being used for miscellaneous purpose. Admittedly miscellaneous purpose has not been explained in the eviction petition but the testimony of PW-1 has explained it; he has enlarged this definition by stating that his two adult daughters and 10 years old son have tuitions; tutors come to their house to teach children but there is no space available with the children to accommodate them; there is no separate space for them to sleep and to meet their friends; admittedly one more room which is depicted in the site plan (Ex.PW-1/7) and which has not been mentioned in the eviction petition is a room without a roof which cannot be used for any purpose and as such even if this fact did not find mention in the eviction petition it can in no manner be termed as concealment of a material fact which would disentitle the petitioner to a decree if he is otherwise so entitled. A Bench of this Court in 1988 (2) RCJ 179 R.D. **Aggarwal Vs. Smt. Arjan Kaur** in this context has held as under:-

> "In an eviction petition on the ground of bona fide requirement it is only where a particular landlord intentionally conceals the residential accommodation available to him from the court that he/she can be non-suited on this ground. Concealment of innocuous accommodation which cannot be used as a regular room should not result in dismissal of her/his claim for more accommodation." **(Para 10)**

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Mr. G.P. Threja, Advocate.

FOR THE RESPONDENT : Mr. Hari Shankar, Advocate for R-1. Mr. Ramesh Kumar, Advocate for R-2.

CASES REFERRED TO:

1. *Satyawati Sharma (Dead) by LRs.* vs. *Union of India* 148(2008) DLT 705 (SC).
2. *Shiv Sarup Gupta* vs. *Dr. Mahesh Chand Gupta,* AIR 1999 SC 2507.
3. *R.D. Aggarwal* vs. *Smt. Arjan Kaur* 1988 (2) RCJ 179.

RESULT: Eviction petition of landlord decreed.

INDERMEET KAUR, J.

1. Order impugned is the judgment and decree dated 04.10.2004 vide which the petition filed by the landlord Dayal Chand under Section 14 (1)(e) of the Delhi Rent Control Act (hereinafter referred to as the 'DRCA') had been dismissed.

2. Record shows that the petitioner claims himself to be the landlord of property bearing No. 1/5695, Gali No. 17, Delhi-10032; the respondent Gulshan Kumar was a tenant on the ground on the said premises; he was in occupation of one room, kitchen with common use of a latrine and bathroom. Contention of the petitioner in the eviction petition is that the premises in his occupation comprises of three rooms on the ground floor with common courtyard and one room on the first floor. His family

comprises of himself, one married son and three children; this eviction petition was filed in the year 2000. The petitioner at the relevant time was 80 years of age; contention being that he needs a separate room for himself; his son Inderjeet aged 45 years has a family of whom two were adult daughters aged 21 years and 15 years respectively and third son is aged 10 years; they had been living together in the said property; his other son is residing in Germany who used to visit the petitioner and the accommodation presently available with them is not sufficient for them. Present eviction petition has accordingly been filed.

3. Leave to defend had been granted to the tenant and he had filed his written statement. He has raised certain contentions; the impugned order has returned a fact finding that the present petitioner is a co-owner in the disputed premises; admittedly a co-owner can maintain an eviction petition and this point was rightly decreed in favour of the landlord. In view of the judgment of 148(2008) DLT 705 (SC) **Satyawati Sharma (Dead) by LRs. Vs. Union of India** there is also no distinction between a commercial and a residential purpose as far as the applicability of provisions contained in Section 14 (1)(e) are concerned.

Oral and documentary evidence had been led before the trial Court. Three witnesses had been examined on behalf of the landlord which included Inderjeet Singh Sharma who had appeared as an attorney of his father as PW-1; PW-2 was their maid servant and PW-3 was their neighbor. Tenant has produced himself as RW-1. On the basis of evidence which had been led before the trial Court, the ARC had returned a finding that the bonafide need of the landlord has not been established. The averments made in the eviction petition as also the documentary evidence which included the site plan Ex.PW-1/7 as also the admission of PW-1 in the cross-examination had led the trial Court to return a finding that the landlord is confused about his need; he has sufficient accommodation available with him; the need of the petitioner having an independent personal room for religious purpose qua the petitioner has come to an end as the petitioner has expired during the pendency of the petition. The landlord having sufficient accommodation with him which had not been put to gainful use, the need of the landlord for the room available with the tenant was a malafide need. Petition had accordingly been dismissed.

4. This Court is sitting in its powers of revision. In AIR 1999 SC 2507 **Shiv Sarup Gupta Vs. Dr. Mahesh Chand Gupta,** the Apex

Court in this context has noted herein as under:-

> "The revisional jurisdiction exercisable by the High Court under Section 25-B (8) is not so limited as is under Section 115 CPC nor so wide as that of an Appellate Court. The High Court cannot enter into appreciation or re-appreciation of evidence merely because it is inclined to take a different view of the facts as if it were a court of facts. However, the High Court is obliged to test the order of the Rent Controller on the touchstone of "whether it is according to law'. For that limited purpose it may enter into re-appraisal of evidence, that is, for the purpose of ascertaining whether the conclusion arrived at by the Rent Controller is wholly unreasonable or is one that no reasonable person acting with objectivity could have reached that conclusion on the material available. Ignoring the weight of evidence, proceeding on wrong premise of law or deriving such conclusion from the established facts as betray the lack of reason and/or objectivity would render the finding of the Controller 'not according to law' calling for an interference under proviso to sub-Section (8) of Section 25-B of the Act. A judgment leading to miscarriage of justice is not a judgment according to law."

5. It is in this background that the contentions of the respective parties have to be appreciated.

6. PW-1 is the attorney holder of his father i.e. the original landlord; his power of attorney has been proved as Ex. PW-1/1; the site plan has been proved as Ex. PW-1/7. His contention on oath had stated that the accommodation available with them consisting of four rooms on the ground floor and one room on the first floor and out of these four room, one room is in possession of the present tenant and three rooms are in possession of the petitioner; the site plan is in accordance with this deposition. This has been explained further by PW-1 in his examination in chief wherein it is deposed that out of three rooms, room 'B' is with Inderjeet Singh; room 'C' is occupied by the landlord himself and room 'D' is used for miscellaneous purpose; one room is in occupation of the present tenant; family of the landlord admittedly at that time comprised himself, his married son and his 6 family members of whom two were adult children; deposition being to the effect that all the children cannot be accommodated in the aforenoted accommodation as they require

separate rooms for sleeping, for their studies as also for meeting their friends; further deposition being to the effect that they are school going children and there is no separate room for taking tuition; room on the first floor is used for storage of goods and articles; the landlord was himself suffering from asthma and other ailments and admittedly being over 80 years at the time of deposition of PW-1; the medical record of report of the landlord had also been proved on record as Ex.PW-1/10; PW-1 i.e. Inderjeet Singh (son of the landlord) was running a shop of wheel alignment; in his cross-examination he has admitted that the rooms on the first floor is used for all the children and the kitchen is presently being used as godown as there is no other space to store the articles; further submission being that his father is not an income tax payee; he himself has an independent income and is not dependent upon his father; this last line of his deposition (as noted supra) has been vehemently highlighted by learned counsel for the respondent to substantiate his submission that PW-1 has himself admitted in his cross-examination that he is not dependent upon his father and as such provisions of Section 14 (1)(e) of the DRCA and the very basis of the eviction petition filed by his father is thus washed out as Section 14 (1)(e) is available only to a landlord to prove either a bonafide need for himself and his family who is dependent upon him; PW-1 has himself admitted that he is not dependent upon his father and thus the need of the landlord not being bonafide calls for a rejection of the eviction petition straightaway.

7. PW-2 was the maid servant who was working with the landlord since the last about 18 years attending to the household work as also to the needs of the landlord who was suffering from asthma and other ailments; she has on oath deposed that the landlord himself requires a puja room as he is religious person; children are school going; there is no space for a tutor; in her cross-examination she has admitted that from the site plan i.e. in between the room which is in occupation of the tenant and the room which is occupation of the landlord, there is a gallery. PW-3 is a neighbor; he was the person who had made available the accommodation in his use for the visits of the second son of the landlord who used to come from Germany and his deposition is to the effect that since there was not enough accommodation available with the landlord his son used to live with him. RW-1 was the tenant himself. He has admitted that he has not filed any counter site plan to the site plan already

filed by the landlord and as such the trial Court had rightly relied upon this document as the only site plan depicting the accommodation correctly. This was the sum total evidence which had led before the trial Court both oral and documentary. The trial Court on this basis had rejected the eviction petition.

8. In view of this Court, this evidence has not been appreciated correctly; there appears to be a manifest illegality committed by the trial Court in this regard which require a correction in the absence of which travesty of injustice will be caused to the landlord.

9. The case of the landlord as is evident from the eviction petition is that he has a three room accommodation on the ground floor and one room on the first floor which is being used for storage of goods. The site plan Ex. PW-1/7 is clearly in conformity with this deposition; his deposition is also in conformity; PW-1 Injderjeet Singh had in fact explained that there are four rooms with them of which one room is with the tenant and the trial Court relying upon this one line version of the petitioner wherein he had stated that he has four rooms available with him and holding that the petitioner is a confused man has clearly erred; the testimony of a witness has to be read as a whole and not a single line statement can be subtracted or extracted to give it a meaning not which is otherwise not made out from the wholesome reading of this version.

10. It has come on record that the family of PW-1 comprised of himself, his wife, three children of whom two were adults and his father; his father i.e. the landlord being 80 years of age and requiring constant medical attention; accommodation available with the landlord at the relevant time i.e. on the date of filing of the eviction petition were three rooms only of which one was occupied by the landlord himself, one by Inderjeet Singh and third room was being used for miscellaneous purpose. Admittedly miscellaneous purpose has not been explained in the eviction petition but the testimony of PW-1 has explained it; he has enlarged this definition by stating that his two adult daughters and 10 years old son have tuitions; tutors come to their house to teach children but there is no space available with the children to accommodate them; there is no separate space for them to sleep and to meet their friends; admittedly one more room which is depicted in the site plan (Ex.PW-1/7) and which has not been mentioned in the eviction petition is a room without a roof which cannot be used for any purpose and as such even if this fact did

not find mention in the eviction petition it can in no manner be termed as concealment of a material fact which would disentitle the petitioner to a decree if he is otherwise so entitled. A Bench of this Court in 1988 (2) RCJ 179 **R.D. Aggarwal Vs. Smt. Arjan Kaur** in this context has held as under:-

> "In an eviction petition on the ground of bona fide requirement it is only where a particular landlord intentionally conceals the residential accommodation available to him from the court that he/she can be non-suited on this ground. Concealment of innocuous accommodation which cannot be used as a regular room should not result in dismissal of her/his claim for more accommodation."

11. PW-1 has further in his deposition explained that although in the eviction petition it has been stated that the room on the first floor is being used for storage purpose but it is now being used a study; substantiating and fortifying the submission of the petitioner that the need of the landlord is grave and that is why the room on the first floor which was used for storage purpose is now being used for a study for the children as there is no space to accommodate them and their tutors. It has also come on record in the version of PW-3 (which remains unchallenged) that the second son who visits his father from Germany is staying at the house of PW-3 as there is no accommodation with his father to accommodate him; testimony of the maid-servant of the petitioner (PW-2) is also relevant and corroborative on this score; all these testimonies were disregarded; the trial Court has failed to appreciate them in the correct perspective.

12. The landlord himself has expired during the pendency of the petition but the need of the family has in no manner decreased; children have grown up and the family of Inderjeet Singh now comprises of himself, his wife and all the three children who are adults and all of whom need separate rooms. Two are adult daughters and third is an adult son; his brother also visits him from the Germany; he also has to be accommodated; the accommodation presently available with the petitioner is only three rooms on the ground floor and one room on the first floor. Even assuming that the two adult daughters can be accommodated in a single room, the son requires one room and Inderjeet Singh and his wife require one room; they also need a guest room as well

to accommodate their brother who is also a co-owner in this premises and it cannot be expected that all times he will continue to live in the house of the neighbor. The bonafide need of the landlord had been disregarded; the testimony has been mis-read. This is an illegality which needs to be cured.

13. In this back ground the impugned order suffers from an infirmity; it is accordingly set aside. Eviction petition of the landlord is decreed.

ILR (2012) II DELHI 626
MAC. APP.

RELIANCE GENERAL INSURANCE CO. LTD. ....APPELLANT

VERSUS

LEELA WATI & ORS. ....RESPONDENT

(G.P. MITTAL, J.)

MAC. APP. NO. : 513/2010 DATE OF DECISION: 19.01.2012

Motor Vehicle Act, 1988—Compensation for death—The Appellant Reliance General Insurance Company Limited impugns the judgment dated 02.06.2010 passed by the Motor Accident Claims Tribunal, (the Tribunal) whereby a compensation of Rs.44,52,100/- was awarded on account of the death of Ram Nayak Mishra, who was working as an Air Conditioning Engineer in Northern Railway and was aged about 59 years at the time of the accident—The sole contention raised on behalf of the Appellant is that the actual income of the deceased is to be taken into consideration to compute the loss of dependency. A large component in the salary was for overtime which was not regular income and therefore, could not have been taken into

account.—The basic pay of the deceased was Rs.14,260/-. He would be entitled to 30% of the pay towards House Rent Allowance (HRA) also, if he would not have opted for the govt. accommodation. It is well settled that all perquisites are to be taken into consideration for the purpose of computing the loss of dependency—Although, it appears that the deceased was almost regularly getting overtime allowance ranging between Rs. 10,000/- to 35,000/- per month. Since the deceased was to retire just after 10-11 months, a sum of Rs. 10,000/- only as overtime allowance, shall be taken for computing the loss of dependency—After adding the national sum of Rs.75,000/- under conventional heads as granted by the Tribunal, the overall compensation comes to Rs.21,26,460/- The compensation is thus reduced from Rs. 44,52,100/- to Rs. 21,26,460/- The excess amount of Rs. 23,25,640/- along with the up-to date interest earned, if any, during the pendency of the Appeal, shall be refunded to the Appellant Insurance Company through its counsel. The statutory amount of Rs. 25.000/- shall also be returned.

The basic pay of the deceased was Rs.14,260/-. He would be entitled to 30% of the pay towards House Rent Allowance (HRA) also, if he would not have opted for the govt. accommodation. It is well settled that all perquisites are to be taken into consideration for the purpose of computing the loss of dependency. In **Raghuvir Singh Matolya & Ors. v. Hari Singh Malviya & Ors.,** (2009) 15 SCC 363, it was held that House Rent Allowance (HRA) is to be included in the deceased's income for computation of the loss of dependency. **(Para 5)**

Important Issue Involved: All perquisites are to be taken into consideration for the purpose of computing the loss of dependency.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Mr. Sameer Nandwani, Advocate.

FOR THE RESPONDENT : Mr. S.N. Parashar, Adv. for R-1 to R-5, Ms. Punam Singh Advocate, For Mr. Kumar Rajesh Singh, Advocate For Northern Railways.

CASE REFERRED TO:

1. *Raghuvir Singh Matolya & Ors.* vs. *Hari Singh Malviya & Ors.,* (2009) 15 SCC 363.

RESULT: Allowed.

G.P. MITTAL, J. (ORAL)

1. The Appellant Reliance General Insurance Company Limited impugns the judgment dated 02.06.2010 passed by the Motor Accident Claims Tribunal, (the Tribunal) whereby a compensation of '44,52,100/- was awarded on account of the death of Ram Nayak Mishra, who was working as an Air Conditioning Engineer in Northern Railways and was aged about 59 years at the time of the accident.

2. The sole contention raised on behalf of the Appellant is that the actual income of the deceased is to be taken into consideration to compute the loss of dependency. A large component in the salary was for overtime which was not regular income and therefore, could not have been taken into account.

3. Per contra, learned counsel for the Respondents/Claimants submits that the deceased was working as an Air Conditioning Engineer in the Indian Railways, the overtime allowance was regularly being paid to the deceased and the same was rightly considered by the Tribunal.

4. To know the exact nature of the allowance being paid, this Court by order dated 31.10.2011 directed examination of the competent officer of the Northern Railways to prove the deceased's salary. Consequently, statement of Raj Kishore, Assistant Divisional Finance Manager was recorded, who proved that the salary for the month of September, 2008 was Rs. 54,117/- which included a component of Rs. 33,535/- towards the overtime, Rs. 1908/- towards travelling allowance and Rs. 696/-

towards the transport allowance. Similarly, in the salary for the month of November, 2008, which was paid in December, 2008, a sum of Rs. 35,997/- was paid as the overtime allowance; Rs. 3016/- towards the transport allowance and Rs. 3582/- as travelling allowance. The witness stated that the travelling allowance as mentioned in the breakup of the salary pertains to the journey undertaken by him during the course of the employment. The salary chart Ex. 'C' to 'G' for the month of July to November, 2008 was filed. Another certificate Ex. 'A' showing the gross amount and the net amount paid to the deceased was also proved. The witness also deposed that the Railway accommodation is to be vacated by the family of the deceased employee after the prescribed period under the Rules.

5. The basic pay of the deceased was Rs.14,260/-. He would be entitled to 30% of the pay towards House Rent Allowance (HRA) also, if he would not have opted for the govt. accommodation. It is well settled that all perquisites are to be taken into consideration for the purpose of computing the loss of dependency. In **Raghuvir Singh Matolya & Ors. v. Hari Singh Malviya & Ors.,** (2009) 15 SCC 363, it was held that House Rent Allowance (HRA) is to be included in the deceased's income for computation of the loss of dependency.

6. In my view the following amounts are to be included in the deceased's pay:-

(i) Basic pay i.e. Rs. 14,260/-.

(ii) Dearness allowance i.e. Rs. 2282/- (16% of 14,260/-).

(iii) House Rent Allowance i.e. 4386/- (30% of 14,260/-).

7. Although, it appears that the deceased was almost regularly getting overtime allowance ranging between Rs. 10,000/- to Rs. 35,000/- per month. Since the deceased was to retire just after 10-11 months, a sum of Rs. 10,000/- only as overtime allowance, shall be taken for computing the loss of dependency.

8. Thus, the deceased's monthly salary works out as Rs. 30,928/- (14,260/- + 2282/- + 4386/- + 10,000/-). After deducting the income tax liability; one-third towards the personal expenses and on applying the multiplier of '9', the loss of dependency works out as Rs. 20,51,460/- (30,928/- x 12 – 29,227/- (income tax) – 1/3 x 9).

9. After adding the notional sum of Rs. 75,000/- under conventional heads as granted by the Tribunal, the overall compensation comes to Rs. 21,26,460/-. The compensation is thus reduced from Rs. 44,52,100/- to Rs. 21,26,460/-.

10. The excess amount of Rs. 23,25,640/- along with the up-to-date interest earned, if any, during the pendency of the Appeal, shall be refunded to the Appellant Insurance Company through its counsel. The statutory amount of Rs. 25,000/- shall also be returned.

11. By the order of this Court dated 06.08.2010, 60% of the awarded amount was ordered to be released in favour of the Claimants, which is in excess of Rs. 21,26,460/- which has been awarded by this Court. Respondent No.1 Leelawati, widow of the deceased and Respondent No.5 Smt. Rampati mother of the deceased, who are the main beneficiaries, are directed to refund the excess amount to the Appellant Insurance Company within four weeks.

12. The Appeal is allowed in above terms.

ILR (2012) II DELHI 630
BAIL APPLN.

SURESH KALMADI ....PETITIONER

VERSUS

CBI ....RESPONDENT

(MUKTA GUPTA, J.)

BAIL APPLN. NO. : 1692/2011 & 1515/2011 DATE OF DECISION: 19.01.2012

Indian Penal Code, 1860—Sections 120-B, 420, 467, 468, 471—Prevention of Corruption Act, 1988—Sections 13 (2) and Section 13 (1) (d)—Bail—Case of prosecution

that petitioners and other accused entered into conspiracy to eliminate all forms of competition and to ensure that the company Swiss Timing Ltd. (STL) was awarded contract for Time Scoring Result (TSR) system—Held, bail is the rule and committal to jail an exception—Refusal of bail is restriction on personal liberty of individual guaranteed under Article 21 of the Constitution—Requirements that have to be balanced are the seriousness of accusations, whether witnesses are likely to be influenced by accused and whether accused likely to flee from justice if granted bail—Prima facie case for offence u/s 467 IPC made out against petitioner—Although accusations against petitioners serious however, evidence to prove accusations is primarily documentary besides few material witnesses—If seriousness of offence on the basis of punishment provided, is the only criteria, courts would not be balancing the constitutional rights but rather recalibrating the scales of justice—Allegation made against petitioner Suresh Kalmadi of threatening witnesses and tampering evidence when witnesses were working under petitioner—Apparent that witnesses harassed and threatened only till they were working under petitioner and thereafter no influence on witnesses—Evidence on record that in past witnesses were intimidated does not prima facie show that there is any likelihood of threat to prosecution witnesses—No merit in contention of CBI counsel that mere presence of petitioners at large would intimidate witnesses—Petitioner Suresh Kalmadi in custody for over 8 month and petitioner V.K. Verma for 10 months—No allegation that petitioners are likely to flee from justice and will not be available for trial—Allegations against petitioners of having committed economic offences which resulted in loss to State exchequer by adopting policy of single vendor and ensuring contract awarded only to STL—Whether case is of exercise of discretion for ensuring best quality or a case of culpability will be decided during the course of trial—No allegation of money trail to petitioners—No evidence of petitioners threatening witnesses or interfering with evidence during investigation or trial—No allegation that any other FIR registered against petitioners—Bail applications allowed.

The Petitioner Suresh Kalmadi has been in custody for over eight months and Petitioner V.K. Verma for ten months. There is no allegation that the Petitioners are likely to flee from justice and will not be available for the trial. The allegations against the Petitioners are of having committed economic offences which have resulted in loss to the State Exchequer by adopting the policy of single vendor and ensuring that the contract is awarded only to STL. Whether it was a case of exercise of discretion for ensuring the best quality or a case of culpability will be decided during the course of trial. There is no allegation of money trial to the Petitioners. There is no evidence of the Petitioners threatening the witnesses or interfering with evidence during investigation or trial. There is no allegation that any other FIR has been registered against the Petitioners.

(Para 17)

Important Issue Involved: Seriousness of offence on the basis of punishment provided is one of the relevant factors while considering bail and not the only factor. Requirements that have to be balanced are the seriousness of accusations, whether witnesses are likely to be influenced by accused and whether accused likely to flee from justice if granted bail.

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Mr. Mukul Rohtagi, Mr. Sushil Kumar, Mr. Sidharth Luthra, Sr. Advocates with Mr. Hitesh Jain, Mr.

Sidharth Aggarwal, Ms. Sheyl Trehan, Ms. Diya Kapur, Mr. Nikhil Pillai and Mr. Aditya Wadhwa, Advocates in Bail Appln 1692 of 2011. Mr. Neeraj Kishan Kaul, Sr. Advocate with Mr. Anurabh Chowdhury, Mr. Amit Sharma, Mr. Vaibhav Tomar, Mr. Kapil Rustagi and Mr. Rakhim, Advocates.

FOR THE RESPONDENT : Mr. Dayan Krishnan and Mr. Gautam Narayan, Spl Counsels with Mr. Nikhil Menon, Advocate in both the Bail Applications.

CASES REFERRED TO:

1. *Sanjay Chandra* vs. *CBI,* 2011(13) SCALE 107.
2. *R. Vasudevan* vs. *CBI,* 166 (2010) DLT 583.
3. *State of U.P.* vs. *Amarmani Tripathi,* (2005) 8 SCC 21.
4. *Court on its own motion* vs. *CBI,* 109 (2003) DLT 494.
5. *Anil Mahajan* vs. *Commissioner of Customs & another,* 2000 III AD (Delhi) 369.
6. *Gurcharan Singh and others* vs. *State (Delhi Administration,* 1978 (1) SCC 118.
7. *Gurcharan Singh* vs. *State,* (1978)1 SCC 118.
8. *Babu Singh* vs. *State of U.P.,* (1978) 1 SCC 579.
9. *State of Rajasthan* vs. *Balchand* : (1977) 4 SCC 308.

RESULT: Application Allowed.

MUKTA GUPTA, J.

1. By these petitions the Petitioners seek bail in case FIR bearing RC-DAI-2010-A-0044 for offence under Section 120B read with Sections 420/467/468/471 IPC and Section 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act, 1988 (in short 'PC Act').

2. Learned counsel for the Petitioner Suresh Kalmadi contends that

the Petitioner was arrested on 24th April, 2011 and the charge sheet was filed on 20th May, 2011. All the offences alleged against the Petitioner are at the most punishable upto seven years except for offence under Section 467 IPC. As per the allegations set out in the charge sheet no offence under Section 467 IPC is made out against the Petitioner. Further the allegation qua forgery relates to insertion of an advertisement wherein instead of the words "Timing, Scoring or/and Result", the words "Timing, Scoring and Result" were used, the cost of which advertisement was only Rs.69,603/- which was not cleared by the Petitioner. There is no delay in the trial on account of the Petitioner. In fact after filing the charge sheet the CBI has twice filed applications as late as on 24th September, 2011 and 3rd November, 2011 for placing additional documents and further list of witnesses on record. The application dated 3rd November, 2011 has been allowed on the 4th January, 2012, and the matter is now listed for scrutiny. The allegations against the Petitioner are regarding procurement of the Time Scoring Results (TSR) and it is alleged that conditions were created so that the tender could be awarded only to the Swiss Timing Omega. According to learned counsel in fact the tender was not finalized by the organizing committee. In view of the complaints received, the matter was referred to the Central Government and the sub-committee of the Central Government consisting of senior Secretary level officers held that there was no illegality or irregularity in the procurement process and it would be appropriate to award the tender to Swiss Timing Omega. Relying on **Gurcharan Singh and others vs. State (Delhi Administration,** 1978 (1) SCC 118 and **Sanjay Chandra vs. CBI,** 2011(13) SCALE 107 it is contended that the gravity of the allegations have to be seen on the basis of the punishment prescribed by the Code and not by what the media reports. In **Sanjay Chandra** (supra) their Lordship's granted bail even though the allegation was for offences under Section 409 read with 120B IPC, which is punishable upto life. Learned counsel further contends that a number of board meetings were held and as is evident from the board meeting dated 5th July, 2008 insistence was to procure from companies that had well established record. There is no denial that Swiss Timing Omega performed in the Olympics, Asian Games and Common Wealth Games. Further even in the Common Wealth Games 2010 there is no allegation that the timings, scoring or results were not excellent. The performance was of the best quality, which was appreciated by one and all. Referring to the notes of

Mr. Jarnail Singh, Chief Executive Officer of the Common Wealth Games and Mr. V.K. Gautam, Chief Operating Officer it is contended that the notes prepared by these two officers also state that the selection of M/s Swiss Timing Omega was the correct decision in the situation. It is further contended that the medical condition of the Petitioner is that he has undergone aortic wall replacement in the year 2005 and thereafter he has been suffering from Cerebral Atrophy. He had strokes even while in the custody and once in such a situation he even received injuries. Thus the Petitioner be granted bail.

3. Learned counsel for Petitioner V.K. Verma contends that the order rejecting bail does not meet the standard of test laid down by the Hon'ble Supreme Court. The discretion has been exercised by the learned Trial Court in a casual manner. The Hon'ble Supreme Court in **Sanjay Chandra** (Supra) clearly held that merely stating that there is an apprehension of witnesses being influenced is not sufficient. Some material should be placed on record to show that the witnesses are likely to be influenced. The other aspect of the Petitioner being influential so as to be in a position to influence the witnesses is that he has deep roots in the society. The aspect of the Petitioner having deep roots in the society thus there being no likelihood of his fleeing from justice has been ignored by the Trial Court. The allegations are essentially that the Petitioner along with other co-accused conspired to change the eligibility criteria so as to benefit the Swiss Timing Omega. The company Swiss Timing Ltd.(STL) enjoys a huge reputation worldwide. Quality and reputation are not the issues raised. Criminal culpability cannot be attributed in case emphasis is on the quality. There is no allegation of any money trail or any pecuniary benefit to the Petitioner. In fact, the Petitioner himself forwarded a complaint for inquiry in view of the pseudonym complaints received. Reiterating the contentions raised on behalf of Petitioner Suresh Kalmadi, it is contended that even Jarnail Singh and V.K. Gautam in their notes stated that this was the best decision in the situation. On a note prepared by the Petitioner V.K. Verma the matter was referred to the Government for intense scrutiny. Even after the intense scrutiny the committee comprising of senior officers reiterated the decision to award tender to STL.

4. Learned counsel for the Petitioner V.K. Verma further submits that when the charge sheet was filed on 25th May, 2011, there was no

mention about the statement of Jarnail Singh, CEO as a witness. When arguments on bail were heard on 1st June, 2011, CBI produced an ante dated statement of Jarnail Singh. In his statement, Jarnail Singh disowned his note and stated that the files were only routed through him. The contents of the letter and notes are not disputed and it is an admitted fact that meetings took place. The fact that Pan American Games were not considered by the Organizing Committee was for the reason that even in the past, Olympic Games never considered Pan American Games to be a qualifying event for consideration. Even though in the meetings Pan American Games was discussed, however ultimately it was unanimously decided in the presence of two prosecution witnesses that companies, who had experience of Common Wealth Games, Asian Games and Olympics games will only be considered. Though V.K. Gautam had sent a note of dissent, however, a perusal of the minutes of the meeting show that all these aspects were discussed and a unanimous decision was taken after everybody from the Government deliberated and decided thereon.

5. To counter the allegation of the prosecution that in the Request for Proposal (RFP) instead of words "Timing, Scoring or/and Result", the words "Timing, Scoring and Result" were used i.e. the word 'or' was deliberately deleted, it is contended that everybody consistently used the words "Timing, Scoring and Result". Even Sujit Panigrahi, who is now the prosecution witness recommended option-1 i.e. there should be one single supplier for Timing, Scoring and Result and recommended the STL. This was even recommended by Vijay Kumar Gautam, who is now the star witness of the prosecution. Even the advertisement issued by Vijay Kumar Gautam before the RFP, was for Timing, Score and Result. Reliance is placed on **Court on its own motion v. CBI,** 109 (2003) DLT 494 to contend that though there is no dispute to the proposition that the police has a power to arrest, however, the arrest should be effected only if there is a need to arrest. It was held that there is a difference between the power of arrest and need to arrest. Relying upon **R. Vasudevan v. CBI,** 166 (2010) DLT 583 it is contended that being on high place in the society works as a double edged weapon, if it can be alleged that the accused can temper with the evidence and threaten the witnesses, it is also countered by the fact that the accused has roots in the society and thus there is no likelihood of absconding. Relying upon **Anil Mahajan v. Commissioner of Customs & another,** 2000 III AD

(Delhi) 369 it is contended that the bail is a rule and not jail. The purpose of keeping a prisoner in custody is not pre-trial detention. The approach of the learned Trial Court in rejecting the bail is totally casual and the only ground on which bail has been denied is that there is apprehension that the accused may influence the witnesses as they are well connected and influential persons. There is no evidence that the Petitioners tried to influence any prosecution witness. It is further submitted that a person on bail has a better position to defend himself during trial and thus, the Petitioner be granted bail who has been in custody for more than 10 months. There is no justification for keeping him behind the bars any further.

6. Learned counsel for the CBI focusses his arguments on four reasons urged by the Petitioners for grant of bail i.e. the law laid down by the Hon'ble Supreme Court in **Sanjay Chandra v. CBI and other** judgments, delay in proceedings, charge under Section 467 IPC being not made out and reliance on certain documents to show that it was a well deliberated decision wherein the witnesses and senior officers of the Government were party. It is contended that in **Sanjay Chandra** (supra) the Hon'ble Supreme Court reiterated the guidelines laid down in its earlier decisions in **Gurcharan Singh v. State,** (1978)1 SCC 118, **Babu Singh v. State of U.P.,** (1978) 1 SCC 579 and **State of U.P. v. Amarmani Tripathi,** (2005) 8 SCC 21. The ratio laid down by all the judgments is that if the accused is of such a character that his mere presence at large would intimidate the witnesses, it is a good ground to deny bail. References are made to the statements of witnesses PW2 V.K. Gautam, Chief Operating Officer, PW-1 Sujit Panigrahi, Additional Director General, Technology FA and PW6 V.K. Saxena, who have shown the influence exerted by the Petitioners and how they had been terrorized and harassed by the Petitioners. Thus, from the statement of the witnesses it is writ large that the Petitioners are disentitled to bail on account of the fact that (1) their mere presence at large would intimidate the witnesses and (2) there is tangible evidence on record to show that they have in the past intimidated persons, who are today prosecution witnesses. Further one of the co-accused has been found to be influencing a prosecution witness.

7. Learned counsel for the CBI further contends that there is no delay on account of the prosecution. During the trial after filing of the charge sheet the copies of the charge sheet and list of documents were

supplied to the accused on 24th May, 2011 when the Petitioners sought copies of the documents in E-form and the co-accused Surjit Lal sought a hard copy of the same. On 21st July, 2011 CBI supplied the copies of complete charge sheet, documents and statements in a DVD to all the accused persons. Thereafter, a request was made by the accused persons that hyper-linking be done for which CBI sought time. On 5th August, 2011 E-copies of the challans with hyperlink were furnished to the accused persons. In the meantime, three other accused surrendered before the Trial Court and E-copies of the challans were served upon them. Since some of the accused are still not available for trial, the CBI moved an application for separation of the trial, which was opposed by the Petitioners and other accused. In the meantime, CBI filed an application seeking to place on record certain additional documents and statements, which was finally decided on 4th January, 2012. The Trial Court has already directed for proceeding with the matter on day-to-day basis and thus from the perusal of the orders passed by the Trial Court, it is evident that there is no delay on account of the CBI.

8. As regards the allegations under Section 467 IPC, learned counsel for the CBI contends that the gravamen of charge against the Petitioners is that they in concert with other accused to achieve a common object entered into a conspiracy and as a part of conspiracy, Surjit Lal the co-accused forged the documents. A perusal of statements of all witnesses clearly reveals that all powers were centralized in the Petitioners and Mr. Bhanot, who were controlling all the decisions. In the charge-sheet there are prima facie allegations of forgery which have been confirmed by the CFSL report. If the Pan American Games were also included then other players in the field of this device would have also been included and thus there would have been more competition. A perusal of the letters written by the Ministry of Youth Affairs and Sports clearly shows that there was no other option but to go ahead with the decision to award contract to STL due to paucity of time. Further the Central Government examined the documents only in reference to the complaints received and not for the purpose of re-validating the action taken by the Petitioners.

9. As regards the medical condition it is submitted that the Petitioner Suresh Kalmadi's condition is stable and he is provided with the best medical treatment. His condition is all right as is evident from the fact that he even approached this Court seeking permission to attend the

Parliament. Thus, bail should not be granted to the Petitioners.

10. I have heard learned counsel for the parties. Briefly the case of the prosecution is that the Petitioner Suresh Kalmadi as the Chairman, Vishwa Kumar Verma as Director General, Lalit Kumar Bhanot, Secretary General of the Organizing Committee of the Commonwealth Games 2010, STL and other accused entered into a conspiracy to eliminate all forms of competition and ensure that STL was awarded the contract for TSR system. The Petitioners along with the other accused initially in the year 2008 attempted to nominate STL as the only eligible vendor. When this attempt was unsuccessful, in the year 2009 they issued a highly defective Expression of Interest by keeping the concerned officers i.e. Technology F.A. in dark. When this also did not bear fruit, the Petitioners with co-accused got issued a tailor made RFP to suit STL to the exclusion of other vendors. This is borne out from the fact that even prior to submitting of the bid in response to RFP on 4th November, 2009 the Petitioner Suresh Kalmadi in the presence of Petitioner V.K. Verma on 12th October, 2009 declared to the General Assembly of the CWG Federation that the TSR system would be provided by STL. In this regard on 21st March, 2009 a note was initiated by co-accused Surjit Lal (DDG Procurement) enclosing therewith an Expression of Interest (EOI) for TSR wrongly stating that the Ministry of Sports had approved the placing of the same on the website without the knowledge of Technology F.A. Further forgeries were committed by Surjit Lal to ensure publication of EOI so as to favour STL. When the officers of Technology F.A. became aware of this EOI from the newspapers/ website of the O.C. on 29th March, 2009, strong objection was raised byPW-2 Vijay Kumar Gautam in his note dated 23rd March, 2009 which was suppressed. In view of the qualifications required in the EOI, none of the major providers of TSR responded. Thus, Surjit Lal recommended that awarding of the contract for TSR to STL be considered, which recommendation was forwarded by co-accused Lalit Bhanot on 4th May, 2009 to the Ministry of Sports seeking its approval for awarding the contract to STL on a single vendor basis. However, the Government did not agree with the said recommendation and the Organizing Committee was advised to procure the TSR system through open tender. Though PW-1 Sujit Panigrahi recommended that an agreed approach to the provision of TSR system be adopted as the extent of planning and work required to deliver the services was significant, however this note was returned by the office

of Petitioner V.K. Verma with the remark that no action was required on that file and PW-1 was dissuaded from processing the matter for open tender and to prepare a scope of work for STL instead. Thereafter, a draft RFP was put up by the Technology F.A. on 29th August, 2009. Even this RFP was manipulated and tampered with and the decisions taken thereon in the 8th OCFC meeting were fabricated. In the RFP the Pan American Games were excluded so as to oust a number of players. To further disqualify a competitor of STL, the Petitioner V.K.Verma once again tampered with the conditions of RFP and got deleted the word "or" thereby making it Timing Scoring and Result Management system instead of Timing Scoring or/and Result Management system. It was falsely stated that the decisions to delete the word "or" was taken on the directions of PW-3 Rahul Verma, Joint Secretary IST, Ministry of Youth Affairs and Sports. In fact no such meeting took place. In order to suppress the dissent, PW-2 V.K. Gautam was divested of his supervision of the Technology F.A. and vide order dated 13th October, 2009 the Petitioner Suresh Kalmadi entrusted it to Petitioner V.K. Verma. Thereafter on 6th November, 2009 V.K. Gautam was removed from OCFC and Sujit Panigrahi was superseded by the Petitioner Suresh Kalmadi by appointing one Sandeep Arya as ADJ Technology.

11. Though much has been stated by the learned counsel for the Petitioner that V.K. Gautam was removed from OCFC because the Government wanted Jarnail Singh to be adjusted and that in fact Jarnail Singh was a party to all the decisions, prima facie at this stage it cannot be said that no case for conspiracy for offence punishable under Section 467 IPC is made out on the facts alleged as there has been systematic manipulation of records to ensure that the contract is awarded to STL. At this stage the allegations of the prosecution have to be taken on their face value. This is an issue which will have to be decided by the Trial Court during trial on appreciation of evidence.

12. However, the issue that is required to be considered by this Court at this stage is whether the Petitioners are entitled to grant of bail when the investigation is admittedly complete and charge-sheet and all other documents under Section 173(8) Cr.P.C. have been filed. In **Sanjay Chandra** (supra) their Lordships held:

> "14. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance

of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, 'necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson.

15. In the instant case, as we have already noticed that the "pointing finger of accusation" against the Appellants is 'the seriousness of the charge'. The offences alleged are economic offences which has resulted in loss to the State exchequer. Though, they contend that there is possibility of the Appellants tampering witnesses, they have not placed any material in support of the allegation. In our view, seriousness of the charge is, no doubt, one of the relevant considerations while considering bail applications but that is not the only test or the factor: The other factor that also requires to be taken note of is the punishment that could be imposed after trial and conviction, both under the Indian Penal Code and Prevention of Corruption Act. Otherwise,

if the former is the only test, we would not be balancing the Constitutional Rights but rather "recalibration of the scales of justice." The provisions of Cr.P.C. confer discretionary jurisdiction on Criminal Courts to grant bail to accused pending trial or in appeal against convictions, since the jurisdiction is discretionary, it has to be exercised with great care and caution by balancing valuable right of liberty of an individual and the interest of the society in general. In our view, the reasoning adopted by the learned District Judge, which is affirmed by the High Court, in our opinion, a denial of the whole basis of our system of law and normal rule of bail system. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty. If such power is recognized, then it may lead to chaotic situation and would jeopardize the personal liberty of an individual. This Court, in **Kalyan Chandra Sarkar v. Rajesh Ranjan:** (2005) 2 SCC 42, observed that "under the criminal laws of this country, a person accused of offences which are non-bailable, is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 of the Constitution, since the same is authorized by law. But even persons accused of non- bailable offences are entitled to bail if the Court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the Court is satisfied by reasons to be recorded that in spite of the existence of prima facie case, there is need to release such accused on bail, where fact situations require it to do so."

16. This Court, time and again, has stated that bail is the rule and committal to jail an exception. It is also observed that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution. In the case of **State of Rajasthan v. Balchand :** (1977) 4 SCC 308, this Court opined:

> "2. The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences

or intimidating witnesses and the like, by the Petitioner who seeks enlargement on bail from the Court. We do not intend to be exhaustive but only illustrative.

3. It is true that the gravity of the offence involved is likely to induce the Petitioner to avoid the course of justice and must weigh with us when considering the question of jail. So also the heinousness of the crime. Even so, the record of the Petitioner in this case is that, while he has been on bail throughout in the trial court and he was released after the judgment of the High Court, there is nothing to suggest that he has abused the trust placed in him by the court; his social circumstances also are not so unfavourable in the sense of his being a desperate character or unsocial element who is likely to betray the confidence that the court may place in him to turn up to take justice at the hands of the court. He is stated to be a young man of 27 years with a family to maintain. The circumstances and the social milieu do not militate against the Petitioner being granted bail at this stage. At the same time any possibility of the absconsion or evasion or other abuse can be taken care of by a direction that the Petitioner will report himself before the police station at Baren once every fortnight.""

13. Thus the requirements that have to be balanced at this stage are the seriousness of the accusations, whether the witnesses are likely to be influenced by the Petitioners being enlarged on bail during trial and whether the accused are likely to flee from justice if released on bail. As stated earlier, prima facie a case for offence under Section 467 IPC is made out, the punishment prescribed for which is up to life imprisonment. Thus, the accusations against the Petitioners are serious in nature. However, the evidence to prove accusations is primarily documentary in nature besides a few material witnesses. As held in **Sanjay Chandra** (supra) if seriousness of the offence on the basis of punishment provided is the only criteria, the Courts would not be balancing the Constitutional Rights but rather recalibrating the scales of justice.

14. Learned counsel for the CBI has strenuously contended that the witnesses were threatened and harassed by the Petitioners who permitted

every course of action to be taken only as per their desire. In this regard statements of PW-1 Sujit Panigrahi, PW-2 V.K. Gautam and PW-6 V.K. Saxena have been relied upon. PW-1 Sujit Panigrahi has alleged that he was harassed and totally sidelined in all the matters. The witness was issued a memo with false allegations resulting in the witness giving resignation to the Petitioner Suresh Kalmadi on 26th November, 2009. The resignation was not accepted at that time and further harassment followed. The witness even asked for being relieved on health grounds as the maltreatment was affecting him and finally on 20th January, 2010 he was relieved of his duty and one Sandeep Arya was brought in, who could manage the things as per the desire of the Petitioners and co-accused. PW-2 V.K. Gautam has stated that due to falsification and manipulation of records, heated arguments ensued between him and V.K. Verma the Petitioner herein, and he threatened to expose the manipulation. However, the Petitioner V.K. Verma contemptuously stated that he was not bothered about it and PW-2 could do what he wanted. PW-2 was removed from the OCFC on 6th November, 2009. PW-2 also had an exchange of words with the Petitioner Suresh Kalmadi on 13th October, 2009 whereafter the work of Technology F.A. was taken away from him and he was put under V.K. Verma. According to this witness the situation in O.C. became so unbearable that he proceeded on long leave from 20th December, 2009 citing personal reasons. PW-6 V.K. Saxena has stated that Kalmadi told him that STL had to be selected for the TSR system and Verma assured that he was sure that the Committee members knew how this had to be done. Petitioner V.K. Verma also threatened the witness PW-6 that if he qualified M/s. MSL he will have to face a CBI enquiry. Thus, to release the pressure being exerted on PW-6 to select STL only, PW-6 recorded his reasons for passing both STL and MSL and circulated his views to all members of the Committee which views formed a part of the Minutes of the Committee's decision. PW-1 Sujit Panigrahi who was also Technology expert agreed with the views of PW-6. Thereafter, Petitioner Suresh Kalmadi got angry with PW-6 and expressed his displeasure by observing that he knew how to get it corrected.

15. Thus, in nutshell the allegations of threatening the witnesses and tampering with the evidence are when the witnesses were working under the Petitioners and they were threatened and harassed to toe the line of the Petitioners. However, whether the said threat can raise an apprehension that the Petitioners are likely to influence the witnesses

during the trial is an issue which has to be examined by this Court. It may be noted that the statements of these witnesses i.e. PW-1, PW-2 and PW-6 were recorded by the CBI when the Petitioners had not been arrested. Thus, it is apparent that the witnesses were harassed and threatened only till they were working under the Petitioners. Thereafter there was no influence on the witnesses and they made their statements fearlessly before the CBI. Thus, the evidence on record that in the past witnesses were intimidated does not prima facie shows that there is any likelihood of threat to the prosecution witnesses. I find no merit in the contention of the learned counsel for the CBI that the mere presence of the Petitioners at large would intimidate the witnesses. Further one co-accused who was actually found influencing the prosecution witness is not the Petitioner before this Court.

16. As regards delay in trial, it may be noted that the charge sheet was filed on the 20th May, 2011 and thereafter twice supplementary charge sheets with list of witnesses and documents have been filed. After the charge sheet was filed, time was consumed in providing it in E-form with hyperlinking. After the scrutiny of the supplementary charge, the matter will now be listed for arguments on charge. Though the learned Trial Court has directed that the trial be conducted on day to day basis, however, in the main charge sheet itself 49 witnesses have been cited. Thereafter, further witnesses have been cited in the two supplementary charge sheets. Thus, the trial is likely to take time.

17. The Petitioner Suresh Kalmadi has been in custody for over eight months and Petitioner V.K. Verma for ten months. There is no allegation that the Petitioners are likely to flee from justice and will not be available for the trial. The allegations against the Petitioners are of having committed economic offences which have resulted in loss to the State Exchequer by adopting the policy of single vendor and ensuring that the contract is awarded only to STL. Whether it was a case of exercise of discretion for ensuring the best quality or a case of culpability will be decided during the course of trial. There is no allegation of money trial to the Petitioners. There is no evidence of the Petitioners threatening the witnesses or interfering with evidence during investigation or trial. There is no allegation that any other FIR has been registered against the Petitioners.

18. In the facts and circumstances of the case, I am inclined to bail to the Petitioners. It is, therefore, directed that the Petitioners be released on bail on their furnishing a personal bond in the sum of Rs.5 lakhs with two sureties of the like amount each, subject to the satisfaction of the learned Trial Court. The Petitioners will not leave the Country without the prior permission of the learned Trial Court.

The Petitions stand disposed of accordingly. Order dasti.

ILR (2012) II DELHI 646
RFA

IFCI VENTURE CAPITAL FUNDS LIMITED ....PETITIONER

VERSUS

SANTOSH KHOSLA & ORS. ....RESPONDENTS

(VALMIKI J. MEHTA, J.)

RFA. NO. : 80/2004 DATE OF DECISION: 22.02.2012

Limitation Act, 1963—Article 113—Regular First Appeal filed against the impugned judgment of the trial Court dated 18.10.2003 dismissing the suit filed by the appellant/plaintiff for recovery of Rs. 3,04,597.60/-— Held: The period of three years arises in the facts of the present case not from the date of the grant of the loan, but in fact from the date when default was committed inasmuch as the loan was repayable over a period of many years and in installments. In such a case, limitation will commence from the date of the default and not from the date of grant of loan. Suits for recovery of amounts in these cases are governed by Article 113 and not by Article 19 of the Limitation Act, 1963.

The trial Court has also misdirected itself in dismissing the suit although a reference was made by the trial Court itself to Order 29 Rule 1 CPC. The Supreme Court in the case of **United Bank of India vs. Naresh Kumar & Ors.,** 1996 (6) SCC 660; AIR 1997 SC 3, has held that suits which are filed by the companies should not be dismissed on technical grounds with respect to filing of the same provided the same is contested to the hilt. In the present case, not only the suit is contested to the hilt by the appellant/plaintiff but also it is undisputed that the suit was instituted and filed through Mr. Mohan Singh who is the Secretary of the appellant/plaintiff-company and therefore a Principal Officer of the appellant/plaintiff-company in terms of Order 29 Rule 1 CPC. When Order 29 Rule 1 CPC refers to the competence to sign and verify the pleadings, it also includes the concomitant power to institute the suit. I have had an occasion to consider this aspect in the case of **Mahanagar Telephone Nigam Limited Vs. Smt. Suman Sharma** 2011 (1) AD (Delhi) 331 wherein I have held that once the person who signs and verifies the plaint is a Principal Officer, then, it ought to be held that the suit is validly instituted in terms of Order 29 CPC. I therefore hold that the suit was validly instituted and the trial Court was not justified in dismissing the suit by returning the finding with respect to issue No.5 of the suit not having been validly instituted. **(Para 8)**

Important Issues Involved: (A) An unqualified acknowledgment of liability gives a fresh cause of action and a fresh period of limitation to file the suit for recovery.

(B) In cases of recovery of loan, limitation will commence from the date of the default and not from the date of grant of loan.

(C) When Order 29 Rule 1 CPC refers to competence to sing and verify the pleadings, it also includes the concomitant power to institute the suit.

[Sa Gh]

CASES REFERRED TO:

1. *Mahanagar Telphone Nigam Limited* vs. *Smt. Suman Sharma* 2011 (1) AD (Delhi) 331.
2. *Syndicate Bank* vs. *R. Veeranna and Ors.* 2003 (2) SCC 15.
3. *United Bank of India* vs. *Naresh Kumar & Ors.,* 1996 (6) SCC 660; AIR 1997 SC 3.

RESULT: Appeal allowed.

VALMIKI J. MEHTA, J. (ORAL)

1. The challenge by means of this Regular First Appeal filed under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 18.10.2003 dismissing the suit filed by the appellant/plaintiff for recovery of Rs. 3,04,597.60/-.

2. The facts of the case are that the appellant/plaintiff granted a loan to the defendant Nos.1 and 2 on 12.5.1978. This loan was granted because the defendant Nos.1 and 2 needed moneys to subscribe to their portions of the share capital in the defendant No.3- company. It was pleaded by the appellant/plaintiff that no interest was payable but service charges @ 1% per annum was payable on the loan which was granted. The loan was secured by the pledge of the borrowers' entire equity share holding in defendant No.3. The defendants executed various security documents in favour of the appellant/plaintiff on 12.5.1978. An amendatory agreement was also signed on 29.4.1982 by the defendant Nos.1 and 2. It was further pleaded in the plaint that on the loan being recalled the same would cease to be interest free and interest would be payable at the current bank rate. It was pleaded that the defendants committed default in repayment of the dues and also acknowledged their liabilities on 29.4.1982, 19.12.1983 and 6.2.1986. It was pleaded that as the defendant Nos.1 and 2 committed default in repayment of the dues, the subject suit came to be filed.

3. The suit was withdrawn against the defendant No.3-company on 27.8.2001. The defendant Nos.1 and 2 contested the suit on identical pleas. The defendants contented that the plaintiff had already appropriated the proceeds of the equity shares pledged which were more than the suit

amount and therefore the suit was not maintainable. It was also pleaded that RIICO and IFCI which are the parent bodies of the original lender were necessary parties as the entire assets of the defendant No.3-company were sold by the said parent bodies.

4. After completion of pleadings, the trial Court framed the following issues:-

> "1. Whether the plaintiff has any locus standi to file the present suit? OPP
>
> 2. Whether the suit is bad for mis-joinder of necessary parties? OPD
>
> 3. Whether the suit against the defendant no.3 is not maintainable as alleged? OPD
>
> 4. Whether the suit is barred by limitation? OPD
>
> 5. Whether suit has been signed, verified and instituted by competent person? OPP
>
> 6. Whether the plaintiff is entitled to suit amount? OPP
>
> 7. Whether plaintiff is entitled to interest? If so at what rate and for what period? OPP
>
> 8. Relief."

5. The trial Court has dismissed the suit by holding that the suit was barred by limitation and was also not properly instituted. These findings have been given while answering issue No.4 pertaining to limitation and issue No.5 pertaining to institution of the suit. So far as the issue No.6 is concerned, the trial Court has held that the appellant/plaintiff had proved its case and therefore it was entitled to an amount of Rs. 2,12,746.60/-.

6. Learned counsel for the appellant/plaintiff has argued that the trial Court has misdirected itself in dismissing the suit as barred by limitation, inasmuch as para 16 of the plaint stated that the default only arose for the first time on 31.12.1983 and February, 1984 when there was default in payment of annual instalments and monthly charges respectively. It is argued that the limitation commences in a case such

as the present, where the amount has to be repaid in instalments, only when the default occurs and not from the date when the loan was granted.

7. I agree with the arguments as urged on behalf of the appellant/plaintiff. The period of three years arises in the facts of the present case not from the date of the grant of the loan, but in fact from the date when default was committed inasmuch as the loan was repayable over a period of many years and in instalments. In such a case, limitation will commence from the date of the default and not from the date of grant of loan. Suits for recovery of amounts in these cases are governed by Article 113 of the Limitation Act, 1963 and not by Article 19 of the Limitation Act, 1963. Further, I may note that the Supreme Court in the case of **Syndicate Bank Vs. R. Veeranna and Ors.** 2003 (2) SCC 15 has held that an unqualified acknowledgment of liability gives a fresh cause of action and a fresh period of limitation to file the suit for recovery. In this case, the appellant/plaintiff has exhibited and proved on record the acknowledgment of debts being Ex.P13 dated 29.4.1982 and Ex.P11 dated 6.2.1986. Therefore, looking at it from any angle of the suit having been filed within three years of 31.12.1983 i.e. on 17.12.1986 or within three years of the acknowledgment of debts, the suit is within limitation.

8. The trial Court has also misdirected itself in dismissing the suit although a reference was made by the trial Court itself to Order 29 Rule 1 CPC. The Supreme Court in the case of **United Bank of India vs. Naresh Kumar & Ors.,** 1996 (6) SCC 660; AIR 1997 SC 3, has held that suits which are filed by the companies should not be dismissed on technical grounds with respect to filing of the same provided the same is contested to the hilt. In the present case, not only the suit is contested to the hilt by the appellant/plaintiff but also it is undisputed that the suit was instituted and filed through Mr. Mohan Singh who is the Secretary of the appellant/plaintiff-company and therefore a Principal Officer of the appellant/plaintiff-company in terms of Order 29 Rule 1 CPC. When Order 29 Rule 1 CPC refers to the competence to sign and verify the pleadings, it also includes the concomitant power to institute the suit. I have had an occasion to consider this aspect in the case of **Mahanagar Telphone Nigam Limited Vs. Smt. Suman Sharma** 2011 (1) AD (Delhi) 331 wherein I have held that once the person who signs and verifies the plaint is a Principal Officer, then, it ought to be held that the

suit is validly instituted in terms of Order 29 CPC. I therefore hold that the suit was validly instituted and the trial Court was not justified in dismissing the suit by returning the finding with respect to issue No.5 of the suit not having been validly instituted.

9. In view of the above, I accept the appeal by setting aside the impugned judgment and decree. The suit of the appellant/plaintiff is decreed for a sum of Rs. 2,12,746.60/- alongwith pendente lite and future interest @ 9% per annum simple till realization. The appellant/plaintiff will also be entitled to costs of this appeal. Decree sheet be prepared. Trial Court record be sent back.

ILR (2012) II DELHI 651
W.P. (C)

ASHOKA ESTATE PVT. LTD. & ORS. ....PETITIONERS

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(BADAR DURREZ AHMED & MANMOHAN SINGH, JJ.)

W.P. (C) 6742/2000, 6671/2000, 7636/2000, 7649/2000, 7717/2000, 7718/2000, 7747/2000 AND 1082/2011

DATE OF DECISION: 23.01.2012

Res judicata—Details of the writ petition, being W.P. (C) No. 6742/2000 being taken for disposal of all the writ petitions challenge to legality and validity of communication dated 10.04.1999 issued by respondent No.2 demanding Additional Premium of Rs. 48,37,415/- and Revised Ground Rent @ Rs. 2,42,057/- per annum by applying land rates at four times of the actual notified rates in alleged violation of its own guidelines

dated 11.01.1995—Petitioner also seeks to challenge the order dated 31.07.2000 by which respondent Nos. 1 and 2 have sought to determine the lease and the two notices dated 04.10.2000 issued by respondent No.4 under Sections 4 and 7 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971—The controversy revolves around the terms communicated by respondent Nos. 1 and 2 in respect of change of user of properties of the petitioners from the residential to commercial—The petitioner's family became owner of plot No.24 Barakhamba Road, New Delhi—Building plans for construction of a Multi-storeyed commercial building submitted to Respondent No.3 were approved—Petitioners entered into Collaboration Agreement with respondent no.5 for construction of the multi storeyed commercial building. As per the agreement, Respondent no.5 was liable to pay commercialization charges to Respondents 1 and 2—Respondent 1 and 2 issued show cause notice for passing order of re-entry for construction of Multi Storeyed Building allegedly without their permission—Petitioner filed C.W. No. 909/1973 challenging the said notice dated 11.07.1973—Fresh policy guidelines issued by of respondents 1 and 2 received by petitioners—Petitioners agreed to abide by the said policy and requested for fresh terms as per policy issued—Fresh terms communicated by respondents 1 and 2 for permission for change of user of land, in purported compliance of the new policy—The fresh demand of Respondents 1 and 2 was allegedly not in accordance with the new policy. Hence petitioner wrote to respondents 1 and 2 accordingly—This Court passed a common judgment in about 22 writ petitions on similar matters as that of the petitioner, where detailed directions were given for calculation of Additional Premium and Revised Ground Rent—Respondents 1 and 2 issued fresh terms to the petitioners in purported compliance of judgment of

this Court dated 19.05.1998. The terms communicated were erroneous in the view of the petitioner—SLP filed by other parties against the judgment of High Court dated 19.05.1998 disposed off. The said parties were permitted to move the High Court for clarification and/or for further directions—Order passed by respondents No.1 and 2 purportedly re-entering the premises and determining the lease—Two notices sent by Respondent No.4 under Section 4 and 7 respectively of The public Premises (Eviction of Unauthorized Occupants) Act, 1971 and the same are under challenge—Held—It is a second round of litigation because the issue involved has already been determined by two Division Benches of this Court who had quashed the revised demand of rates at four times of the actual notified rates—The Division Bench in its judgment date 19.05.1998 clearly held that the additional premium/conversion charges for the conversion of user of land will be determined with reference to the land rates (as notified by the Government (Ministry of Urban Development) from time to time applicable on the "crucial date" as per FAR assigned to the plot prevailing on the crucial date—Policy dated 11.01.1995 is the policy which gave the formula for calculation of additional premium/ conversion charges which has already been accepted by the Division Bench in its judgment dated 19.05.1998—Calculation issued by the respondent No. 2 vide letter dated 10.04.1999 claiming additional premium/conversion charges of Rs. 48,37,415/- is erroneous and without application of mind—Land rates have been wrongly presumed to be based on FAR 100 and the same were wrongly multiplied with 4—This is so, because the FAR assigned to the plot was already 400 and there was no scope for further multiplying by 4—Annexure P-17 shows the land rate @ 600 Sq. Yds. in 1969 but did not specify the FAR—There was no change in 1970—No contrary evidence in this regard

has been produced by the respondent No.2 in order to show that the land rates in 1970 were prescribed for FAR 100—Therefore, the letter dated 10.04.1999 raising additional premium in view thereof is quashed—Notification/circular dated 18.01.1996 issued by the respondent No.2 is also quashed—The present writ petition is allowed and communication dated 10.04.1999 and the communication dated 31.07.2000 and the two communications dated 04.10.2000 are quashed—The respondent Nos. 1 and 2 are at liberty to raise their fresh demand for change of the user of the property No.24, Barakhamba Road, New Delhi in accordance with principles laid down by the Division Bench judgment dated 19.05.1998 and the finding arrived herein.

After having considered the facts and the earlier decisions on the same very point, we feel that in fact it is a second round of litigation because the issue involved has already been determined by two Division Benches of this Court who had quashed the revised demand of rates at four times of the actual notified rates. **(Para 47)**

We feel that the calculation issued by the respondent No.2 vide letter dated 10.04.1999 claiming additional premium/ conversion charges of Rs.48,37,415/- is erroneous and without application of mind. The land rates have been wrongly presumed to be based on FAR 100 and the same were wrongly multiplied with 4. This is so, because the FAR assigned to the plot was already 400 and there was no scope for further multiplying by 4. Annexure P-17 shows the land rate @ 600 Sq. Yds. in 1969 but did not specify the FAR. There was no change in 1970. No contrary evidence in this regard has been produced by the respondent No.2 in order to show that the land rates in 1970 were prescribed for FAR 100. Therefore, the letter dated 10.04.1999 raising additional premium in view thereof is quashed. We also quash the notification/circular dated 18.01.1996 issued by the respondent No.2 in view of the reasons given by us. The

said notification/circular was in the possession of the respondents, it was not brought to the notice of the Division Bench which delivered the judgment dated 19.05.1998. Since we have considered the entire matter afresh and quashed the letter dated 10.04.1999, our decision with regard to the notification/circular dated 18.01.1996 would remain the same. Therefore, the question of the writ-petitions being barred by laches or resjudicata does not arise.

(Para 50)

Important Issue Involved: When the issue has already been settled by previous decision of Division Bench, in the absence of new developments, the decision shall be binding and the charges would have to be computed on that basis.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Dr. Harish Uppal, Adv. in W.P. (C) No. 6742/2000, Mr. H.L Tiku, Sr. Adv. with Ms. Yashmeet Kaur, Adv. in W.P.(C) No. 6671/2000, Mr. Jayant Nath, Sr. Adv. with Mr. Anish Tandon, Adv. in W.P. (C) Nos. 7636, 7649 & 7717, 7718/2000, Mr. Amit Sethi, Adv. in W.P. (C) No. 7747/2000, Mr. Amit Khemka with Mr. Ranjit Adv, in W.P. (C) No. 1082/2001.

FOR THE RESPONDENTS : Mr. Parag P. Tripathi, ASG with Mr. B.V. Niren, Mr. S. Farsat and Mr. Manikya Khanna, Advs. for respondent in W.P. (C) No. 6742/2000. Mr. Ashutosh Lohia, Adv. for NDMC in W.P. (C) No. 6742/2000. Mr. Raman Oberoi, Adv. for Respondent in W.P. (C) No. 6671/2000. Mr. Mr. Parag P. Tripathi, ASG with Mr. B.V. Niren, Mr. S. Farsat and Mr. Manikya Khanna, Advs. for the respondent in W.P.(C) Nos. 7636, 7649, 7717, 7718, 7747/2000 and 1082/2001.

CASES REFERRED TO:

1. *Ashoka Estates Pvt. Ltd.* vs. *Dewan Chand Builders :* 159 (2000) DLT 233.
2. *Express Newspapers Pvt. Ltd.* vs. *UOI:* AIR (1986) SC 872.
3. *Mrs. Daya Wanti Punj & Ors.* vs. *NDMC & Ors.:* AIR 1982 Delhi 534 (DB).
4. *Chiranjilal* vs. *L&DO* W.P.(C) No. 219/1973.
5. *Rajeshwar Nath and Ors.* vs. *L&DO & Ors.,* C.W.P. No. 909/1973.

RESULT: Appeal dismissed.

MANMOHAN SINGH, J.

1. Since a common question of law is involved in all the writ petitions, the facts and details of the writ petition, being W.P. (C) No.6742/2000, are being taken for disposal of all the writ petitions.

2. The present writ petition has been filed by seventeen petitioners (hereinafter referred to as the 'petitioner') challenging the legality and validity of communication dated 10.04.1999 issued by respondent No.2 demanding Additional Premium of Rs.48,37,415/- and Revised Ground Rent @ Rs.2,42,057/- per annum by applying land rates at four times of the actual notified rates in alleged violation of its own guidelines dated 11.01.1995.

3. The petitioner also seeks to challenge the order dated 31.07.2000 by which respondent Nos. 1 and 2 have sought to determine the lease and the two notices dated 04.10.2000 issued by respondent No.4 under Sections 4 and 7 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971.

4. The controversy revolves around the terms communicated by

respondent Nos.1 and 2 in respect of change of user of properties of the petitioners from the residential to commercial.

5. The dispute in the present writ petition pertains to a plot of land being No.24, Barakhamba Road, New Delhi. The said property comprises of land measuring about 0.956 acres or equal to about 4628 sq. yds. The said property was purchased by Sh. Prem Nath by Registered Sale Deed dated 16.05.1938. The said Original Lessee had taken the property from respondent Nos.1 and 2 vide Perpetual Lease Deed.

6. That under the master plan sanctioned for Delhi, the area around Connaught Place including the area where the plot of the petitioner stood, was declared to be a commercial area. Hence, under the DDA Act and the Master Plan, it was compulsory that use of the premises should be for commercial purposes.

7. The petitioner, in view of the position under the master plan, applied to NDMC (Respondent No.3) for permission for construction of a multi storeyed commercial building on the said plot. Necessary plans were submitted to NDMC on 25.08.1970. The plans submitted to respondent No.3 NDMC were sanctioned, vide Resolution No.37/19 dated 23.10.1970.

8. Thereafter, the petitioner entered into a Collaboration Agreement dated 01.03.1972 with respondent No.5 namely M/s Dewan Chand Builders Pvt. Ltd. The said agreement dated 01.03.1972 also provides that the said M/s Dewan Chand Builders Pvt. Ltd. was responsible to pay commercialisation charges and other dues to the respondent for seeking permission to develop a multi-storeyed commercial building.

9. The builder has allegedly failed to fulfill its obligations, therefore, he has been impleaded as respondent No.5. The petitioner after receipt of sanctioned plan from NDMC, submitted an application to respondent L&DO for grant of permission for construction of a multi-storeyed commercial building. Several reminders were also sent to this effect as no permission was received. The petitioner thereafter started construction after due intimation to respondent L&DO. The respondent had issued a notice dated 11.07.1973 asking the petitioner to show cause as to why an order of re-entry may not be passed.

10. Thereafter, the petitioner along with the builder M/s Dewan

Chand Builders Pvt. Ltd. Respondent No.5 filed a writ petition being C.W.P. No. 909/1973 titled **Rajeshwar Nath and Ors. vs. L&DO & Ors.,** challenging the notice dated 11.07.1973. After filing of the writ petition, the building was completed and a number of flats were sold by the petitioners/builders.

11. Subsequently respondent Nos. 1 and 2 effected some change in their policy. A communication intimating the new policy dated 11.01.1995 was received by the petitioner. Petitioner vide letter dated 28.03.1995 wrote to Respondent L&DO accepting the said policy and also forwarded a pay order of Rs.1 lakh as a token amount. Pursuant to the said communication, the respondent L&DO on 20.10.1995 sent revised terms for grant of permission to construct a multi storeyed building.

12. In a similar controversy earlier, a writ petition was filed in 1973 being W.P.(C) No. 219/1973 titled as **Chiranjilal Vs. L&DO** on account of construction of multi-storeyed buildings located at Barakhamba Road, New Delhi. Along with that writ petition fifteen other writ petitions were filed challenging re-entry before this court during the period 1972-1991 and were tagged together. The petition filed by the petitioner and the builder were tagged along with other similar petitions that were pending before this Court.

13. When the writ-petitions came up for hearing in 1994, a statement was made by L&DO to regularize the same by a scheme. The scheme was published on 11.01.1995. Pursuant to this on 17.10.1995 demands were raised by L&DO from each of the writ petitioners.

14. The petitioner on 29.11.1995 sent a communication to respondent L&DO pointing out the defects in the terms communicated by the respondent L&DO.

15. Thereafter on 18.01.1996, an additional circular was issued by the Ministry of Urban Affairs, Government of India stating that the land rate would be on the basis that the permissible FAR on the date of construction would be taken as 100 and then multiplied on the basis of the actual FAR permitted. Thus, if the land rate is Rs.600/- and the actual FAR permitted in 1972-74 was 400 that FAR will be treated as 100. If, for example, on the date of application, the applicable FAR is 250, then the land rate would be multiplied by 2.5 to arrive at figure of Rs.1500/

- instead of Rs.600/-.

16. The batch matters along with which C.W.P. No.909/83 had been tagged, were heard by this Court and disposed off by a common judgment passed by this Court on 19.05.1998. Some of the demands raised by respondent L&DO were quashed. Respondent L&DO was given 6 weeks time to raise fresh demands on the basis of the directions given by this Court. The operative portion of the said judgment directed as follows:-

> "That the respondents, consistently with the observations made hereinabove, shall within six weeks from the date of this order, give fresh terms and conditions for the condonation of the breaches of the terms and conditions of the lease to the concerned Lessee (petitioner) irrespective of the fact whether any notice of determining the lease and/or for exercising the right of re-entry has been already given or not."

17. That the said judgment was challenged in the Supreme Court by some of the private parties. The Supreme Court vide its order dated 26.04.1999 while upholding the judgment of the Division Bench of this Court gave liberty to the parties in the SLP's to move the High Court for clarification and/or further directions on matters of calculations.

The Supreme Court also clarified that in respect of the fresh demand raised on 10.04.1999, if any parties intend to raise any issues in respect of the same, they may do so before the L&DO within a week from the order of the Supreme Court.

18. The respondent L&DO on 10.04.1999 communicated fresh terms for grant of permission for change of user to the petitioner in purported compliance with the judgment of this Court dated 19.05.1998. The respondent No.2 L&DO vide communication dated 31.07.2000 also sent a communication determining the lease and making an order of re-entry.

19. The respondent No.4 on 04.10.2000 sent two notices under Section 4 and 7 respectively of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971. The notice under Section 4 seeks to commence proceedings to take physical possession of the property from the petitioner. Similarly the notice under Section 7 seeks to commence

proceedings to recover the alleged dues claimed vide communication dated 10.04.1999 as damages.

20. It is also appropriate to mention some of the relevant dates and events for better understanding of the facts. The same are:

16.5.1938	The petitioner's family became owner of plot No.24 Barakhamba Road, New Delhi
23.10.1970	Building plans for construction of a Multi-storeyed commercial building submitted to Respondent No.3 were approved.
01.03.1972	Petitioners entered into Collaboration Agreement with respondent no.5 for construction of the multi storeyed commercial building. As per the agreement, Respondent no.5 was liable to pay commercialization charges to Respondents 1 and 2.
11.7.1973	Respondents 1 and 2 issued show cause notice for passing order of re-entry for construction of Multi Storeyed Building allegedly without their permission.
1973	Petitioner filed C.W.No.909/1973 challenging the said notice dated 11.07.1973.
11.01.1995	Fresh policy guidelines issued by of respondents 1 and 2 received by petitioners on (17.02.1995).
28.03.1995	Petitioners agreed to abide by the said policy and requested for fresh terms as per policy issued.
28.10.1995	Fresh terms communicated by respondents 1 and 2 for permission for change of user of land, in purported compliance of the new policy.
29.11.1995	The fresh demand of Respondents 1 and 2 was allegedly not in accordance with the new policy. Hence petitioner wrote to respondents 1 and 2 accordingly.
19.05.1998	This Court passed a common judgment in about 22 writ petitions on similar matters as that of the petitioner, where detailed directions were given for calculation of Additional Premium and Revised Ground Rent.

10.04.1999	Respondents 1 and 2 issued fresh terms to the petitioners in purported compliance of judgment of this Court dated 19.05.1998. The terms communicated were erroneous in the view of the petitioner.
26.04.1999	SLP filed by other parties against the judgment of High Court dated 19.5.1998 disposed off. The said parties were permitted to move the High Court for clarification and/or for further directions.
24.04.2000	Reminder sent by respondent No.2.
31.07.2000	Order passed by respondents No.1 and 2 purportedly re-entering the premises and determining the lease.
04.10.2000	Two notices sent by Respondent No.4 under Section 4 and 7 respectively of The Public Premises (Eviction of Unauthorized Occupants) Act 1971.

21. Mr Parag P. Tripathi, learned Additional Solicitor General of India appearing on behalf of the respondent No.1/Union of India submitted that although the petitioners have not directly impugned or challenged the notification/circular dated 10.01.1996 in these writ petitions, however in effect they are challenging the said notification by stating impliedly that the notification / circular is contrary to the 1995 policy. According to him the case of the respondent No.2 is covered by the 1996 notification which has not been directly impugned by the petitioners and in any event cannot be done now, because, the said challenge would be barred by laches and the principles of constructive res judicata and also by Order 2 Rule 2 CPC. He argues that in fact the Notification/Circular of 18.01.1996 has always been consistently followed by respondent No.2 and as far as the question of permitting misuse or user contrary to the lease deed is concerned, it is a matter which depends on the discretion of the lessor subject to terms of the lease deed and any policy in this regard. Therefore, the writ petitions filed by the parties are not maintainable and are liable to be dismissed.

22. We have heard the learned counsel appearing on behalf of all the petitioners. It is an admitted position that after the passing of the order dated 26.04.1999 by the Supreme Court, fresh demands were

raised by the respondents on all the petitioners. As the legal point involved in all the petitions is common, except the relevant dates and events, therefore only the facts of W.P.(C) No. 6742/2000 are given in this judgment. The result thereof would be the same.

23. The first contention of the learned counsel for the petitioner is that the calculations of additional premium in the letter dated 10.04.1999 is erroneous in view of the judgment passed by the Division Bench on 19.05.1988.

24. The respondent Nos. 1 and 2 have also demanded revised ground rent by the impugned letter dated 10.04.1999. It is obvious that the calculation of additional ground rent also depends on the correct calculation based on the crucial date and the land rates applicable on the crucial date, therefore, on the basis of policy dated 11.01.1995 of respondent Nos. 1 and 2, revised ground rent was to be calculated as follows:

> "Revised ground rent will be charged @ 2.5 of the notional premium i.e. premium arrived upon by multiplying the land area with land rates applicable at the time of crucial date".

25. The respondent Nos. 1 and 2 have also demanded the amount for permission to change the user of the premises under the headings of (a) Additional Premium (b) Revised Ground Rent (c) misuse (d) penalty for unauthorized construction and (e) interest.

26. The respondents by the impugned letter dated 10.04.1999 also demanded interest on additional premium the details of the same are given as under:

"1(ii)	Interest @ 14% p.a. from 20.01.1996 (90 days after the issue of the terms Letter dated 20.10.95) to 19.02.99 and thereafter @ Rs. 56,437/- p.m.	Rs.20,89,233.00

Similarly respondents have demanded interest on Revised Ground Rent as follows:

2(ii)	Interest @ 10% p.a. from 10.01.96 to 19.02.99 and thereafter @ Rs. 44.841/- p.m. (90 days after issue of terms letter	Rs.16,59,989.00/-

	dated 20.10.95)	
2(iv)	Interest @ 10% on the above RGR From 15.1.96 to 14.2.99 and Thereafter @ Rs. 7060/-.	Rs.1,34,275.00/-

27. Under this heading the demand of the respondents No.1 and 2 is Rs.37,49,222/-. The contention of the petitioner is that the said demands were without any basis and reason as the same were raised in 1995 and were quashed by the judgment of the Division Bench, therefore, the question of interest does not arise.

28. The Division Bench vide its judgment dated 19.05.1998 clearly quashed the notice/demand/bills raised by the lessor and no further action was taken by the respondents in pursuance thereof. Therefore, we feel that the claim of charging interest is also not sustainable as the said demand for interest is erroneous on the face of the judgment passed by the Division Bench. It is a matter of fact that while passing the judgment dated 19.05.1998 directions were issued to the respondent Nos.1 and 2 to issue fresh directions within six weeks from the date of order for condonation of the breaches of the alleged terms and conditions of the lease deed. The respondent Nos. 1 and 2 sent the fresh terms and conditions to the petitioner by the impugned letter dated 10.04.1999 demanding the interest from January 1996 to April 1999.

29. As regards the misuser charges, according to the petitioner the built-up area in the building is 1,67,231 sq. ft. or thereabout. The alleged misuse of about 9,000 sq. ft. as claimed by the respondent is without any basis whatsoever. The learned counsel for the petitioner submits that even no notice of appearance in order to clarify the fact has been issued by the respondent. It is argued by the petitioners that most of the floor space was sold to the third parties and petitioners have no control over the persons who had purchased the floor area in the multi storey building therefore, he could not have stopped the purchaser of the area or petitioner in action against them if any as the possession of the said area is lying with the third parties. The petitioner in support of his submissions has referred Clause 14 of the Flat Buyer Agreement which reads as under:

"BUYERS TO ABIDE BY THE BUILDING BYE-

LAWS OF STATUTORY AUTHORITIES

The buyer shall maintain at his/her/their cost the premises agreed to be acquired by him/her/them in the same condition, state and order in which it would be delivered to him/her/them and shall abide by all laws, bye-laws, rules and regulations of the Government/local bodies and/or of Ashoka Estate Maintenance Society or any other Authorities and local bodies and shall attend, answer and be responsible and liable for all losses, damages, fines and penalties for all deviations, violations or breach of any of the conditions or laws, bye-laws, or rules and regulations and shall always observe and perform all the terms and condition contained in this Agreement."

30. According to the petitioners, they have not committed any breach and no action can be taken against them. The petitioner has also argued that the said demand is also contrary to the provision of the Delhi Apartment Ownership Act, 1986. Section 5 of the said Act provides each apartment to be heritable and transferable. The same reads as under:

"Subject to the provisions of Section 6, each apartment, together with the undivided interest in the common areas and facilities appurtenant to such apartment, shall, for all purpose constitute as a heritable and transferable immovable property within the meaning of any law for the time being in force, and accordingly, an apartment owner may transfer his apartment and the percentage of undivided interest in he common areas and facilities appurtenant to such apartment by way of sale, mortgage, lease, gift, exchange or in any other whatsoever in the same manner, to the same extend and subject to the same rights, privileges, obligations, liabilities, investigations, legal proceedings, remedy and to penalty, forfeiture or punishment as any other immovable property or make a bequest of the same under the law applicable to the transfer and succession of immovable property."

31. In view of the above said provision, the petitioners allege that there is a procedure provided under Section 8 of Delhi Apartment Ownership Act, 1986 which provides, as to how a lessor is to deal with the flat owner who is in default. It is argued that in the present case, the respondent Nos. 1 and 2 have chosen to by-pass the said mandatory

provisions of Section 8 of the Act and the petitioner is not aware of the area being misused. No show cause notice of any sort was given to the petitioner nor any personal hearing was given to the petitioner in order to explain whether any mis-use exists or not and the petitioner has no idea about it and the respondents have, therefore, no power to levy misuse charges. No term has been pointed out by the respondent No. 2 as to under which provision they are empowered to levy the misuse charges.

32. The respondent Nos. 1 and 2 have also levied damages for alleged unauthorized construction of the area of 424 sq. fts. The detail of the same are given as under:

Damages charges Un-authorised construction Area 424 sq. fts.

(i) @ Rs.2,968/- p.a. from 17.1.79 to 31.3.79 Rs. 602.00

(ii) @ Rs.5,665/- p.a. from 1.4.79 to 31.3.81 Rs.11,330.00

(iii) @ Rs.16,677/- p.a. from 1.4.81 to 31.3.87 Rs.1,00,062.00

(iv) @ Rs.36,238/- p.a. from 1.4.87 to 7.7.88 Rs.45,968.00

Increased area -954 sq. ft.

(v) @Rs.81,537/- p.a. from 8.7.88 to 31.3.89 Rs.60,376.00

(vi) @ Rs.1,48,892/- p.a. from 1.4.89 to 31.7.90 Rs.1,98,659.00

(vii) @ Rs.2,48,153/- p.a. from 1.8.90 to 31.3.91 Rs.1,65,209.00

(viii) @ Rs.2,97,784/- p.a. from 1.4.91 to 31.3.99 Rs.2,46,7936.00

33. It is submitted by the petitioner that the total area constructed in the premises is about 1,67,231 sq. ft., the respondent Nos. 1 and 2 are claiming the damages charges for alleged unauthorised construction of 424 sq. fts. The further contention of the petitioner is that the petitioners has no idea and is not aware of the same. The levy of damages for unauthorized construction, if any, is not permissible unless the principles of natural justice is followed. No positive reply has been given by the respondents, nor any show cause notice of personal hearing was given before the levy of damages. The petitioner was unaware about the same. On the other hand the respondent Nos. 1 and 2 in the impugned letter

have alleged that they have chosen to re-enter the property vide the impugned communication dated 31.07.2000 and have claimed that right and title in the properties have ceased.

34. It is argued that the action of the respondent Nos. 1 and 2 in seeking to take possession is clearly contrary to the settled law. The Supreme Court in the case of **Express Newspapers Pvt. Ltd. vs. UOI:** AIR (1986) SC 872 clearly held that respondents 1 and 2 in similar circumstances are obliged to take possession only by due process of law which necessarily implies filing of a suit by the lessor for the enforcement of the alleged right of re-entry, if any, upon forfeiture of lease due to breach of the terms of the lease. Hence, notices sent by respondent No.4 are also misconceived. Respondent Nos. 1 and 2 cannot take the possession in the manner they are trying to do.

35. It is the admitted position that the Division Bench upheld the levy of additional premium/conversion charges to be calculated on the basis of land rates prevalent on the crucial date, i.e. the date on which the application was made for change of user to the L&DO by the land owner.

36. The Division Bench in their judgment dated 19.05.1998 clearly held that where no application for change of user had been made, the date of sanction of the building plans by the local body was to be treated as crucial date. It is also held that for the purpose of calculating the additional premium/conversion charges, the crucial date would be as under:

> "(a) The date of receipt of application (complete in all respects) for conversion accompanied by the requisite documents and the earnest money, where applicable, will be the crucial date for determining the land rates applicable for calculation of conversion charges;
>
> (b) In cases where no application for conversion has been made or where such application is made after sanction of the building plan, date of sanction of such plan by the local body will be the crucial date;
>
> (c) In cases where application has neither been made nor construction executed in accordance with the originally sanctioned

plan but is executed as per the revalidated plan, the date of revalidation of such plan will be the crucial date."

37. In the present case, the complete plans of the petitioner were sanctioned on 23rd October, 1970. The crucial date therefore, is to be taken as 23rd October, 1970 and therefore, the calculation of additional premium / conversion charges has to be on that basis.

38. The Division Bench in their decision also held that the land rates as notified on the crucial date shall be applied as follows:-

"The Additional Premium/conversion charges, for the conversion of the user of the land will be determined with reference to the land rates (as notified by the Government (Ministry of Urban Development) from time to time applicable on the crucial date as per the FAR assigned to the plot prevailing on the crucial date. In case where the land rates are linked to the prescribed FAR, the same will be increased or reduced, as the case may be proportionately with reference to the actual FAR applicable on the plot as on the crucial date but in cases where the land rates have been prescribed as per existing FAR, while calculating Additional Premium/conversion charges, the land rate need not be proportionately increased or reduced."

The additional premium is to be determined with reference to the land rate on the crucial date as per the FAR assigned to the plot, prevailing on the crucial date.

39. The land rates as notified in 1970 applied to the FAR assigned to the plot as rates were not prescribed for any specific FAR. Annexure P-17, i.e. Information for the Guidelines issued by the Government of India for the lease holders, specifies the land rates, but there is no mention of FAR. The respondents No.1 and 2 have multiplied the land rates as applicable for 1970 by 4, though there is nothing to show that the land rates stipulated in 1970 were prescribed with any particular FAR and, more so, an FAR of 100. The respondents No.1 and 2, as per the policy, dated 11.01.1995 gave the formula for calculating the additional premium / conversion charges as follows:

"50% of the difference between commercial/ residential land value as the case may be as per the rate prevailing on the crucial

date and those prevalent at the time of last transaction".

40. The case of the petitioner is that in view thereof additional premium had to be calculated on the basis of above said formula taking into account the land rate in October 1970 on the basis of FAR assigned to the plot and that the respondent No.2's letter dated 10.04.1999 claiming additional premium of Rs.48,37,415/- is contrary to the judgment passed by the Division Bench on 19.05.1998. The details of the same have already been referred to above.

41. Learned counsel for the petitioner submits that the petitioner's case is squarely covered by the reported judgment of **Mrs. Daya Wanti Punj & Ors. v. NDMC & Ors.:** AIR 1982 Delhi 534 (DB) as the facts in the two cases are almost similar. This judgment of a Division Bench has not been challenged before the Hon'ble Supreme Court and has become final. The petitioner has also referred to another judgment in CWP No. 1159/1982 **Ajit Singh Sabharwal,** which has been decided on the basis of **Mrs. Daya Wanti Punj** (supra) judgment.

The petitioner has placed on record the documents which show that the case of the petitioner is similar to the cases of **Daya Wanti Punj** (supra) and **Ajit Singh Sabharwal** (supra) wherein conversion was allowed @ Rs. 600/- per Sq. Yds. Paras 17 to 20 of the judgment passed by the Division Bench in the case of **Daya Wanti Punj** (supra) reads as under:

"(17) The Government considers the application dated 30th December, 1970 as the first application for permission for permanent change of purpose. But they are asking for charges on the basis of the rates prevailing in 1972 i.e. Rs.1500 per sq. yard. The short question for decision is whether the actual rates of 1970 should form the basis of the permission or the rates of 1972 be the basis which the Government has adopted. In this connection, we will refer to the letter of the Ministry of Works and Housing and Urban Development dated 22nd April, 1966 in which the policy regarding the "crucial date" with reference to which the charges should be calculated is laid down. The relevant portion of the letter is:

"CRUCIAL DATE OF CALCULATING THE UNEARNED

INCREASE:

For the purpose of calculating Government dues, land values prescribed by Government as prevailing at the time of according sale permission would normally be the basic....

PERMANENT CHANGE OF PURPOSE:

Principles enunciated in the foregoing paragraphs for determining the charges, and the crucial date for calculating such charges will also apply in respect of permanent change of purpose of leased premises."

(18) This letter shows that on the, 'crucial date' for calculating charges in respect of permanent change of purpose ''the land values prescribed by the Government as prevailing at the time of according permission" would normally be the basis. What is the "crucial date" is the first question? What are the "land values" prevalent on the "crucial date" is the second question? On the correspondence, we have come to the conclusion that the "crucial date" for according permission ought to be 30th December, 1970. This was the first application for permission for all practical purposes. This the Government does not dispute. It is their own stand. Now, the "land values" prevailing in 1970 were Rs.600 per sq. yard, according to the Government's own prescribed rates. We do not see how in view of this admitted stand the Government can ask for payment on the basis of Rs.1500 per sq. yard. They rely for this purpose on a letter dated 30th July 1979 which is said to be a clarification of the Government policy formulated on 21st June 1979. This letter reads: "To

33-7-79

The Land & Development Officer,

New Delhi.

Sub: Rates to be applied for pending applications received prior to 1972 for conversion to multi-storeyed commercial and Group Housing, in Delhi.

Sir,

This question of the rate to be applied for pending applications received prior to 1972 for conversion to multi-storeyed commercial and Group Housing in Delhi has been considered in consultation with Finance Division. Keeping in view the fact that the land rates during the years immediately prior to 1972 were not appreciably lower than the rates fixed for 1972 it has been decided that the rates determined for the year 1972 vide this Ministry's letter No. I-22011/1/75-III (11) dated 21st June, 1979 may be applied for the pre- 1979 cases. This has the approval of the Finance Division (Lands Unit) vide their U.O. No. 5 (13) Fd (L)/79/379 dated 26-7-1979.

Yours faithfully,
sd/-
(V.S. Rathan)
Under Secretary to the
Govt. of India."

(19) On the strength of this letter, the L.&D.O. says that he is bound by the instructions of the Government to charge Rs.1500 per sq. yard because even though it is a "pre-1972 case" it has been decided by the Government that the rates determined for the year 1972 have to be applied. We cannot see eye to eye with the Government. Nor do we see the logic of this letter. The stand of the Government is legally indefensible. A man who applies for permission in 1970 cannot be asked to pay on the basis of the land values prescribed by the Government for 1972. This is not in dispute that for 1970 the rate would be Rs.600 per sq. yard. That rate was prevalent from 1962 to 14th January, 1972. It is a fallacious reasoning to say that the land rates prior to 1972 were not "appreciably lower" than the rates fixed for 1972. There is a world of difference between land values of Rs.600 per sq. yard for 1970 and Rs.1500 per sq. yard for 1972. This is an area of interplay of market forces.

(20) From the counter-affidavit of the Government it appears that permission was given on the basis of the land rates of Rs.600 per sq. yard to three lessees, namely, (1) Life Insurance Corporation regarding 25, Curzon Road, (2) Himalaya House regarding 23, Curzon Road and (3) Hindustan Times regarding

18/20, Curzon Road. All the three lessees had applied to the Government during the period 1966 to 1968. The terms were given to them between 1968 and 1971 and they were informed that the lesser was willing to give his consent for change of purpose from residential to commercial on the basis of the land value of Rs.600 per sq. yard. There cannot be a different yard stick for the petitioners. Their case is also covered by that block of years which covered the period from 1966 to 14-1-72. They are entitled to be treated on the same footing as those three lessees, namely, L.I.C., Himalaya House, and Hindustan Times, were treated. We see no justification for adopting the basis of the land value of Rs.1500 per sq. yard which is the basis of the Government's demand. Our conclusion is that 1970 is "that point of time", to use an expression of the Government policy dated 21st June, 1979, on the basis of which market value of the land should be ascertained for the purposes of giving permission for permanent change of purpose."

42. We agree with the learned counsel for the petitioner as most of the facts of the petitioner are similar with the facts of the case of **Daya Wanti Punj** (supra) which attained finality.

43. The plans for the multi-storeyed building were sanctioned on 23.10.1970 on the basis of FAR 400. The construction was started and completed plans were sanctioned by the NDMC vide its resolution No. 17 dated 21.03.1984, after Rs.6.5 lacs was paid as compounding charges. The land rate in 1970 was Rs.600 per sq. Yds. as per brochure of the L&DO and judgment in **Dayawanti's** case (supra) and also in the case of 11, Tolstoy Marg, New Delhi. The crucial date in the case of petitioner is 23.10.1970. Thus, there is no justification for the L&DO to demand anything more from the petitioner than what was charged in case of **Daya Wanti Punj** (supra) and **Ajit Singh Sabharwal** (supra).

44. The petitioner has also referred to the judgment in **Ashoka Estates Pvt. Ltd. Vs. Dewan Chand Builders** : 159 (2000) DLT 233 in support of their submissions where it has been held that the responsibility of paying the commercialization charges is of the builders in view of the Clause of the agreement between the owners and the builders.

45. It is also submitted that the demand of the L&DO is many times

more than the actual amount received by the owners from the builders/ purchasers and by this time, all the owners / petitioners are old and are not in a position to meet the unreasonable demand of respondent No.2.

46. The case of the petitioner is also fortified by the reply dated 16.04.2010 to a query under the Right to Information Act, the relevant extract of which reads as under:

"The information asked for is as under:

As stated in the application.

The information sought is given below:

Your application was referred to A.A. B.P. (N-2), to provide the information. Now reply has received as under:-

1. Plans were sanction on 400 FAR.
2. The required copy of reso. No. 17 dated 21.03.84 of Completion Plan in r/o 24, Ashoka Road are available in record.

Copy of the same can be collected after paying the requisite fees i.e. Rs. 2/- per page.

(A.M. ATHALE)
PIO/D.C.A.-I
Tel No. 23748419"

47. After having considered the facts and the earlier decisions on the same very point, we feel that in fact it is a second round of litigation because the issue involved has already been determined by two Division Benches of this Court who had quashed the revised demand of rates at four times of the actual notified rates.

48. The Division Bench in its judgment dated 19.05.1998 clearly held that the additional premium/conversion charges for the conversion of user of land will be determined with reference to the land rates (as notified by the Government (Ministry of Urban Development) from time to time applicable on the "crucial date" as per FAR assigned to the plot prevailing on the crucial date.

49. We are of the view that the policy dated 11.01.1995 is the policy which gave the formula for calculation of additional premium/ conversion charges which has already been accepted by the Division Bench in its judgment dated 19.05.1998.

50. We feel that the calculation issued by the respondent No.2 vide letter dated 10.04.1999 claiming additional premium/conversion charges of Rs.48,37,415/- is erroneous and without application of mind. The land rates have been wrongly presumed to be based on FAR 100 and the same were wrongly multiplied with 4. This is so, because the FAR assigned to the plot was already 400 and there was no scope for further multiplying by 4. Annexure P-17 shows the land rate @ 600 Sq. Yds. in 1969 but did not specify the FAR. There was no change in 1970. No contrary evidence in this regard has been produced by the respondent No.2 in order to show that the land rates in 1970 were prescribed for FAR 100. Therefore, the letter dated 10.04.1999 raising additional premium in view thereof is quashed. We also quash the notification/circular dated 18.01.1996 issued by the respondent No.2 in view of the reasons given by us. The said notification/circular was in the possession of the respondents, it was not brought to the notice of the Division Bench which delivered the judgment dated 19.05.1998. Since we have considered the entire matter afresh and quashed the letter dated 10.04.1999, our decision with regard to the notification/circular dated 18.01.1996 would remain the same. Therefore, the question of the writ-petitions being barred by laches or resjudicata does not arise.

51. For the aforesaid reasons by following the judgment of **Daya Wanti Punj** (supra) we direct the respondents to raise demand for change of user on the basis of the rates of Rs.600/- per sq. yds.

52. The present writ petition is allowed and we quash the communication dated 10.04.1999 and the communication dated 31.07.2000 and the two communications dated 04.10.2000 as filed in the present writ petition as annexure P-12, 14, 15 and 16 respectively. The respondent Nos. 1 and 2 are at liberty to raise their fresh demand for change of the user of the property No.24, Barakhamba Road, New Delhi in accordance with principles laid down by the Division Bench judgment dated 19.05.1998 and the finding arrived by us.

53. The petitioner in Writ Petition No.6742/2010, in view of the order dated 20.11.2000 had deposited Rs. 40 lacs by order dated 10.11.2000. The said amount would be adjusted against the proposed fresh demand to be raised by the respondent Nos. 1 and 2.

54. The connected Writ Petitions being W.P.(C) Nos. 6671/2000, 7636/2000, 7649/2000, 7717/2000, 7718/2000, 7747/2000 and 1082/2001 which are having the same prayers are also disposed of with these directions.

55. All the writ petitions stand disposed of. No costs.

ILR (2012) II DELHI 674
W.P. (C)

SATYADIN MAURYA ....PETITIONER

VERSUS

DIRECTORATE OF EDUCATION & ORS. ....RESPONDENTS

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

W.P (C). NO. : 7338/2011 DATE OF DECISION: 24.01.2012

Delhi School Education Rules, 1973—Rule 120 (1)(d)(ii)—Brief facts—Petitioner, an employee of respondent No. 3 Air Force Bal Bharti School charged with, in spite of being married, having an illicit relationship with another married woman—An inquiry held and as per the report of the Inquiry Officer, the charge stood proved—Disciplinary Authority formed an opinion that a major penalty of removal from service be imposed and served notice under Rule 120(1)(d)(ii) of the Rules—Disciplinary Authority imposed the punishment as proposed—However, instead of preferring the statutory appeal under Section 8(3) of the Delhi School Education Act, 1973 present writ petition is filed and the *vires* of the aforesaid Rule is also challenged contending that Rule 120 (1) (d), in so far as requires the Disciplinary Authority to, immediately after

receiving the report of the inquiry and even before giving a chance to the charged employee to represent there against, from an opinion as to the penalty if any to be imposed, amounts to pre-judging the matter and is violative of the principles of natural justice and is contrary to the decision taken by the Supreme Court in *Managing Director, ECIL, Hyderabad Vs. B. Karunakar* (1993) 4 SCC 727. Held—The Apex Court in *Managing Director, ECIL, Hyderabad* was considering the effect of the 42nd Amendment to the Constitution whereby Article 311 of the Constitution of India was amended and came to the conclusion that in consonance with the principles of natural justice, still there would be requirement to serve upon the delinquent employee a copy of the inquiry report and give him an opportunity to make the representation against the findings recorded by the Inquiry Officer and thereafter take a decision whether to accept the findings of the Inquiry Officer or not—That would not mean that if there is a provision in any other law, Statue or Rules which still exists for affording an opportunity even against the proposed penalty, that becomes bad in law—It was a provision which was made in favour of the employee, though the same is taken away insofar as position under Article 311 of the Constitution of India qua civil servants is concerned—However such a provision available under Rule 120(1)(d)(ii) supra to the employees of School cannot be said to be contrary to the provisions of the Constitution.—Merely because punishment is proposed in the show cause notice, the Disciplinary Authority cannot be said to have pre-judged the matter or that the same results in the representation there against being considered with a closed mind or infructuous—Opinion formed at that stage is a tentative opinion formed only on the basis of the record of the inquiry proceedings and subject to the consideration of the representation by the

employee there against—Formation of the said opinion does not stop the Disciplinary Authority from forming another opinion or changing the earlier opinion after considering the representation of the employee—Such a provision is favourable to the employee and cannot be treated as bad in law—Rule 120(1)(d) gives a right of hearing to the employee not only during the inquiry but also at the stage when those findings are considered by the Disciplinary Authority—Rule 120(1)(d) expressly provides for giving to the delinquent employee notice of the opinion formed and action proposed to be taken and calling upon him to submit his representation against the proposed action and for "determining" the penalty if any to be imposed only after considering such representation of the delinquent employee—The procedure laid down leaves no manner of doubt that the opinion to be formed on consideration of the record of the inquiry is a tentative opinion and the final "determination" of guilt and penalty if any to be imposed is to take place only after considering the representation of the employee—Such a procedure is found to be fair and merely because a tentative opinion is required to be formed to enable cause to be shown there against, cannot be said to be a violation of principles of natural justice and rather such a procedure sub serves the principle.

Thus what follows from the aforesaid judgment is that the Supreme Court was considering the effect of the 42nd Amendment to the Constitution whereby Article 311 of the Constitution of India was amended and came to the conclusion that in consonance with the principles of natural justice, still there would be requirement to serve upon the delinquent employee a copy of the inquiry report and give him an opportunity to make the representation against the findings recorded by the Inquiry Officer and thereafter take a decision whether to accept the findings of the Inquiry Officer or not. That would not mean that if there is a

provision in any other law, Statute or Rules which still exists for affording an opportunity even against the proposed penalty, that becomes bad in law. As pointed above, it was a provision which was made in favour of the employee, though the same is taken away insofar as position under Article 311 of the Constitution of India qua civil servants is concerned. However such a provision available under Rule 120(1)(d)(ii) supra to the employees of School cannot be said to be contrary to the provisions of the Constitution. **(Para 6)**

We are not convinced with the argument of Mr. Shanker Raju learned counsel for the petitioner that merely because punishment is proposed in the show cause notice, the Disciplinary Authority can be said to have pre-judged the matter or that the same results in the representation there against being considered with a closed mind or infructuous. The opinion formed at that stage is a tentative opinion formed only on the basis of the record of the inquiry proceedings and subject to the consideration of the representation by the employee thereagainst. Formation of the said opinion does not stop the Disciplinary Authority from forming another opinion or changing the earlier opinion after considering the representation of the employee. Rather, such a provision is favourable to the employee and cannot be treated as bad in law. Rule 120(1)(d) gives a right of hearing to the employee not only during the inquiry but also at the stage when those findings are considered by the Disciplinary Authority. The formation of a tentative opinion by the Disciplinary Authority and communication thereof to the employee enables an employee to know exactly how the Disciplinary Authority has perceived and what inferences have been drawn from the record of inquiry i.e. what is playing in the mind of the Disciplinary Authority and to respond thereto and point out the defects and defaults in such perceptions and deductions drawn by the Disciplinary Authority from the record of inquiry. The Supreme Court in **Yoginath D. Bagde Vs. State of Maharashtra** (1999) 7

SCC 739 had occasion to consider a provision similar to Rule 120, contained in Maharashtra Civil Services (Discipline & Appeal) Rules, 1979 and held that where the Inquiry Authority has found the delinquent employee guilty of the charge framed and the Disciplinary Authority agrees with that finding, there arises no difficulty; the difficulty arises only where the Disciplinary Authority disagrees with the findings of the Inquiry Authority. It was further held that the opinion formed by the Disciplinary Authority before issuance of the notice, as required to be given under Rule 120(1)(d)(ii), is a tentative opinion and not a final opinion. In the facts of that case, it was held that the Disciplinary Authority had formed a final opinion before hearing the delinquent employee in that case and for this reason the order of dismissal was set aside. However the Apex Court did not hold such a Rule to be bad and rather held that where an opportunity of hearing is given to the delinquent employee before taking a final decision in the matter related to findings against the delinquent employee, the principles of natural justice stand complied. **(Para 7)**

Rule 120(1)(d) expressly provides for giving to the delinquent employee notice of the opinion formed and action proposed to be taken and calling upon him to submit his representation against the proposed action and for "determining" the penalty if any to be imposed only after considering such representation of the delinquent employee. The procedure laid down leaves no manner of doubt that the opinion to be formed on consideration of the record of the inquiry is a tentative opinion and the final "determination" of guilt and penalty if any to be imposed is to take place only after considering the representation of the employee. Such a procedure is found to be fair and merely because a tentative opinion is required to be formed to enable cause to be shown thereagainst, cannot be said to be a violation of principles of natural justice and rather such a procedure subserves the said principle. **(Para 8)**

Important Issue Involved: Delhi School Education Rules, 1973 Rule 120(1)(d) expressly providing for giving to the delinquent employee notice of the opinion formed and action proposed to be taken and calling upon him to submit his representation against the proposed action and for "determining" the penalty if any to be imposed only after considering such representation of the delinquent employee cannot be said to be a violation of principles of natural justice and rather such a procedure sub serves the said principle.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Shanker Raju, Advocate.

FOR THE RESPONDENTS : Ms. Purnima Maheshwari, Adv. for R-1. Ms. Rekha Palli & Ms. Punam Singh advocates. for R-2 & 3.

CASES REFERRED TO:

1. *Yoginath D. Bagde* vs. *State of Maharashtra* (1999) 7 SCC 739.
2. *Managing Director, ECIL, Hyderabad* vs. *B. Karunakar* (1993) 4 SCC 727.

RESULT: Appeal dismissed.

A.K. SIKRI, ACTING CHIEF JUSTICE (ORAL)

1. The petition impugns Rule 120(1)(d)(ii) of the Delhi School Education Rules, 1973 as ultra vires to the Constitution of India.

2. The petitioner was an employee of respondent No.3 Air Force Bal Bharti School. He was on 28th May, 2009 charged with, inspite of being married, having an illicit relationship with another married woman. An inquiry was held against the petitioner. As per the report of the Inquiry Officer, the charge stood proved against the petitioner. Thereafter the Disciplinary Authority, after considering the record of the inquiry proceedings formed an opinion that a major penalty of removal from

service, which shall not be a disqualification for future employment in any other recognized private school be imposed on the petitioner and served notice dated 13th January, 2011 under Rule 120(1)(d)(ii) of the Rules giving 15 days. time to the petitioner to represent against the same. The petitioner submitted his reply; however that did not find favour with the Disciplinary Authority which vide order dated 27.01.2011 imposed the punishment as proposed.

3. Section 8(3) of the Delhi School Education Act, 1973 provides remedy of appeal to the Delhi School Tribunal against such an order. However, instead of preferring the statutory appeal, present writ petition is filed and the vires of the aforesaid Rule is also challenged. Rule 120 reads as under:

> **120. Procedure for imposing major penalty.** – (1) No order imposing on an employee any major penalty shall be made except after an inquiry, held, as far as may be, in the manner specified below:
>
> (a) the disciplinary authority shall frame definite charges on the basis of the allegation on which the inquiry is proposed to be held and a copy of the charges together with the statement of the allegations on which they are based shall be furnished to the employee and he shall be required to submit within such time as may be specified by the disciplinary authority, but not later than two weeks, a written statement of his defence and also to state whether he desires to be heard in person;
>
> (b) on receipt of the written statement of defence, or where no such statement is received within the specified time, the disciplinary authority may itself make inquiry into such of the charges as are not admitted or if considers it necessary so to do, appoint an inquiry officer for the purpose;
>
> (c) at the conclusion of the inquiry, the inquiry officer shall prepare a report of the inquiry regarding his findings on each of the charges together with the reasons therefor;
>
> (d) the disciplinary authority shall consider the record of the inquiry and record its findings on each charge and if

the disciplinary authority is of opinion that any of the major penalties should be imposed, it shall: -

(i) furnish to the employee a copy of the report of the inquiry officer, where an inquiry has been made by such officer;

(ii) give him notice in writing stating the action proposed to be taken in regard to him and calling upon him to submit within the specified time, not exceeding two weeks, such representation as he may wish to make against the proposed action;

(iii) on receipt of the representation, if any, made by the employee, the disciplinary authority shall determine what penalty, if any, should be imposed on the employee and communicate its tentative decision to impose the penalty to the Director for his prior approval;

(iv) after considering the representation made by the employee against the penalty, the disciplinary authority shall record its findings as to the penalty which it proposes to impose on the employee and send its findings, and decision to the Director for his approval and while sending the case to the Director, the disciplinary authority shall furnish to him all relevant records of the case including the statement of allegations charges framed against the employee, representation made by the employee, a copy of the inquiry report, where such inquiry was made, and the proceedings of the disciplinary authority.

(2) No order with regard to the imposition of a major penalty shall be made by the disciplinary authority except after the receipt of the approval of the Director.

(3) Any employee of a recognised private school who is aggrieved by any order imposing on him the penalty of compulsory retirement or any minor penalty may prefer an appeal to the Tribunal.

4. Mr. Shanker Raju learned counsel for the petitioner submits that Rule 120 (1) (d), in so far as requires the Disciplinary Authority to,

immediately after receiving the report of the inquiry and even before giving a chance to the charged employee to represent thereagainst, form an opinion as to the penalty if any to be imposed, amounts to pre-judging the matter and is violative of the principles of natural justice and is contrary to the decision taken by the Supreme Court in **Managing Director, ECIL, Hyderabad Vs. B. Karunakar** (1993) 4 SCC 727. He has specifically referred to the following discussion in the said judgment:

"25. While the right to represent against the findings in the report is part of the reasonable opportunity available during the first stage of the inquiry viz., before the disciplinary authority takes into consideration the findings in the report, the right to show cause against the penalty proposed belongs to the second stage when the disciplinary authority has considered the findings in the report and has come to the conclusion with regard to the guilt of the employee and proposes to award penalty on the basis of its conclusions. The first right is the right to prove innocence. The second right is to plead for either no penalty or a lesser penalty although the conclusion regarding the guilt is accepted. It is the second right exercisable at the second stage which was taken away by the Forty-second Amendment.

30. Hence the incidental questions raised above may be answered as follows:

(i) .....

(ii) .....

(iii) .....

(iv) In the view that we have taken, viz., that the right to make representation to the disciplinary authority against the findings recorded in the enquiry report is an integral part of the opportunity of defence against the charges and is a breach of principles of natural justice to deny the said right, it is only appropriate that the law laid down in Mohd. Ramzan case should apply to employees in all establishments whether Government or non-Government, public or private. This will be the case whether there are rules governing the disciplinary proceeding or not and whether they expressly prohibit the furnishing of the copy

of the report or are silent on the subject. Whatever the nature of punishment, further, whenever the rules require an inquiry to be held, for inflicting the punishment in question, the delinquent employee should have the benefit of the report of the enquiry officer before the disciplinary authority records its findings on the charges levelled against him. Hence question (iv) is answered accordingly."

5. The contention of Mr. Shanker Raju learned counsel for the petitioner is totally misconceived. We have to bear in mind the context in which the aforesaid decision in **Managing Director, ECIL, Hyderabad** (supra) was rendered by the Apex Court. The Apex Court was considering the impact and effect of first proviso to Article 311(2) (after the 42nd Amendment). It is a matter of common knowledge that Article 311 of the Constitution, deals with civil servants in the employment of Union of India or the State. Article 311 of the Constitution of India, as it originally stood, *inter alia* provided that no government servant shall be dismissed from service or removed or reduced in rank except after holding an inquiry into the allegations for which chargesheet is to be served. In case, the charges were proved, Article 311 of the Constitution of India further provided that before imposing punishment, it was incumbent upon the Disciplinary Authority to give show cause notice to the delinquent employee stating the penalty which Disciplinary Authority had in mind. What it implied was that even before a particular punishment is imposed, the Disciplinary Authority was supposed to indicate the same in the show cause notice and the chargesheeted employee had a right to make his representation and convince the Disciplinary Authority that the punishment proposed should not be imposed. This was thus a provision which was in favour of the employees. By the 42nd Amendment to the Constitution, this provision was done away with. After this amendment, there was no need to give any show cause notice for proposed penalty. It is in this context, the question arose as to whether any show cause notice of any nature whatsoever is required to be given to the employee before imposing the penalty. The Supreme Court held that such a show cause notice would be mandatory as the same would be in conformity with the principles of natural justice irrespective of the amendment in the first proviso of Article 311(2) by 42nd Amendment. It is in this context and discussing this aspect that the observations aforesaid were made by the Supreme Court.

6. Thus what follows from the aforesaid judgment is that the Supreme Court was considering the effect of the 42nd Amendment to the Constitution whereby Article 311 of the Constitution of India was amended and came to the conclusion that in consonance with the principles of natural justice, still there would be requirement to serve upon the delinquent employee a copy of the inquiry report and give him an opportunity to make the representation against the findings recorded by the Inquiry Officer and thereafter take a decision whether to accept the findings of the Inquiry Officer or not. That would not mean that if there is a provision in any other law, Statute or Rules which still exists for affording an opportunity even against the proposed penalty, that becomes bad in law. As pointed above, it was a provision which was made in favour of the employee, though the same is taken away insofar as position under Article 311 of the Constitution of India qua civil servants is concerned. However such a provision available under Rule 120(1)(d)(ii) supra to the employees of School cannot be said to be contrary to the provisions of the Constitution.

7. We are not convinced with the argument of Mr. Shanker Raju learned counsel for the petitioner that merely because punishment is proposed in the show cause notice, the Disciplinary Authority can be said to have pre-judged the matter or that the same results in the representation thereagainst being considered with a closed mind or infructuous. The opinion formed at that stage is a tentative opinion formed only on the basis of the record of the inquiry proceedings and subject to the consideration of the representation by the employee thereagainst. Formation of the said opinion does not stop the Disciplinary Authority from forming another opinion or changing the earlier opinion after considering the representation of the employee. Rather, such a provision is favourable to the employee and cannot be treated as bad in law. Rule 120(1)(d) gives a right of hearing to the employee not only during the inquiry but also at the stage when those findings are considered by the Disciplinary Authority. The formation of a tentative opinion by the Disciplinary Authority and communication thereof to the employee enables an employee to know exactly how the Disciplinary Authority has perceived and what inferences have been drawn from the record of inquiry i.e. what is playing in the mind of the Disciplinary Authority and to respond thereto and point out the defects and defaults in such perceptions and deductions drawn by the Disciplinary Authority from the record of inquiry. The

Supreme Court in **Yoginath D. Bagde Vs. State of Maharashtra** (1999) 7 SCC 739 had occasion to consider a provision similar to Rule 120, contained in Maharashtra Civil Services (Discipline & Appeal) Rules, 1979 and held that where the Inquiry Authority has found the delinquent employee guilty of the charge framed and the Disciplinary Authority agrees with that finding, there arises no difficulty; the difficulty arises only where the Disciplinary Authority disagrees with the findings of the Inquiry Authority. It was further held that the opinion formed by the Disciplinary Authority before issuance of the notice, as required to be given under Rule 120(1)(d)(ii), is a tentative opinion and not a final opinion. In the facts of that case, it was held that the Disciplinary Authority had formed a final opinion before hearing the delinquent employee in that case and for this reason the order of dismissal was set aside. However the Apex Court did not hold such a Rule to be bad and rather held that where an opportunity of hearing is given to the delinquent employee before taking a final decision in the matter related to findings against the delinquent employee, the principles of natural justice stand complied.

8. Rule 120(1)(d) expressly provides for giving to the delinquent employee notice of the opinion formed and action proposed to be taken and calling upon him to submit his representation against the proposed action and for "determining" the penalty if any to be imposed only after considering such representation of the delinquent employee. The procedure laid down leaves no manner of doubt that the opinion to be formed on consideration of the record of the inquiry is a tentative opinion and the final "determination" of guilt and penalty if any to be imposed is to take place only after considering the representation of the employee. Such a procedure is found to be fair and merely because a tentative opinion is required to be formed to enable cause to be shown thereagainst, cannot be said to be a violation of principles of natural justice and rather such a procedure subserves the said principle.

9. The petitioner has also not stated as to which provision of the Constitution is violated by Rule 120. The rule cannot be treated as ultra vires the judgment of the Supreme Court that was rendered while interpreting an altogether different provision.

10. That apart, we are informed by Ms. Rekha Palli learned counsel appearing for the respondent School that prior to the notice dated

13.01.2011 (supra) also, the petitioner was served with the copy of the inquiry report vide covering letter dated 07.07.2010 (placed at page 50 of the paper book as Annexure P-6). On going through the said notice, it becomes clear that the petitioner was given opportunity to make representation thereagainst as well by 21.07.2010. Thus, when we see the facts of the present case, the grievance of the petitioner even on merits is unfounded. Here the petitioner was first given copy of the report along with opportunity to make representation and which opportunity he availed by submitting reply dated 16.07.2010; it is only thereafter that the tentative opinion was formed and yet another opportunity was granted to the petitioner under Rule 120(1)(d)(ii) to make representation against the proposed penalty as well. We fail to understand as to how the petitioner can feel aggrieved of such action of the School whereby he is given opportunity two times before the punishment was imposed.

11. We thus find no merit in this writ petition which is accordingly dismissed insofar as challenge to the vires of Rule is concerned. However since the remedy of statutory appeal to the Tribunal is provided to challenge the order of punishment, it would be open to the petitioner to approach the Tribunal. We may however take note of the contention of learned counsel for the respondents that even before the petitioner had approached this Court by the present writ petition, the limitation period for filing the appeal had lapsed. We make it clear that as and when such appeal is filed, it would be open to the respondents to contest the same as time barred and even to contest the application for condonation of delay, if filed.

No order as to costs.

ILR (2012) II DELHI 687
CRL. M.C.

VIKRANT KAPOOR ....PETITIONER

VERSUS

THE STATE & ORS. ....RESPONDENTS

(M.L. MEHTA, J.)

CRL. M.C. NO. : 3918/2009 DATE OF DECISION: 27.01.2012

Code of Criminal Procedure, 1973—Section—156, 200—Petitioner filed complaint in Police Station for registration of FIR against Respondent no. 2 alleging Respondent No.2 in conspiracy with other Respondents misappropriated Flat in Rohini by concealing Will bequeathing said Flat exclusively to him—FIR not registered—Petitioner, then filed complaint under Section 200 Cr.. P.C. along with application under Section 156 (3) before Metropolitan Magistrate (MM)—Application dismissed by learned MM expressing view, investigation not required by police and he directed petitioner to lead pre-summoning evidence—Aggrieved by said order, petitioner filed criminal revision before court of learned Additional Sessions Judge which was also dismissed—Petitioner assailed said order in Criminal M.CA—He urged, investigation by police necessary as part of record was maintained by DDA and Sub—Registrar, Amritsar which could not be collected by petitioner and could only be unearthed through police investigation—Held—Section 156 (3) of the Code empowers to Magistrate to direct the police to register a case and initiate investigation but this power has to be exercised judiciously on proper grounds and not in a mechanical manner. In those cases where the allegations are not very serious and the complainant himself is in possession of evidence to prove his allegations there should be no need to pass order under Section 156(3) of the Code.

The plea of the petitioner that the documentary evidence that needs to be adduced by him cannot be recovered without the help of the police is without any merit as this record being known to the petitioner can be summoned and got produced in evidence by the petitioner before the learned M.M. **(Para 13)**

Important Issue Involved: Section 156 (3) of the Code empowers to Magistrate to direct the police to register a case and initiate investigation but this power has to be exercised judiciously on proper grounds and not in a mechanical manner. In those cases where the allegations are not very serious and the complainant himself is in possession of evidence to prove his allegations there should be no need to pass order under Section 156(3) of the Code.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Harpreet Singh, Mr. Sanjay Bhardwaj Mr. Rajinder Singh Advocates.

FOR THE RESPONDENTS : Ms. Fizani Husain, APP. Mr. Manish Sharma Advocate.

CASES REFERRED TO:

1. *Meenakshi Anand Sootha* vs. *State,* 2007 (4) JCC 3230.
2. *Mohd. Yusuf* vs. *Afaq Jahan and Anr.,* AIR 2006 SC 705.
3. *Minu Kumari and Another* vs. *State of Bihar and Others,* (2006), 4 SCC 359.
4. *B.S.Joshi* vs. *State of Haryana,* (2003) 4 SCC 675.
5. *M/s. Skipper Beverages Pvt. Ltd.* vs. *State* 2001 IV AD

(Delhi) 625.

6. *All India Institute of Medical Sciences Employees' Union (Reg.) through its President* vs. *Union of India and others* (1996 (11) SCC 582).

7. *Janata Dal* vs. *H.S. Chowdhary,* (1992) 4 SCC 305.

RESULT: Petition dismissed.

M.L. MEHTA, J.

1. This petition is filed under Section 482 CrPC read with Article 227 of the Constitution of India challenging the order dated 8.9.2009 of learned ASJ in Crl.Rev.P. 254/2009 whereby the revision petition filed by the petitioner was dismissed and also challenging the order dated 10.7.2009 of learned Metropolitan Magistrate where the application of the petitioner filed under Section 156(3) CrPC was dismissed.

2. The petitioner herein had filed a complaint on 25.5.2008 with P.S. Kotla Mubarakpur alleging that the respondent No. 2 in connivance with respondent Nos. 3, 4 and 5 had conspired to misappropriate Flat No. 505, Ground Floor, Sunhari Bagh Apartments, Sector 13, Rohini, Delhi by applying for mutation of the said property in DDA. The petitioner had alleged that the property belonged to late Mrs. Swaran Kapoor (grandmother of the petitioner) and was bequeathed to the petitioner exclusively. The petitioner alleged that respondent No. 2 while applying for said mutation in DDA concealed the second page of the will wherein the fact of the property being bequeathed to the petitioner was mentioned. However, no FIR was registered by the police.

3. On 15.7.2008, the petitioner addressed a letter to the concerned DCP about non-registration of FIR by the police. On 24.3.2009, the petitioner filed before the Metropolitan Magistrate a complaint under Section 200 CrPC along with an application under Section 156(3) CrPC. The application of the petitioner was dismissed by the learned M.M., vide his order dated 10.7.2009 expressing the view that it was not a case where investigation was required by the police and asked the petitioner to lead pre-summoning evidence.

4. Aggrieved by the said order, the petitioner filed a criminal revision before the court of ASJ which came to be dismissed vide the impugned order dated 8.9.2009.

5. The impugned orders have been assailed by the petitioner on the ground that the application of the petitioner has been dismissed without assigning any reason as to why the case was not a fit case for investigation by the police and the evidence showing the commission of cognizable offences by respondent Nos. 2 to 5 are the part of the record maintained by DDA and Sub-Registrar, Amritsar which cannot be collected by the petitioner and can only be unearthed through the police investigation.

6. I have heard learned counsel for the petitioner and respondent and perused the record.

7. The main grievance of the petitioner is that learned M.M. ought to have issued directions under Section 156(3) CrPC for the registration of the FIR instead of taking cognizance of the complaint and adjourning the case for pre-summoning evidence.

8. In **Mohd. Yusuf Vs. Afaq Jahan and Anr.,** AIR 2006 SC 705, the difference between investigation as envisaged under Section 156(3) CrPC and one under Section 202 CrPC are highlighted and it was also explained that the Magistrate need not order any such investigation under Section 156(3) CrPC if he proposes to take cognizance of the offence. Once he takes cognizance of the offence, he has to follow the procedure envisaged in Chapter XV CrPC.

9. In **Meenakshi Anand Sootha Vs. State,** 2007 (4) JCC 3230 Delhi, the learned M.M. dismissed the application under Section 156(3) CrPC for giving direction to SHO to investigate the matter and instead took cognizance of the case and proceeded with the complaint case of the complainant. On facts the following observations were made by this Court:

> "10. It is well settled that under Section 156(3), CrPC, the Magistrate has not to pass the order mechanically and has to apply his judicial mind. On this point, decision of this Court, **M/s. Skipper Beverages Pvt. Ltd. v. State** 2001 IV AD (Delhi) 625, may be referred to in which it was held:
>
> 'It is true that Section 156(3) of the Code empowers to Magistrate to direct the police to register a case and initiate investigation but this power has to be exercised judiciously on proper grounds and not in a mechanical manner. In those cases

where the allegations are not very serious and the complainant himself is in possession of evidence to prove his allegations there should be no need to pass order under Section 156(3) of the Code."

10. In the light of **Meenakshi Anand** case (Supra), the learned M.M. and ASJ have exercised judicial discretion and taken cognizance of the offence and adjourned the matter for pre-summoning evidence.

11. In case of **Minu Kumari and Another Vs. State of Bihar and Others,** (2006), 4 SCC 359, the Supreme Court observed thus:

"When the information is laid with the Police, but no action in that behalf is taken, the complainant is given power under Section 190 read with Section 200 of the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the complaint/evidence recorded prima facie discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused. These aspects have been highlighted by this Court in **All India Institute of Medical Sciences Employees' Union (Reg.) through its President v. Union of India and others** (1996 (11) SCC 582). It was specifically observed that a writ petition in such cases is not to be entertained"

12. In the light of the above pronouncements, it cannot be said that the learned M.M. and ASJ committed any illegality by rejecting the application of the petitioner for registration of FIR.

13. The plea of the petitioner that the documentary evidence that needs to be adduced by him cannot be recovered without the help of the police is without any merit as this record being known to the petitioner can be summoned and got produced in evidence by the petitioner before

the learned M.M.

14. The powers of High Court under Section 482 CrPC are to be exercised sparingly and not as a matter of routine. Inherent powers of High Court under Section 482 CrPC are meant to add ex debita justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of court.

15. In **Janata Dal Vs. H.S. Chowdhary,** (1992) 4 SCC 305, the Supreme Court observed that in what circumstances the inherent powers should be exercised:

"132 The criminal courts are clothed with inherent power to make such orders as may be necessary for the ends of justice. Such power though unrestricted and undefined should not be capriciously or arbitrarily exercised, but should be exercised in appropriate cases, ex debito justitiae to do real and substantial justice for the administration of which alone the courts exist. The powers possessed by the High Court under Section 482 of the Code are very wide and the very plentitude of the power requires great caution in its exercise. Courts must be careful to see that its decision in exercise of this power is based on sound principles".

16. Further, in **B.S.Joshi Vs. State of Haryana,** (2003) 4 SCC 675, the Supreme Court reiterated the legal position that the Court's inherent powers have no limit, but should be exercised with utmost care and caution. Inherent powers must be utilized with the sole purpose to prevent the abuse of the process of the court or to otherwise secure the ends of justice.

17. In the light of the above judicial pronouncements and the facts and circumstances of the case, I do not find any illegality or impropriety in the impugned orders of the courts below.

18. The petition is accordingly dismissed.

ILR (2012) II DELHI 693
W.P. (C)

MANAGEMENT EDUCATION & RESEARCH INSTITUTE **....PETITIONER**

VERSUS

DIRECTOR HIGHER EDUCATION & ORS. **....RESPONDENTS**

(HIMA KOHLI, J.)

W.P. (C) NO. : 505/2010 **DATE OF DECISION: 27.01.2012**

(A) Delhi Professional Colleges or Institution (Prohibition of Capital Fee, Regulation of Admission Fixation of non-Exploitative Fee & Other Measures to Ensure Equity and Excellence) Act, 2007—Sections 19(1)—Petition filed for quashing of the order dated 29.12.2009 passed by a Committee whereby a penalty of Rs. 10.00 Lacs was imposed on the petitioner/Institute for compounding an offence punishable under Section 18 of the Act on Account of non-compliance of Rule 8(2)(a)(ii) of the Rules contravening the provisions of the aforesaid Act—Brief facts—Petitioner/Institute, a society engaged in providing education to students and affiliated to respondent No. 3./University—For the academic year 2008-09 for MCA course, the petitioner had advertised the management quota seats through its website and its notice board, instead of advertising the said seats in two leading newspapers (one in Hindi and one in English) as required under Rule 8(2)(a)(ii) of the Rules—Aforesaid deficiency noticed by respondent No. 3/University—Petitioner/Institute called upon to furnish explanation—Peititioner/Institute admitted to having breached the aforesaid Rule and sought condonation of the lapse and expressed its sincere regret—Respondent No. 1/Director of Higher

Education was requested to take a lenient view in the matter and impose minimum penalty as the Institute had already apologized for the error—Respondent No.1/Director of Higher Education issued a notice to show cause to the petitioner/Institute stating *inter alia* that a meeting of the Committee constituted under Section 19 of the Act was held to compound an offence under Section 18 of the Act—Noticed that the petitioner/Institute had not advertised the admission notice of the management quota seats for the MCA course in two leading newspapers as required under the said rules—The petitioner/Institute submitted its reply stating inter alia that the admission notice was displayed in the website of the Institute and on the notice board but on account of an inadvertent omission, the petitioner/Institute did not advertise the admission notice in two daily newspapers—Further explained that despite the fact that the advertisement could not be published in newspapers, there was a very good response from applicants as indicated by the fact that the Institute received 96 applications against 6 seats under the management quota—Under such circumstances, condonation of the omission was sough by the petitioner/Institute—Committee took into account the fact that it was the first time that the Institute had committed such an offence after the Act had come into force, therefore, by the impugned order dated 29.12.2009 decided to compound the offence by imposing a penalty of Rs. 10 lacs on the petitioner/Institute for contravening Rule 8(2)(a)(ii) of the Rules—Hence the present petition on the ground that the breach in the present case was purely technical in nature and no penalty ought to have been imposed on it—Held—Petitioner/Institute not complied with requirement of advertising the management quota seats in two leading newspapers—Instead, chose to display the advertisement only on its website and on the notice board—The breach committed by the

petitioner/Institute cannot be treated to be only technical in nature—The mode and manner of filling-up the management quota seats has been clearly laid out under Rule 8(2)(a)(ii) of the Rules. Once the petitioner/Institute decided to advertise the management quota seats and fill up the same, then Rule 8 of the Rules would automatically come into play and in such circumstances the term "may" used in the proviso to Section 13 as a prefix to the phrase, "be advertised and filled-up" has to be read only in the context of Rule 8(2)(a)(ii) of the Rules, which mandates that an institution ought to issue an advertisement in the prescribed manner—The petitioner/Institute cannot be permitted to interpret the said Rule to state that displaying an advertisement on its website and on its notice board should be treated as sufficient for the purpose of advertisement—The purpose and intent of the aforesaid Rule is to ensure that the notice of filling up the management quota seats gets as wide a publicity as possible—It is for this reason that the advertisements are required to be carried in two languages, Hindi and English and not only in local newspapers, but in two leading daily newspapers, besides displaying the same on the institution's website and its notice board, as prescribed in the Act and Rules.

In the case in hand, it is admitted that the petitioner/Institute had not complied with the requirement of advertising the management quota seats in two leading newspapers. Instead, the petitioner/Institute chose to display the advertisement only on its website and on the notice board. The explanation sought to be offered by the petitioner/Institute for the aforesaid breach of the terms of allotment of management quota seats, is that the same was on account of inadvertence on the part of its officers and further, that though the admission notices were not advertised in two newspapers, they were prominently displayed on its website and on the notice board. It is pertinent to note that the aforesaid

admission of the mistake committed by the petitioner/Institute was reiterated by it in its letter dated 3.12.2008 addressed to respondent No.1/Director of Higher Education, wherein sincere regret was expressed with an assurance that due care would be taken in future and further, the petitioner/Institute requested that a lenient view may be taken in the matter by imposing a minimum penalty on it. **(Para 19)**

Merely because the petitioner/Institute had tendered an unqualified apology for the mistake committed by it and requested the respondent No.1/Director Higher Education to impose a minimal penalty on it for the said breach, cannot be treated as a ground to overlook the illegality committed by it in the process of filling-up the seats in the management quota. It is pertinent to note that for the contravention of such a provision, Section 18 of the Act envisages punishment of imprisonment for a term which may extend to three years, or with fine which may extend to one crore rupees, or with both. In the present case, the Committee had agreed to compound the offence so as to impose a lighter punishment on the petitioner/Institute. The punishment to be imposed on the defaulting institute has been laid down in Section 19 of the Act. The phrase "punishment" is not interchangeable with the phrase "penalty" as sought to be urged by the learned counsel for the petitioner/Institute. The term "fine" has been used in both, Sections 18 & 19 of the Act, while further specifying that in any case the said fine would not be less than '5.00 lacs. However, the manner of calculation of the fine has been left entirely to the discretion of the Committee, authorized by the Government in this behalf. **(Para 20)**

As for the contention of the learned counsel for the petitioner/Institute that the Institute ought to be entirely absolved from the penalty imposed on it as the breach committed by it is purely technical in nature and on application of the Heydon's Rule of Interpretation, it would be seen that the requirement of advertising the management quota seats was satisfied to a large extent in view of the number of applications received

by the petitioner/Institute, this Court is not inclined to accept the aforesaid argument. The breach committed by the petitioner/Institute cannot be treated to be only technical in nature as sought to be asserted by learned counsel for the petitioner/Institute. The mode and manner of filling-up the management quota seats has been clearly laid out under Rule 8(2)(a)(ii) of the Rules. Once the petitioner/Institute decided to advertise the management quota seats and fill up the same, then Rule 8 of the Rules would automatically come into play and in such circumstances, the term "may" used in the proviso to Section 13 as a prefix to the phrase, "be advertised and filled-up" has to be read only in the context of Rule 8(2)(a)(ii) of the Rules, which mandates that an institution ought to issue an advertisement in the prescribed manner. The petitioner/Institute cannot be permitted to interpret the said Rule to state that displaying an advertisement on its website and on its notice board should be treated as sufficient for the purpose of advertisement and thus, claim an option to dispense with the requirement of advertising the admission notice for filling-up the management quota seats into two leading newspapers. The purpose and intent of the aforesaid Rule is to ensure that the notice of filling-up the management quota seats gets as wide a publicity as possible. It is for this reason that the advertisements are required to be carried in two languages, Hindi and English and not only in local newspapers, but in two leading daily newspapers, besides displaying the same on the institution's website and its notice board, as prescribed in the Act and Rules.

(Para 23)

(B) Judicial Review—In the course of exercising its power under judicial review, the Court is required to examine the decision making process of an authority and not the decision itself—As held in the Supreme Court in the case of *A.P.S.R.T.C. Vs G. Sirnivas Reddy,* reported as AIR (2006) SC 1465, the power of judicial review under Article 226 lays emphasis on the decision making process, rather than the decision itself and only such an action is open to judicial review, where an order or action of the State or an authority is illegal, unreasonable, arbitrary or prompted by malafides or extraneous consideration—In the present case, even if it is assumed that the decision arrived at by the Court could have been different from the one arrived at by the Committee, as for example the quantum of fine imposed in the impugned order, could have been less than or more than that imposed by the Committee, would in itself not be a ground for interference as the Court ought not to step into the shoes of the Committee and then arrive at a different conclusion—For all the aforesaid reasons, the present petition is dismissed being devoid of merits.

It may also be noted that even otherwise, in the course of exercising its power under judicial review, the Court is required to examine the decision making process of an authority and not the decision itself. As held in the Supreme Court in the case of **A.P.S.R.T.C. Vs G. Srinivas Reddy,** reported as AIR (2006) SC 1465, the power of judicial review under Article 226 lays emphasis on the decision making process, rather than the decision itself and only such an action is open to judicial review, where an order or action of the State or an authority is illegal, unreasonable, arbitrary or prompted by malafides or extraneous consideration. In the present case, even if it is assumed that the decision arrived at by the Court could have been different from the one arrived at by the Committee, as for example, the quantum of fine imposed in the impugned order, could have been less than or more than that imposed by the Committee, would in itself not be a ground for interference as the Court ought not to step into the shoes of the Committee and then arrive at a different conclusion.

(Para 25)

Important Issue Involved: Delhi Professional Colleges or Institution (Prohibition of Capital Fee, Regulation of Admission Fixation of non—Exploitative Fee & Other Measures to Ensure Equity and Excellence) Act, 2007—Sections 19 (1) & 18 of the Act—Petitioner/Institute not complied with the requirement of advertising the management quota seats in two leading newspapers—The breach committed by the petitioner/Institute cannot be treated to be only technical in nature—The mode and manner of filling up the management quota seats has been clearly laid out under Rule 8(2)(a)(ii) of the Rules—Merely because the petitioner/Institute had tendered an unqualified apology for the mistake committed by it and requested the respondent No. 1/Director Higher Education to impose a minimal penalty on it for the said breach, cannot be treated as a ground to overlook the illegality committed by it in the process of filling-up the seats in the management quota.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Raghav Awasthi, Advocate.

FOR THE RESPONDENT : Ms. Purnima Maheshwari with Ms. Poonam Kumari & Mr. D.K. Singh, Advocates for R-1 & 2, Mr. Mukul Talwar, Advocate, for R-3.

CASES REFERRED TO:

1. *A.P.S.R.T.C.* vs. *G. Srinivas Reddy,* reported as AIR (2006) SC 1465.
2. *Ranjit Thakur* vs. *Union of India* reported as (1987) 4 SCC 611.
3. *Olga Tellis & Ors.* vs. *Bombay Municipal Corporation and Ors.* reported as (1985) Supp. 2 S.C.R. 51.
4. *M/s. Hindustan Steel Ltd.* vs. *The State of Orissa* reported as AIR 1970 SC 253.

5. *Basheshar Nath* vs. *Commissioner of Income-Tax, Delhi & Rajasthan & Anr.* reported as AIR 1959 SC 149.
6. *Bhagat Ram* vs. *State of Himachal Pradesh,* reported as AIR 1953 SC 454.

RESULT: Appeal Dismissed.

HIMA KOHLI, J. (Oral)

1. The present petition is filed by the petitioner praying inter alia for quashing of the order dated 29.12.2009 passed by a Committee authorized by the Lt.Governor, NCT of Delhi, in exercise of the powers under Section 19(1) of Delhi Professional Colleges or Institution (Prohibition of Capital Fee, Regulation of Admission Fixation of non-Exploitative Fee & Other Measures to Ensure Equity and Excellence) Act, 2007 (in short 'the Act'), whereunder a penalty of Rs. 10.00 lacs was imposed on the petitioner/Institute for compounding an offence punishable under Section 18 of the Act on account of non-compliance of Rule 8(2)(a)(ii) of the Rules made by the Government in pursuance of the powers conferred upon it under Section 23 of the Act.

2. The offence alleged against the petitioner/Institute was set out in a notice to show cause dated 12.6.2009 issued by respondent No.1/ Director Higher Education calling upon it to explain as to why penalty should not be imposed on it for contravening the provisions of the aforesaid Act, upon compounding an offence under Section 18 of the Act.

3. While issuing notice on the present writ petition, vide order dated 25.1.2010, it was directed that subject to the petitioner/Institution depositing a sum of Rs. 2.50 lacs within four weeks, without prejudice to its rights and contentions, operation of the impugned order dated 29.12.2009, would remain stayed.

4. Learned counsel for the petitioner/Institute states that the aforesaid amount was duly deposited by the petitioner/Institute and, vide order dated 19.8.2010, the interim order dated 25.1.2010 was made absolute till the decision of the petition with the condition that in the event of the petition being dismissed, the petitioner/Institute would be liable to pay interest @ 9% per annum on the stayed amount from 25.1.2010 till the date of payment. It was further directed that the amount of Rs. 2.50 lacs

deposited by the petitioner, be released to respondent No.3/University subject to final adjudication in the petition. It was however clarified that if respondent No.3/University did not take any steps for release of the amount within one month from the date of passing of the order, the amount would be kept in an interest bearing fixed deposit.

5. Counsel for respondent No.3/University states that his client had not approached the Registry for release of the aforesaid amount and therefore the Registry was required to place the amount in an interest bearing fixed deposit.

6. Before adverting to the factual matrix of the case, it would be necessary to take into consideration the relevant provisions of the Act.

7. Section 13, which deals with the manner in which admissions are to be made in an institution, that is subject to the provisions of this Act, is as under:-

> "13. An institution shall, subject to the provisions of this Act, make admission through a common entrance test to be conducted by the designated agency, in such manner, as may be prescribed :
>
> Provided that the management seats may be advertised and filled up, from the candidates who have qualified the common entrance test, by the institution in a transparent manner based on the merit at the qualifying examination."

8. Section 18 deals with the powers to convict the defaulting institution and lays down the offences and penalties, reads as under:-

> "18. Without prejudice to the penalty specified in any other law for the time being in force, whoever contravenes the provisions of this Act or the rules made thereunder shall, on conviction be punishable with imprisonment for a term which may extend to three years, or, with fine which may extend to one crore rupees, or with both."

9. Section 19 envisages compounding of offences punishable under Section 18 in a manner as stated below :

> "19.(1) Any offence punishable under Section 18 may be compounded by such officer or body as may be specially

> authorized by the Government in this behalf, either before or after the institution of the prosecution, on payment for credit to the Government of such sum as such officer or body may impose :
>
> Provided that such sum shall not, in any case, be less than five lakh rupees and, exceed the maximum amount of the five which may be imposed under this Act for the offence so compounded :
>
> Provided further that in the event of charging of excessive fee by the institution than the notified fee, the amount of compounding fee shall not be less than double the amount of fee excessively charged or five lakh rupees, whichever is higher."

10. Section 23 empowers the Government to make rules in relation to various matters including the manner of filling the management seats by the management of an institution covered under Section 13, as laid down in clause (i), sub-section (2) of Section 23.

11. The Rules framed by the Govt. of NCT of Delhi under the Act include Rule 8, which relates to allotment of seats. Relevant for consideration in the present case is Rule 8(2)(a)(ii) of the Rules, which reads as below:-

> **"8. Allotment of seats:**
>
> (1) xxx xxx xxx
>
> (2) Every institution other than a minority institution, shall provide for seats in respect of management quota, wards of defence personnel, persons with disability and others the manner as described below:-
>
> (a) Management Quota. -(i) The Chairman or Secretary of the highest management body of the institution shall furnish an affidavit to the designated agency, mentioned therein that they have followed the procedure laid down in the Act and these rules in transparent manner and that they have done so without any prejudice or undue favour. Such an affidavit shall accompany the list of successful candidates under management quota, to be lodged with the University in the manner laid down in sub-clause (viii).

(ii). The institution shall advertise the admission notice for management quota seats in at least two leading daily newspapers, one in Hindi and other in English in addition to displaying the same on the institution's website and the institution's notice Board, kept at a conspicuous place. The admission notice shall be displayed at least a fortnight before the last date for closing the admission for the concerned course in the University and shall include therein information necessary for the students seeking admission in management quota seats. The admission notice shall include herein the place for which admission forms will be available, the date, time and manner for submission of completed applications and the schedule for various admission processes of counseling. Prospective applicants shall be given a period of at least eighteen days to apply for seats under the management quota, in the aforementioned manner."

12. The factual matrix of the case lies in a narrow compass. The petitioner/Institute is a society engaged in providing education to students. This institute is affiliated to respondent No.3/University. The academic course in question, which is the subject matter of the present petition, is a three years MCA course. For the academic year 2008-09, the petitioner/Institute had advertised the management quota seats through its website and its notice board, instead of advertising the said seats in two leading newspapers (one in Hindi and one in English) as required under Rule 8(2)(a)(ii) of the Rules. When the aforesaid deficiency in filling up the management quota seats was noticed by respondent No.3/University, it brought the same to the notice of respondent No.1/Director of Higher Education vide letter dated 27.10.2008. The petitioner/Institute was also called upon to furnish an explanation.

13. Vide letter dated 02.12.2008 addressed to respondent No.1/Director of Higher Education, the petitioner/Institute admitted to having breached the aforesaid Rule and sought condonation of the lapse and expressed its sincere regret. Vide letter dated 03.12.2008 addressed by the Registrar of the petitioner/Institute to respondent No.1/Director of Higher Education, regret was expressed and the respondent No.1/Director of Higher Education was requested to take a lenient view in the matter and impose minimum penalty as the Institute had already apologized for the error. On 12.06.2009, respondent No.1/Director of Higher Education

issued a notice to show cause to the petitioner/Institute stating inter alia that a meeting of the committee constituted under Section 19 of the Act was held on 12.05.2009 to compound an offence under Section 18 of the Act as it had been noticed that the petitioner/Institute had not advertised the admission notice of the management quota seats for the MCA course in two leading newspapers as required under the said rules. The show cause notice called upon the petitioner/Institute to explain its conduct in contravention of the provisions of the Act.

14. The petitioner/Institute submitted its reply on 14.6.2009, to the notice to show cause stating inter alia that the admission notice was displayed in the website of the Institute and on the notice board but on account of an inadvertent omission, the petitioner/Institute did not advertise the admission notice in two daily newspapers. It was further explained that despite the fact that the advertisement could not be published in newspapers, there was a very good response from applicants as indicated by the fact that the Institute received 96 applications against 6 seats under the management quota. Under such circumstances, condonation of the omission was sought by the petitioner/Institute. On 7.7.2009, the Committee granted a personal hearing to the petitioner/Institute for compounding of the offence under Section 19 of the Act. After taking into consideration the submissions made by the petitioner/Institute, the Committee took into account the fact that it was the first time that the Institute had committed such an offence after the Act had come into force, therefore, by the impugned order dated 29.12.2009, it was decided to compound the offence by imposing a penalty of '10 lacs on the petitioner/Institute for contravening Rule 8(2)(a)(ii) of the Rules. The said penalty was directed to be deposited with respondent No.1/Director of Higher Education, within two weeks from the date of passing of the order.

15. The petitioner/Institute has assailed the impugned order dated 29.12.2009 on the ground that the breach in the present case was purely technical in nature and no penalty ought to have been imposed on it. Learned counsel for the petitioner/Institute states that the right to be heard is a fundamental right under Article 14 of the Constitution of India and in the present case, the said right was denied to the petitioner/Institute for the reason that the Registrar of respondent No.3/University was a member of the Committee constituted under the Act and given the

fact that respondent No.3/University itself was the complainant, he could not have been made a part of such a Committee. It is therefore submitted that on account of a conflict of interest, the petitioner/Institute has been denied the fundamental right enshrined in Article 14 of the Constitution of India. In support of his submission, learned counsel relies on the decisions in the cases of **Basheshar Nath vs. Commissioner of Income-Tax, Delhi & Rajasthan & Anr.** reported as AIR 1959 SC 149, and **Olga Tellis & Ors. Vs. Bombay Municipal Corporation and Ors.** reported as (1985) Supp. 2 S.C.R. 51.

16. It is next submitted by learned counsel for the petitioner/Institute that assuming, without admitting, that the petitioner/Institute is guilty of the offence alleged against it, the punishment of penalty of Rs. 10.00 lacs imposed on it is grossly disproportionate to the offence and therefore ought to be waived and if not waived, reduced to a large extent. He seeks to explain the aforesaid stand by pointing out that the annual fee payable by each student is Rs. 50,000/- and considering the fact that the petitioner/Institute could have allotted six seats in the management quota, at best, the Committee ought to have imposed a fine of '3.00 lacs on the petitioner/Institute by multiplying the annual fee of Rs. 50,000/- into six. Learned counsel for the petitioner/Institute relies on the judgment in the cases of **Bhagat Ram vs. State of Himachal Pradesh,** reported as AIR 1953 SC 454, **M/s. Hindustan Steel Ltd. vs. The State of Orissa** reported as AIR 1970 SC 253 and **Ranjit Thakur vs. Union of India** reported as (1987) 4 SCC 611 to urge that the Court is empowered to go into the quantum of punishment and ought to do so in the present case as the same is entirely disproportionate to the offence alleged against the petitioner/Institute. Lastly, reliance is placed on the Heydon's Rule of Interpretation to urge that the mischief, sought to be prevented by the Act ought to be kept in mind and having regard to the facts of the case, where the applications received in respect of six seats were far more than the number of seats available in the management quota, the intent and the object of the Act was satisfied even without any advertisement having been inserted by the petitioner/Institute in two national newspapers.

17. Per contra, learned counsel for respondent/University vehemently opposes the present petition and submits that a bare perusal of Section 18 of the Act reveals that it deals with "offences" and not "penalties", as sought to be urged by the learned counsel for the petitioner/Institute.

He states that equating the present case with the case of **M/s Hindustan Steel Ltd.** (supra) would be of no avail to the petitioner/Institute as the present case is not one of imposition of penalty but one where the offence has been compounded under Section 19 of the Act and a penalty has been imposed on the petitioner/Institute. He further questions the assumption on the part of the petitioner/Institute that the Registrar of respondent No.3/University is an interested party in the present case and therefore ought not to have been made a part of the Committee constituted by the Government. It is stated that the role of respondent No.3/University is only that of an informant and the Registrar cannot be treated as a complainant, as urged by the other side. He asserts that the offence envisaged under the Act is an offence against the public at large inasmuch as the Act provides for equity and excellence in professional education in the National Capital Territory of Delhi and such an object which is a laudable one, is meant for the higher good of the public at large and not to subserve the interest of respondent No.3/University. Thus, no bias could be claimed by the petitioner/Institute against the respondent No.3/University or its Registrar. Learned counsel further states that the vires of Rule 8(2)(a)(ii), sought to be challenged by the petitioner/Institute, has not been taken as a ground for challenge in the writ petition and therefore ought not be examined by the Court. Lastly, it is urged that in any case, the penalty imposed on the petitioner/Institute has been on the lower side for the reason that Section 19 of the Act envisages that penalty shall not, in any case, be less than Rs. 5.00 lacs and shall not exceed the maximum amount of fine, which is Rs. 1.00 crore, whereas, in the present case, the petitioner/Institute has been let off quite lightly with a fine of Rs. 10.00 lacs imposed on it.

18. This Court has heard the learned counsels for the parties and carefully perused the documents placed on record, as also examined the extant provisions of law as noticed herein above. It is an undisputed position that under Section 13 of the Act, the petitioner/Institution is required to make admissions through a common entrance test in the manner as prescribed by the respondent No.3/University and further that the management quota seats are required to be advertised and filled-up from amongst the candidates who have qualified the common entrance test, but in a transparent manner, based on merit at the qualifying examination. Rule 8 lays out the manner in which the allotment of seats are to be made by a college or an institute for each course. Sub-rule

2(a)(ii) of Rule 8 stipulates that an institution shall advertise the admission notice for filling up the management quota seats in at least two leading daily newspapers, one in Hindi and the other in English in addition to displaying the same on the website of the institution as also on the notice board of the institution at a conspicuous place. The timeline for display of the advertisement as also for submission of applications of prospective applicants has also been stipulated in the aforesaid Rule.

19. In the case in hand, it is admitted that the petitioner/Institute had not complied with the requirement of advertising the management quota seats in two leading newspapers. Instead, the petitioner/Institute chose to display the advertisement only on its website and on the notice board. The explanation sought to be offered by the petitioner/Institute for the aforesaid breach of the terms of allotment of management quota seats, is that the same was on account of inadvertence on the part of its officers and further, that though the admission notices were not advertised in two newspapers, they were prominently displayed on its website and on the notice board. It is pertinent to note that the aforesaid admission of the mistake committed by the petitioner/Institute was reiterated by it in its letter dated 3.12.2008 addressed to respondent No.1/Director of Higher Education, wherein sincere regret was expressed with an assurance that due care would be taken in future and further, the petitioner/Institute requested that a lenient view may be taken in the matter by imposing a minimum penalty on it.

20. Merely because the petitioner/Institute had tendered an unqualified apology for the mistake committed by it and requested the respondent No.1/Director Higher Education to impose a minimal penalty on it for the said breach, cannot be treated as a ground to overlook the illegality committed by it in the process of filling-up the seats in the management quota. It is pertinent to note that for the contravention of such a provision, Section 18 of the Act envisages punishment of imprisonment for a term which may extend to three years, or with fine which may extend to one crore rupees, or with both. In the present case, the Committee had agreed to compound the offence so as to impose a lighter punishment on the petitioner/Institute. The punishment to be imposed on the defaulting institute has been laid down in Section 19 of the Act. The phrase "punishment" is not interchangeable with the phrase "penalty" as sought to be urged by the learned counsel for the petitioner/Institute. The term

"fine" has been used in both, Sections 18 & 19 of the Act, while further specifying that in any case the said fine would not be less than '5.00 lacs. However, the manner of calculation of the fine has been left entirely to the discretion of the Committee, authorized by the Government in this behalf.

21. This Court is not inclined to accept the submission made by learned counsel for the petitioner/Institute that the fine imposed on it ought to be calculated by taking into consideration the number of seats under the management quota and then multiplying them with the fee that would have been payable by the students in respect of the first year of the course to be undertaken by them. However, even if such a yardstick was to be adopted by the Committee to assess the penalty to be imposed on the petitioner/institute, considering the fact that the course in question is a course spread over a period of three-years and there were six seats available for allotment in the management quota and the annual fee fixed by the petitioner/Institute is Rs. 50,000/- per student, then, by the end of the course, each student would be expected to have deposited a sum of '1.50 lacs with the petitioner/Institute. The said amount of Rs. 1.50 lacs, if multiplied by six seats, would total to a sum of '9.00 lacs. It may further be noted that as per the respondent No.3/University, the annual fee for the year 2008-09 for six management quota seats was Rs. 65,000/- X 6 = Rs. 3,90,000/- and the students taking admission under the said quota would have deposited a sum of Rs. 11,70,000/- with the petitioner/institute at the end of three years. This calculation would clearly demonstrate that the quantum of fine imposed by the Committee on the petitioner/Institute has been quite reasonable inasmuch as the same has been assessed as Rs. 10.00 lacs, which is on the lower side.

22. As regards the argument urged by the counsel for the petitioner/Institute that principles of natural justice have been violated in the present case for the reason that the petitioner/Institute was not afforded an appropriate opportunity of hearing and its right had been violated on account of the fact that the Registrar of respondent No.3/University was a part of the Committee, this Court finds no force in the aforesaid submission. Learned counsel for respondent No.3/University has rightly made short shrift of the said argument by pointing out that the role of the Registrar of respondent No.3/University is only regulatory in nature and in the present case, the latter had simply forwarded the information

gathered by it from the petitioner/Institute and left the matter in the hands of respondents No.1 & 2. In fact, respondents No.1 & 2 are the ones, who decided to take notice of the offence committed by the petitioner/ Institute and initiate action under the Act. The offence committed by the petitioner/institute can only be described as an offence against the public at large and not against any particular individual. Thus, by no stretch of imagination, can the respondent No.3/University be treated as a complainant in the present case. At best, the role which can be assigned to it is that of an informant of an offence committed by an institution governed under the Act.

23. As for the contention of the learned counsel for the petitioner/ Institute that the Institute ought to be entirely absolved from the penalty imposed on it as the breach committed by it is purely technical in nature and on application of the Heydon's Rule of Interpretation, it would be seen that the requirement of advertising the management quota seats was satisfied to a large extent in view of the number of applications received by the petitioner/Institute, this Court is not inclined to accept the aforesaid argument. The breach committed by the petitioner/Institute cannot be treated to be only technical in nature as sought to be asserted by learned counsel for the petitioner/Institute. The mode and manner of filling-up the management quota seats has been clearly laid out under Rule 8(2)(a)(ii) of the Rules. Once the petitioner/Institute decided to advertise the management quota seats and fill up the same, then Rule 8 of the Rules would automatically come into play and in such circumstances, the term "may" used in the proviso to Section 13 as a prefix to the phrase, "be advertised and filled-up" has to be read only in the context of Rule 8(2)(a)(ii) of the Rules, which mandates that an institution ought to issue an advertisement in the prescribed manner. The petitioner/Institute cannot be permitted to interpret the said Rule to state that displaying an advertisement on its website and on its notice board should be treated as sufficient for the purpose of advertisement and thus, claim an option to dispense with the requirement of advertising the admission notice for filling-up the management quota seats into two leading newspapers. The purpose and intent of the aforesaid Rule is to ensure that the notice of filling-up the management quota seats gets as wide a publicity as possible. It is for this reason that the advertisements are required to be carried in two languages, Hindi and English and not only in local newspapers, but in two leading daily newspapers, besides displaying the same on the

institution's website and its notice board, as prescribed in the Act and Rules.

24. The last submission made by the counsel for the petitioner/ Institute is a prayer for compassion on the ground that the petitioner/ Institute is a philanthropic institution and has been set up to provide quality education to students from underprivileged background and thus, the fine of '10.00 lacs imposed on it would be too heavy a burden for it to bear. The aforesaid explanation offered by learned counsel for the petitioner/Institute for seeking reduction of the fine imposed on the petitioner/Institute in terms of the impugned order is not tenable inasmuch as all the institutions recognized for imparting higher education are required to be charitable organizations under the Act. The petitioner/Institute herein is no different from other similarly placed institutions and thus, cannot claim any special treatment on the basis of being a charitable organization.

25. It may also be noted that even otherwise, in the course of exercising its power under judicial review, the Court is required to examine the decision making process of an authority and not the decision itself. As held in the Supreme Court in the case of **A.P.S.R.T.C. Vs G. Srinivas Reddy,** reported as AIR (2006) SC 1465, the power of judicial review under Article 226 lays emphasis on the decision making process, rather than the decision itself and only such an action is open to judicial review, where an order or action of the State or an authority is illegal, unreasonable, arbitrary or prompted by malafides or extraneous consideration. In the present case, even if it is assumed that the decision arrived at by the Court could have been different from the one arrived at by the Committee, as for example, the quantum of fine imposed in the impugned order, could have been less than or more than that imposed by the Committee, would in itself not be a ground for interference as the Court ought not to step into the shoes of the Committee and then arrive at a different conclusion.

26. For all the aforesaid reasons, the present petition is dismissed being devoid of merits. As the petitioner/Institute has already deposited a sum of Rs. 2.50 lacs in terms of the order dated 25.1.2010, the said amount is directed to be released to respondent No.1 in terms of the operative para of the impugned order, along with the interest accrued thereon. It is further directed that the petitioner/Institute shall deposit the balance sum of Rs. 7.50 lacs with respondent No.1 along with interest

payable @ 9% per annum from 25.1.2010 till the date of payment in terms of the order dated 19.08.2010. Needful shall be done within a period of four weeks. In view of the fact that interest is being paid by the petitioner/Institute on the amount of fine imposed on it, the Court does not deem it appropriate to direct the petitioner/Institute to pay any costs to the other side.

ILR (2012) II DELHI 711
CRL. APPEAL

JAMAL MIRZA **....APPELLANT**

VERSUS

STATE **....RESPONDENT**

(S. RAVINDRA BHAT & S.P. GARG, JJ.)

CRL. APPEAL. NO. : 891/2009, 852/2009, 813/2009 **DATE OF DECISION: 27.01.2012**

Indian Penal Code, 1860—Section—396, 397—Vienna Convention Consular Relations—1963—Article 36(1)(b)—Appellants preferred appeals against their conviction under Section 396 read with Section 397 IPC and pointed out various lacunas in prosecution case—They also urged that they were Bangladesh nationals and during investigations when they refused to participate in TIP, they were not assisted by Consular Officers of their country as provided by Vienna Convention on Consular Relations, which India had ratified, therefore, it was fatal irregularity in trial of appellants—Held—There is no automatic acceptance of an international treaty, even post ratification, as domestic law in India—It only becomes binding as law once Parliament has indicated its acceptance of the

ratified treaty through enabling legislation—Since no legislation existed the said treaty was not binding—However, the appellants were given legal representation; therefore object of article 36(1)(b) of treaty was satisfied.

The Supreme Court's ruling in **Jolly George Verghese v. Bank of Cochin** 1980 (2) SCC 360 is that treaties entered into by the Union of India do not become enforceable in the courts and neither do they become part of the domestic law of India. Yet, they can be assimilated as aids to interpretation of the Constitution of India, to the extent their provisions are not inconsistent with municipal law. Justice Krishna Iyer elucidated on this point thus:-

> "India is now a signatory to this Covenant and Art. 51(c) of the Constitution obligates the States to "foster respect for international law and treaty obligations in the dealings of organized peoples with one another." **Even so, until the municipal law is changed to accommodate the Government what binds the court is the former, not the latter." (Para 59)**

Important Issue Involved: There is no automatic acceptance of an international treaty, even post ratification, as domestic law in India—It only become binding as law once Parliament has indicated its acceptance of the ratified treaty though enabling legislation.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Arvinder Singh, Advocate for Appellant in Crl. A. 813/2009, Ms. Purnima Sethi, Advocate for Appellant in Crl. A. 852/2009., Ms. Anu Narula, Advocate for Appellant in Crl.A. 891/2009

FOR THE RESPONDENT : Ms. Richa Kapoor, APP on behalf of State in all the Appeals.

CASES REFERRED TO:

1. *People's Union for Civil Liberties* vs. *Union of India* (1997) 3 SCC 433.
2. *S.R. Bommai* vs. *Union of India* MANU/SC/0444/1994 : [1994]2SCR644.
3. *Khatri and Ors.* vs. *State of Bihar* (1981)SCC(Cri)235.
4. *Hussainara Khatoon* vs. *State of Bihar* (1980) SCC(Cri) 35.
5. *Jolly George Verghese* vs. *Bank of Cochin* 1980 (2) SCC 360.
6. *Maneka Gandhi* vs. *Union of India,* MANU/SC/0133/1978 : [1978]2SCR621.

RESULT: Appeals dismissed.

S.P. GARG, J.

1. The Appellants Jamal Mirza (A-1), Mohd. Faruq @ Mohd.Raju (A-2) (since released), Alam @ Mamoon (A-3) and Nizam @ Mijam @ Titoo (A-4) (hereafter referred to by their names) have preferred the present appeals against the judgment and order on sentence dated 15.04.2009 and 25.04.2009 respectively passed by learned Additional Sessions Judge whereby they were held guilty for the commission of offences punishable under Section 396 read with Section 397 IPC and were sentenced to undergo imprisonment for life with fine of Rs. 2,000/- each. The prosecution case, in short, may be delineated as follows:

2. The present case was registered by the Police of PS Punjabi Bagh by FIR No.346/2000. Complainant-Ms.Megha Nijhara aged 16 years in her statement to the Police disclosed that on the night intervening 6/7th May 2000 at about 4:30 A.M. she and her sister, Radhika, and brother Raghav were sleeping in her room. Upon hearing some noise, she got up and saw that six young boys in the age group of 18 to 22 years were standing near her bed. Four of them were armed with pistols and two of them had daggers in their hands. They threatened to kill all of them if they made any noise. They tied their hands and inquired as to

where the cash was kept. Thereafter, at gun point, they took her (the complainant) to her parents. room and threatened to kill her if they raised an alarm, and also tied their hands.

3. The complainant further stated that from the said room, the assailants took out articles lying in the almirah. They inquired from her father where the cash was kept. When he said that it was in his mother's room, the two assailants, at gun point took him to his mother's room. The other assailants searched the almirah. In the meantime, her mother opened the passage door, woke up her uncles Ravinder @ Ravi and Kaushlender. They reached the said room; on seeing them, the two assailants got perplexed and grappled with them (Ravinder and Kaushlender). The two intruders present on the ground floor also went upstairs and started firing at her uncle and father. Her mother and uncle Rajiv Nijhara started raising noise of 'chor-chor' from his room. At that, the assailants went up-stairs and fired at them. The assailants fled from the spot after robbing several articles.

4. The complainant further stated that her uncle Ravinder died due to gunshot injuries; her father and uncle Kaushlender sustained serious injuries. While fleeing the attackers took away cash in a rexene bag. They also removed her aunt's gold bangles as well as those of her grand-mother. She further stated that she could identify the assailants.

5. On hearing sound of gun fire at the spot, some neighbours rushed to the spot and informed the police who went the place of occurrence and recorded complainant's statement. The injured were removed to Maharaja Agarsen Hospital where Ravinder @ Ravi was declared "brought dead". The injured Kaushlender was shifted to AIIMS for treatment.

6. On reaching the spot, the police from PS Punjabi Bagh conducted necessary proceedings. Inspector Ram Singh Chauhan got the FIR registered through constable Satbir. He collected the MLCs of the injured. The crime team was summoned; a finger-print expert lifted six chance prints and a private photographer was called in who took photographs of place of occurrence. The IO prepared site plans of the place of crime; two bullets were seized from the first floor of Jitender Nijhara's portion of premises and sealed. The Police also found two sports shoes, in the adjoining room at the first floor which were taken into possession. The

dead body of the deceased Ravinder @ Ravi was collected and post-mortem was conducted.

7. During investigation, A-1 was arrested on 11.05.2008 in a case registered as FIR No.297/2000 PS Saraswati Vihar by Anti Robbery Section, Crime Branch, New Delhi and one loaded pistol was recovered from his pocket. He was interrogated and his disclosure statement was recorded in that case in which he revealed his involvement in the present case. The PS Saraswati Vihar informed Inspector Ram Singh Chauhan, PS Punjabi Bagh about this disclosure statement, by A-1. Subsequently A-1 was arrested in this case and the IO moved an application for conducting his test identification parade (TIP). A-1 refused to participate in the proceedings. On 22.05.2000, on interrogation, his disclosure statement was recorded. Pursuant to the disclosure statement, A-1 led to recover a dagger which was used in commission of this offence from a vacant plot which was situated at a distance of about three plots away from the place of incident. Investigating officer prepared a sketch of the dagger and the same was seized by him.

8. On 23.08.2000 A-2 was arrested by the Anti Robbery Cell, Crime Branch, Janak Puri in a case FIR No.161/2000 PS Janak Puri. In his disclosure statement (made in that case), he confessed to his involvement in this case. He was also arrested in this case on 28.08.2000. An application was moved before the learned Metropolitan Magistrate for TIP of A-2 but he too refused to participate in TIP proceedings.

9. On 12.12.2000 A-3 and A-4 were arrested by the police, in Faridabad, in FIR No.767/2000 under Section 395/397 IPC. In their disclosure statements both also revealed about their involvement in the present case. This information was relayed to PS Punjabi Bagh, A-3 and A-4 were arrested in the present case on 19.01.2001. Application for conducting TIP of A-3 and A-4 was moved before the concerned court. A-3 agreed to participate in the TIP proceedings. The TIP was subsequently conducted by the learned Metropolitan Magistrate where Kaushlender correctly identified A-3 as one of the assailants who had committed the offence. A-4 declined to participate in the TIP proceedings alleging that he had already been shown to the witnesses in the police station.

10. The IO sent all the sealed parcels to FSL, Malviya Nagar and subsequently collected the reports. He recorded statements of concerned

witnesses at different stages during investigation. After completion of investigation Police of PS Punjabi Bagh filed challan against A-1 to A-4 for the commission of offences under Sections 396/397/302/307 IPC and 25/54/59 Arms Act in the court of learned Metropolitan Magistrate. The case was later committed to the Court of Sessions. To prove charges against the Appellants, the prosecution examined 47 witnesses. Statements of the Appellants were recorded under Section 313 Cr.P.C. They denied their involvement in the commission of the offence and pleaded innocence and that they were falsely implicated in this case. They, however, did not prefer to lead any evidence in defence.

11. After consideration of submissions of the parties, and after considering the evidence on record, the Trial Court convicted all the Appellants in the manner described earlier, and passed the sentencing order.

12. During pendency of these appeals, on 17.03.2011 this Court noted that A-2 had claimed that he was juvenile on the date of incident i.e. 07.05.2000. An Ossification test of the A-2 was directed; according to the opinion given, his age was stated to be between 14 years to 17 years on the date of the offence. By order dated 18.04.2011 A-2 was released as he had already remained in custody for over three years. A-2 was set at liberty after giving him benefit of Section 1(a) of the Juvenile Justice (Care and Protection of Children) Act, 2000 on account of the fact that he had already been in custody for the maximum period prescribed under the said Act.

13. Learned counsel for the Appellants have vehemently argued that the prosecution failed to prove its case against them beyond reasonable doubt. There are material contradictions, inconsistencies and improvements in the statements of prosecution witnesses which make it unsafe to record any conviction. The Appellants were falsely implicated in this case because they were Bangladeshi nationals. Nothing was recovered from their possession. No robbed jewellery or cash was recovered from the possession of any of the Appellants or at their instance. All of them were arrested by the police in various other cases and on recording their disclosure statements they were falsely implicated in this case. The anxiety of the police was to solve the case one way or the other. No weapon of offence was recovered from the possession of the Appellants. No efforts were made by the police to get their blood samples or finger-

prints matched with the blood and finger-prints detected at the spot. The Appellants were justified in declining to participate in TIP proceedings as they were shown to the material prosecution witnesses in the police station.

14. Learned counsel further urged identification of the Appellants in Court by the witnesses cannot be believed. PW-7 (Renu) failed to identify A-3 in TIP proceedings. The witnesses examined by the prosecution before the learned Trial Court gave different versions regarding the role played by each Appellant at the time of the incident. They gave differing versions regarding the total number of assailants. The details of the jewellery robbed were not furnished. The dagger allegedly recovered at the instance of A-1 was never shown to the material witnesses at the time of their examination before the Court. Recovery of the dagger itself is doubtful. No independent public witness was joined at the time of arrest of the Appellants and at the time of recording their disclosure statements.

15. The material witnesses have testified that Appellants had covered their faces with handkerchief and thus it was not possible for the inmates of the house to identify all the attackers. They identified the assailants in Court only at the instance of police officers. It was argued, in respect of one of the Appellants, i.e. in Crl. Appeal No. 813/2009, that upon the said accused refusing the TIP, they were not assisted by the Consular Officers of their country, i.e., Bangladesh, contrary to provisions of the Vienna Convention on Consular Relations, 1963 which India has ratified. He argued that it was the prosecution's case that the Appellants were Bangladeshi nationals, and so they should have been accorded the rights assigned to them under this treaty. The relevant article-Article 36 (1) (b). This, according, to counsel, resulted in an unfair trial, rendering the impugned judgment liable to be set aside.

16. The learned APP for the State refuted these arguments and sought to support the findings recorded by the learned Trial Court convicting the Appellants. It is argued that mere non-recovery of the robbed articles does not demolish case of the prosecution. The inmates of the house had no ulterior motive to falsely identify the Appellants. Recovery of the dagger was pursuant to A-1's disclosure statement in the presence of an independent public witness i.e. PW-11 (Ajay Mahajan). Minor contradictions and improvements should be ignored as the

testimonies of prosecution witnesses, was recorded after about five years of the incident.

17. We have carefully considered the respective submissions of learned counsels on either side, perused the impugned judgment and other material on record. Each aspect, relating to the prosecution allegations regarding involvement of the Appellants, and the contentions made by the parties, is discussed hereafter.

(A) Involvement of A-3

18. The material testimony regarding the presence of A-3 is that of PW-13 (Jitender Nijara), injured in the incident. In his deposition before the Court, he testified having been taken to ground floor at gun point when he disclosed that the cash was kept in his mother's room, in the ground floor. Thereafter two accused persons asked him at gun point to lead them to his mother's room, threatening to kill his children if he refused to co-opearte. He, thereafter, rang the bell of room on the ground floor and his sister Renu responded, switched on the lights and opened the main entrance gate. He instructed his sister to keep quiet since guns were pointed at his head. The Accused persons threatened his mother to hand over the keys of the almirah or see him die The accused snatched keys from his mother and he was made to sit on a chair. Gold bangles were removed from the hands of his mother and sister; the accused kept threatening to kill all of them. He (PW-13) further testified that one accused tried to misbehave with his sister and when he tried to resist, his legs were tied. One more person came down from the first floor and inquired about more cash. In the meantime, the accused were unable to search more valuables. One of them shot him at point blank range on the chest and he fell down. He heard more sounds of bullets firing. Within 5/7 minutes after receiving injury, he became unconscious. PW-13 Jitender identified A-3 present before the court to be the assailant who had fired at him from point blank range on his chest.

19. No material contradictions have been elicited by the learned defence counsel for A-3 in cross-examination to discard the testimony of this injured witness. No suggestion was put that A-3 had not sustained fire injuries at the hands of A-3. No suggestion was put if A-3 was not armed with pistol/revolver at that time. The suggestion given was that the assailants had covered their faces with handkerchief and the accused

persons were not the assailants.

20. The overall testimony of this witness reveals that he categorically identified A-3 as the individual actively involved in the incident and had shot him with a fire arm in the room in which his sister and mother used to stay, on the ground floor. This injured witness had no ulterior motive to falsely implicate A-3.The testimony of PW-13 (Jitender Nijara) has been corroborated on material particulars by PW-7 (Renu). In Court, she deposed that when she was sleeping in her room with her mother, the house bell rang several times. She woke up and switched on the light and saw that it was 4.50 AM. She went to the lobby and reached the main door. She saw from the peep-hole, her brother Jitender's face. She also noticed that two men were standing on either side of Jitender and were pointing revolvers at him. She opened the door and her brother asked her to keep quiet. Thereafter both intruders, armed with revolvers took her brother into the room where she used to sleep. Her mother was also in that room. Those men demanded that they should be given cash. Her two gold bangles were removed by those men. Her mother handed over keys of an *almirah* to them and they also removed eight gold bangles which she was wearing. The *Almirah* was opened and articles kept inside were thrown out. Those men continued abusing them and misbehaving with them. She heard noise of firing from the first floor and in the meantime a third man, who was outside came into the room and inquired from his companions whether they had got cash. She further testified that the third person fired in the air. Her brother Jitender was made to sit on a chair and that man shot him on his shoulder. On hearing noise from upstairs, the accused persons got perplexed and ran out.

21. PW-7 (Renu) also identified A-3 by pointing towards him and stated that he had fired at her brother Jitender in her room. Cross-examination of this witness also failed to reveal any discrepancy regarding the role attributed to A-3 in the incident. She denied the assertion that she had identified the accused as he was shown to her by the police. She denied that she was unable to identify the accused persons as the assailants were muffled and the lights in the house were switched off and thus she was unable to see and identify the assailants.

22. The entire testimony of this natural witness whose presence at the spot has not been challenged inspires confidence. She had no ulterior motive to falsely identify A-3. She has fully corroborated the version

given by PW-13 (Jitender) that the firing incident in which he sustained injuries had taken place in her room. Merely because this witness failed to identify A-3 during test identification parade proceedings is not a factor to dislodge the entire testimony of this witness regarding the role played by A-3 in the commission of the offence.

23. PW-12 (Kaushelender) is another important witness connecting A-3 in the commission of the offence. This witness also deposed that after her sister-in-law Manju knocked at the door of his room, he got up and went inside the room of Jitender. He saw two persons standing and pointing guns towards Megha, Raghav and Radika. When he entered in the room of Jitender, his brother Ravi apprehended both the assailants present there. The accused fired from a *desi katta* which they were carrying. In the meantime three persons also came there; one of them had a revolver, the other had a *desi katta* and the third one was armed with a *chura*. They fired indiscriminately. Consequently he sustained injuries on the left side of his belly. He was further attacked with the knife (chura). His brother Jitender received bullet injuries. He was hit with the revolver butt on his head. He further testified that his brother Jitender also received several injuries and he came to know about that when he came down. A-3 present in the Court was having *desi Katta*. This witness identified A-3 as the person involved in the dacoity committed at his house during TIP proceedings conducted on 09.02.2001.

24. In the cross-examination this witness denied the suggestion that the assailants were other persons and had covered their faces at the time of incident. He denied the suggestion that he had identified the accused at the instance of police. He further denied that he was called by the police at Faridabad lock-up and the accused persons were shown to him there or that the accused was shown to him prior to his TIP conducted at Tihar Jail.

25. The overall testimony of this witness also reveals that he has supported the case of the prosecution in its entirety. The presence of this witness at the spot is not in controversy. This witness has no axe to grind to falsely implicate A-3 in the commission of the offence as he himself had sustained injuries in the incident. No suggestion was put to this witness in the cross-examination that his brother Jitender had not sustained injuries in the incident on the ground floor in the room of PW-7 (Renu). The testimony of this witness inspires confidence as he had

participated in TIP proceedings of A-3 and had identified A-3 correctly to be one of the assailants who had committed dacoity in their house. There is nothing on record to show if A-3 was ever shown to this witness prior to the TIP by PW-39, Dr.Shababuddin, the learned MM. This witness had sustained injuries and his brother met with death would be interested in bringing home the guilt of the real offenders, and would not falsely implicate an innocent individual. None of the accused including A-3 was known to the witness prior to the occurrence; he bore no ill will or animosity with any of the accused. The cross-examination has not brought any material inconsistencies to doubt his testimony. This witness not only identified A-3 during TIP proceedings but also identified him on his appearance before the Court.

26. A-3 and A-4 were arrested by the police at PS City Faridabad, in case FIR No.767/2000 under Section 395/397 IPC. PW-43 (Inspector Krishan Kumar) proved arrest of both A-3 and A-4 in the said case. He recorded the disclosure statements of A-3 and A-4 in which they revealed commission of the offences in the present case. He passed on that information to the duty officer PS Punjabi Bagh and thereafter the IO of this case came to the police station; he handed over the photocopies of the disclosure statements marked X and Y to him. PW-42 (HC Jagmer Singh) deposed on similar lines and stated that disclosure statements were made by A-3 and A-4 in his presence and Mark X and Mark Y contained his signatures. PW-31 also identified both A-3 and A-4 to be the persons who had made disclosure statements Mark X and Mark Y. PW-35 (WSI Umesh Bala) recorded the formal FIR No.767/2000 Ex.PW35/A in this regard.

27. In the cross-examination of all these witnesses nothing was suggested if at any time if A-3 and A-4 were shown by the police to the public witnesses. There was no explanation how, and under what circumstances A-3 and A-4 were present at PS City Faridabad which led the Faridabad police to arrest them in FIR No. 767/2000 under Section 395/397 IPC.

28. PW-25 (SI Satish Kumar) arrested A-3 and A-4 on 19.01.2001 after getting information from the police of Harayana. A-3 refused to participate in TIP proceedings. A-4 agreed to participate in TIP proceedings in which PW-12 (Kaushelender) identified him. In the TIP proceedings conducted by PW-39 (Dr.Shababuddin, MM) no suggestion was given to

the witness that he had any acquaintance with the Faridabad police to falsely implicate A-3 and A-4 in this case. No specific date was suggested to this witness as to when A-3 and A-4 were shown to the witnesses and if so to whom. If A-4 was sure that public witness had already seen him at the lock up at Faridabad or in Delhi, there was no occasion for him to participate in TIP proceedings.

29. PW-39 (Dr.Shababuddin) learned MM proved the TIP proceedings (Ex.PW-39/A), where PW-12 identified A-3. Remand papers on the record show that on 22.01.2001 the application was moved by the concerned IO before Sh. Rajender Kumar, learned MM for issuance of production warrants in respect of A-3 and A-4. It mentioned that both, i.e. A-3 and A-4 had been arrested in case FIR No.767/2000 under Section 395 and 397 by the City Police, Faridabad, Haryana and there they had made disclosure statements for the commission of the offence in this case. Both A-3 and A-4 were present in judicial custody in Rohtak Central Jail. The Learned MM issued production warrants for A-3 and A-4 for 31.01.2001. On 31.01.2001 again production warrants were issued for 05.02.2001. On 05.02.2001 both the said accused were produced before Court and the IO moved an application for interrogation of A-3 for 30 minutes, which was allowed. Thereafter the IO moved an application to conduct TIP proceedings. The order-sheet reveals that A-3 was taken to the court, with his face muffled when the TIP application was moved. Thereafter TIP proceedings were conducted by PW-39. All these proceedings demonstrate that after moving the application for issuance of production warrants, A-3 was in judicial custody and there was no occasion for the police to show him to the prosecution witnesses, so that they could identify him in this case.

30. PW-16 (Manju Nijhara) also supported the prosecution. She too testified that her husband was taken to the ground floor at pistol point by four assailants. She heard the sound of a bullet shot in the ground floor but she did not know what happened there since she was in Ravinder's room on the first floor, at that time. This witness pointed towards A-3 as the person who had taken her husband Jitender on the ground floor. Nothing material emerged from the cross-examination of this witness to discard his testimony. Minor contradictions about the number of assailants is not fatal to the prosecution case since the presence of A-3 at the spot was described by this witness and had attributed a

specific role to him. Learned defence counsel has tried to encash the statement of the witness in the cross-examination where she admitted that the assailants had covered their faces with handkerchief on the day of the alleged incident. The assertion of this witness is to be taken into consideration in the overall context of her deposition. She categorically identified A-3 as the person who had taken her husband on the ground floor. There is nothing in the cross-examination to suggest that at that time that A-3 had covered his face with handkerchief. The testimony of this witness was recorded on 21.09.2005 after about five years. Some discrepancies are bound to occur when a witness is examined after lapse of so much time.

31. PW-1 Dr.Chander Mohan Bansal, Maharaja Aggarsain Hospital, Punjabi Bagh proved the MLC Ex.PW1/D prepared by him when he medically examined PW-13 (Jitender Nijara) who was taken to the hospital with the history of assault with a fire arm. PW-1 found three injuries on his person; one of them a punctured wound on the upper arm, one on the lateral side and the another in the armpit and the last, a second puncture wound on the right side of the chest near axilla. This witness was not cross-examined by the accused. The medical evidence on the record by the witness supplemented the ocular version given by PW-13 (Jitender) regarding injuries sustained by him when he was fired at point blank range on the chest.

32. Testimony of all the witnesses referred above, thus establishes beyond doubt presence of A-3 at the spot at the time of occurrence and his participation in the commission of offence.

(B) Involvement of A-I

33. A-1 was arrested on 11.05.2000 by PW-25 (SI Satish Kumar) and Inspector Suresh Kaushak when they were posted in the Anti Robbery Section, of the Crime Branch. A-1, with his three associates was apprehended at about 09.00 PM. and on his personal search, one loaded country made pistol was recovered from his pocket. A case, FIR 297/ 2000, PS Saraswati Vihar was registered against A-1. PW-3, Head Constable Balbir Singh, of PS Punjabi Bagh recorded a DD /Ex.PW-3/A on receipt of information on telephone from ASI Bhrahm Parkash of Crime Branch while working as duty officer on 12.05.2000. On receipt of DD No.11/A dated 12.05.2000 Ex.PW3/C, PW-46 (Ram Singh) came

to know that A-1 was sent to judicial custody for a day by the Court of Sh.M.C.Gupta, learned MM. On 13.05.2000 PW-46 (Ram Singh) moved an application for conducting TIP of A-1 which was assigned to PW-29, Sh.L.K.Gaur, the learned MM where A-1 was produced with his face in a muffled condition. He expressed willingness to participate in TIP proceedings. Accordingly (PW-29), Sh.L.K.Gaur, the learned MM fixed the date for holding TIP as 16.05.2000. That day Sh.R.S.Chauhan moved an application for postponing the date of the TIP. On that application (Ex.PW29/B), PW 29 fixed the date -for holding TIP- as 20.05.2000. On 20.05.2000 PW-29 reached Jail No.5 Tihar for conducting TIP proceedings. A-1, however, refused to participate in the TIP proceedings. His statement was recorded by the learned Metropolitan Magistrate; A-1 stated that he did not want to take part in the TIP because after he was caught he was kept in custody for three days; during that period, his photographs were taken and a video recording was made. On the way to Court, when he had to be produced, his face was shown to two persons and on the same day when he was in the lock-up, he was also shown to two women. PW-29 (Sh.L.K.Gaur) proved TIP proceedings Ex.PW29/C and the certificate Ex.PW29/E regarding correctness of the proceedings.

34. The above discussion shows that A-1 opted to participate in the TIP proceedings, when for the first time he was produced before the concerned Metropolitan Magistrate in a muffled condition and when the application for TIP was assigned to PW-29 (Sh.L.K.Gaur). At that time, A-1 did not disclose if the police had shown him to the prosecution witnesses. He was in judicial custody for the period between 16.05.2000 and 20.05.2000. When PW-29 reached on 20.05.2000 Tihar Jail to conduct TIP proceedings, A-1 refused to participate in the TIP saying that he had been shown to the police witnesses and was not interested in participating in the TIP proceedings. It seems that the plea, taken by A-1 was an afterthought. He did not elaborate how and when he was shown to the prosecution witnesses. This plea cannot be believed as he had earlier consented to participate in the TIP proceedings.

35. PW-12 is a material witness to prove involvement of A-1 in the incident. In his deposition before the Court this witness specifically identified A-1 as one amongst those present, amongst the assailants. He attributed a specific role to A-1 in the incident. This witness had sustained

bullet injury on the left side of his stomach. He further deposed to having been attacked with a knife (*chura*). He identified A-1 as the person with a chura and named A-1 as the person responsible for inflicting the knife injury on him.

36. PW-40 (Dr.Amit Gupta) who medically examined PW-12 (Kaushelender) proved the MLC Ex.PW40/A. He deposed that the injuries found on the the witness were dangerous and caused by fire arms and a sharp object with blunt force. This witness was not cross-examined by the accused. Thus, the deposition of PW-12 has been corroborated by medical evidence. PW-7 (Renu) in her deposition before the Court identified A-1 and stated that he had a knife. In the cross-examination she stated that the knife was a quite long and its blade had *'dante'* like that of *'Ari'* (serrated edges like in a saw). She volunteered to add that the assailants had tried to tear her clothes with that knife, and therefore, she could not forget that knife.

37. PW-8 (Rajiv Nijhara) also supplemented PW-7.s version and deposed that A-1 was the individual with a knife, besides the person who had fired at him. This witness identified the knife/dagger Ex.P-1 which was in possession of A-1 at the time of occurrence.

38. PW-13 (Jitender Nijhara) identified A-1 who had a dagger in his hand and was first amongst those standing behind his daughter with daggers and who participated in the dacoity incident.

39. PW-15 (Megha Nijhara) also identified A-1 though she stated that he had a pistol in his hand when he entered her room. PW-15 pointed towards A-1 as the person with a dagger and a pistol in his hand and who had threatened her with a dagger and pistol.

40. Testimonies of above witness undoubtedly establish presence of A-1 at the spot at the time of incident. All the material prosecution witnesses identified A-1 during their deposition before Court. They assigned a specific role to A-1 in the commission of the offence. PW-12 (Kaushelender) is an injured witness and A-1 had inflicted injuries with a knife. No ill-will or ulterior motive was imputed to these witnesses in their cross-examination to make for deposing falsely against A-1. Nothing was suggested to the prosecution witnesses where else A-1 was on the day of incident. Despite lengthy cross-examination of these witnesses, nothing material was elicited to disbelieve the facts deposed

by them. A-1 failed to disclose as to how, from where and under what circumstances he was arrested by the police of the Anti Robbery Section, Crime Branch, New Delhi. He did not examine any of his family members in defence to prove his presence at any place other than the place of incident on that day.

41. The Prosecution further relied upon the circumstance of recovery of the dagger Ex.P-1 at the instance of A-1 pursuant to his disclosure statement. PW-46 deposed that when A-1 refused to participate in the TIP proceedings on 20.05.2000, he moved an application for his police custody remand for five days on 22.05.2000. On 23.05.2000 in the presence of PW-24 (HC Sunder Singh), A-1 was interrogated and his disclosure statement Ex.PW24/A was recorded. Thereafter A-1 led the police party to the spot of incident and pointing out memo Ex.PW8/C was prepared. Thereafter A-1 led the police party, consisting of PW-46, HC Sunder and members of the public Ajay Mahajan and Rajeev Nijhara to a vacant plot located four plots away from the place of incident. A-1.s statement led to recovery of a dagger from the grass in the plot. A sketch of the dagger Ex.PW8/A was prepared, it was sealed and seized by seizure memo Ex.PW8/B. A site map of the place of recovery of dagger Ex.PW46/H was also prepared. The dagger Ex.P-1 with cover was recovered at the instance of A-1.

42. PW-11 (Ajay Mahajan) supported PW-46's deposition and testified that on 23.05.2000 at about 7.00 PM. the police had taken A-1 to the spot. There he was identified by family members of the deceased as one present amongst the assailants on 07.05.2000. He further deposed that in his presence A-1 led to recovery of the dagger Ex.P-1 from the vacant plot and that it was seized by the police. The testimonies of PW-8 (Rajiv Nijhara) and PW-24 (Janak) are on similar lines.

43. On a consideration of the statements of these witnesses, what the prosecution was able to prove that A-1 led the police team to the spot and at his instance in pursuance of his disclosure statement the dagger P-1 was recovered from a vacant plot situated near the place of incident. The testimony of PW-11 (Ajay Mahajan), an independent public witness, on this aspect cannot be disbelieved. No enmity has been alleged against A-1 to force PW-11 (Ajay Mahajan) to make a statement against him. All the witnesses to the recovery have supported each other and no material discrepancies can be seen from a comparison of these

44. The recovery of the dagger Ex.P-1 lends credence to the prosecution case regarding presence of A-1 at the spot as all prosecution witnesses testified that A-1 was armed with a dagger/knife at the time of incident and had inflicted injury on the person of PW-12 (Kaushelender). All the prosecution witnesses, therefore, identified A-1 as one of those present at the spot during the time of the incident. PW-15 (Megha Nijhara) even deposed that the assailants had talked to her for about ten minutes and therefore she was able to identify the accused. The evidence on record points to the accused having been at the spot for sufficiently long to enable the prosecution witnesses to identify them.

(C) Involvement of Nizam @ Titoo (A-4)

45. A-4 was arrested with A-3 by the Faridabad police in FIR No.767/2000 under Section 395/397 IPC. As discussed above, his disclosure statement mark 'Y' was recorded and he disclosed about commission of the present offence. Subsequently he was arrested by the police of PS Punjabi Bagh.

46. After A-4 was produced before the Court pursuant to the production warrants issued, an application was moved by PW-25 for conducting his TIP proceedings. PW-39 (Dr.Shababuddin), learned MM conducted TIP proceedings 24.02.2001 when A-4 was produced before him in muffled face. A-4 refused to participate in the TIP proceedings stating that he had been shown to the witnesses in the police station. He was warned by PW-39 (Dr.Shababuddin) that refusal to take part in the TIP proceedings would draw adverse inference against him. Despite that, he refused to take part in TIP proceedings. PW-39 (Dr.Shababuddin) recorded his statement and proved the TIP proceedings (Ex.PW-39/A). This witness was not cross-examined. Since A-4 remained in judicial custody prior to 24.02.2001, there hardly any possibility for the police to show him to the prosecution witnesses.

47. PW-13 (Jitender Nijara) in his deposition identified A-4 as the one who pointed a gun at his daughter and forced her to sit in the room. PW-15 (Megha Nijhara) also recognised A-4 and testified that he was armed with a dagger in his hand when he entered her room along with other accused person. PW-16 (Manju Nijhara) assigned a specific role to A-4 while identifying him and deposed that all the four accused present in Court were the same assailants who had robbed and looted them. She

pointed at A-4 and deposed that he was present, with A-3 and went down stairs along with him. A-4 was standing in the balcony in the dark at that time. PW-12 (Kaushelender) deposed to being sure that besides Jamal Mirza (A-1) and Mohd. Faruq @ Mohd.Raju (A-2) the other two accused were also involved in the dacoity committed at his house.

48. The statements of these witnesses, identifying A-4 as one amongst the assailants, cannot be doubted. They withstood searching cross-examination and nothing material could be elicited to disbelieve them.

49. These witnesses had no prior acquaintance with the accused. A-4 did not also claim that he was somewhere else, on the date of occurrence. We, consequently, see no reason to disbelieve the prosecution witnesses regarding identification of A-4.

(D) Involvement of Mohd. Faruq @ Mohd.Raju A-2

50. As noticed earlier, A-2 had also filed appeal against the impugned judgment. He was, however, directed to be released as he was a juvenile on the date of occurrence i.e. 07.05.2000. By order dated 18.04.2011, A-2 was ordered to be released as he had already remained in custody for over three years. No further discussion is thus required regarding the role played by A-2 in the commission of the offence.

(E) Incident

51. The dacoity has not been disputed by the Appellants. It is also not in controversy that during the incident one of the inmates Ravinder @ Ravi was shot dead. PW-6 (Dr.Komal Singh) proved the post-mortem report Ex.PW-6/A where in her opinion the cause of death was haemorrhagic shock due to fire arm injury to the lung. All injuries were ante-mortem and were of the same duration. PW-1 (Dr.Chander Mohan Bansal) proved the MLC of injured Rajiv and Kaushal Ex.PW1/A and Ex.PW1/B respectively. They had also sustained injuries in that incident. PW-40 (Dr.Amit Gupta) opined that the injuries sustained by PW-12 (Kaushelender) were dangerous and caused by fire arm plus sharp object with blunt force. We are also of the view that incident cannot be fabricated by the prosecution witnesses.

52. The plea of the Counsel for the Appellants is that they were not the perpetrators of the crime and were falsely implicated by the police just to solve the case. We do not subscribe to this view as the Appellants

were apprehended on different dates, by the police personnel of different police stations for commission of different offences. A-3 and A-4 were even arrested by the police of Faridabad police. It cannot be assumed that the police were engaged in an inter-state conspiracy, to falsely implicate the Appellants. . Similarly, the argument that the Appellants were falsely implicated because they were Bangladeshi nationals, is unconvincing. Their arrest, on different dates, long after the incident shows that the police did not have any such ulterior motive to implicate them merely because they were Bangladeshis. The material on record shows that at the time of arrest of A-3 in case FIR No.299/2000 PS Saraswati Vihar one Ibrahim, s/o Abdul Raseed resident of Bangladesh was also arrested. However, he was not involved in this case. This fact too belies the Appellants. contention.

(F) Discrepancies, TIP proceedings etc.

53. The Appellants had sought to highlight contradictions, improvements and inconsistencies in the statements of prosecution witnesses; they were dealt with by the Trial Court in the impugned judgment. We find no reasons to interfere in the findings on that aspect. Minor contradictions or discrepancies in the statements of prosecution witnesses are bound to occur when they are recorded after lapse of a long time.

54. In the present case, six strangers had sneaked inside a residential house at the dead of night. They were armed with deadly weapons. They had threatened to kill the inmates including minor children. Not only did they ransack the house, they used deadly weapons in causing dangerous injuries. One of the residents was shot dead. The Court can well understand the mental trauma/stress of inmates on witnessing such a horrible scene. It is not always easy for an eye-witness in such a situation to a ghastly murder to register the precise details regarding number of the assailants; the minute role played by each of them and the assailant who inflicted the injuries and on which part of the body of the injured. An incident of dacoity cum murder is often a heart rending spectacle in which even a witness wholly un-connected to the assailant or the victim may be traumatized by the violence, involving the killing of a human being in cold blood. To expect from witnesses who go through such a night-marish experience, meticulous narration and recall of events, detailing who hit whom at what precise part of the body etc. is a tall order. The Courts

have to be realistic in their expectations from witnesses and go by what would be reasonable based on ordinary human conduct with ordinary human frailties of memory, the power to register events and recall the details. A witness who is terrorised by the brutality of the attack cannot be disbelieved merely because he is imprecise in his description of who hit the deceased on what part of the body or the nature of arms or weapons that a particular assailant had. There is some mix-up or confusion. It is the totality of evidence on record and its credibility that would eventually determine whether the prosecution has proved the charge against the Appellants. Slight discrepancies which do not shake the basic version of the witnesses cannot be given undue weightage or importance to dislodge the prosecution's case. Such variations creep in because there are always natural differences in the faculties of different individuals in the matter of observation, perception and memorization of details.

55. In the present case, all material witnesses have fully narrated the sequence of incident minutely in graphic details; have categorically identified the Appellants to be among the assailants; assigned specific role in the participation of the occurrence. The Appellants had consciously refused to participate in the TIP proceedings. They cannot now contend that they were identified by the prosecution's witnesses for the first time in the Court. There was no long time gap between the date of arrest of the Appellants and their production in the Court and the applications moved by the police for getting their TIPs conducted. Furthermore, no plausible reasons have been given by the Appellants for their alleged false implication. The Court is also conscious of the fact that the witnesses who deposed during the trial, and also participated in the TIP, were residents of the house; some of them were injured. They were also interested in ensuring that the real assailants instrumental in causing death of their close relatives in the incident, were brought to book.

56. It is also important to recollect that all prosecution witnesses had occasion to interact, or were in confrontation with the accused, during the attack and incident. The attackers had stayed inside the house for sufficiently long time and had moved freely from one place to another. The house lights had been switched on at that time. The assailants had conversed with the inmates of the house. The prosecution witnesses narrated details how the assailants accomplished their mission. All these circumstances clearly show that the witnesses got full opportunity to see

and identify the Appellants. There is thus no reason discarding their testimonies.

57. The Learned Counsel for the Appellant in Crl. Appeal No. 813/2009, argued that upon the accused refusing the TIP, they were not assisted by the Consular Officers of their country, i.e., Bangladesh, as provided by the Vienna Convention on Consular Relations, 1963 which India has ratified. He argued that it was the prosecution's case itself that the Appellants were Bangladeshi nationals, and so they should have been accorded the rights assigned to them under this treaty. The relevant article-Article 36 (1) (b)- relied on by the Counsel has been reproduced below:

> "(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph"

58. According to counsel, this is a fatal irregularity in the trial of the Appellants, and a consequent subversion of the procedure established by law. Since he has relied on the fact of India's ratification of this treaty to make this contention, the position of law with respect to the enforceability of international treaties in India needs to be examined.

59. The Supreme Court's ruling in **Jolly George Verghese v. Bank of Cochin** 1980 (2) SCC 360 is that treaties entered into by the Union of India do not become enforceable in the courts and neither do they become part of the domestic law of India. Yet, they can be assimilated as aids to interpretation of the Constitution of India, to the extent their provisions are not inconsistent with municipal law. Justice Krishna Iyer elucidated on this point thus:-

> "India is now a signatory to this Covenant and Art. 51(c) of the Constitution obligates the States to "foster respect for international law and treaty obligations in the dealings of organized peoples with one another." **Even so, until the municipal law is changed**

> **to accommodate the Government what binds the court is the former, not the latter."**

60. In **People's Union for Civil Liberties v. Union of India** (1997) 3 SCC 433, the Supreme Court had said that:

> "The main criticism against reading such conventions and covenants into national laws is one pointed out by Mason, CJ. Himself, viz., the ratification of these conventions and covenants is done, in most of the countries by the Executive acting alone and that the prerogative of making the law is that of the Parliament alone, unless the Parliament legislates, no law can come into existence. It is not clear whether our Parliament has approved the action of the Government of India ratifying the said 1966 Covenant. Assuming that it has, the question may yet arise whether such approval can be equated to legislation and invests the covenant with the sanctity of a law made by Parliament. As pointed out by this Court in **S.R. Bommai v. Union of India** MANU/SC/0444/1994 : [1994]2SCR644 , every action of Parliament cannot be equated to legislation. Legislation is no doubt the main function of the Parliament but it also performs many other functions all of which do not amount to legislation. In our opinion, this aspect requires deeper scrutiny than has been possible in this case. For the present, it would suffice to state that the provisions of the covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by courts as facets of those fundamental rights and hence, enforceable as such."

61. It can therefore be seen that there is no automatic acceptance of an international treaty, even post ratification, as domestic law in India. It only becomes binding as law once Parliament has indicated its acceptance of the ratified treaty through enabling legislation. Since no such legislation exists, this treaty is not binding, and therefore, non – compliance with its provisions does not result in a violation of the procedure established by law. The only rider is that if the standard postulated in the covenant or international treaty is consistent with Indian law, the same can be considered as an aid to interpretation of the relevant provision of municipal law.

62. The safeguard provided for in the Article of the Convention in the present case, is to ensure that the foreign national who has been arrested or detained is not denied his basic human rights and pertinently is afforded effective legal assistance in a criminal trial. The Right to Life as contained in Article 21 of the Constitution of India is available even to foreign nationals in India, and the right to legal representation has been read into this right in **Khatri and Ors. State of Bihar** (1981) SCC (Cri) 235 and **Hussainara Khatoon v. State of Bihar** (1980) SCC(Cri) 35.

In Hussainara Khatoon the Supreme Court has held:

> "It is now well settled, as a result of the decision of this Court in **Maneka Gandhi v. Union of India,** MANU/SC/0133/1978 : [1978]2SCR621 that when Article 21 provides that no person shall be deprived of his life or liberty except in accordance with the procedure established by law, it is not enough that there should be some semblance of procedure provided by law, but the procedure under which a person may be deprived of his life or liberty should be 'reasonable, fair sad 'Just', Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as 'reasonable, fair and just'. It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the courts process that he should have legal services available to him."

63. Since the Appellants in the present case were given legal representation, the object of Article 36(1)(b) is satisfied. The non compliance with a procedural safeguard, contained in the Convention, of notifying the consulate or embassy of the foreign national, that he is facing trial, does not in such an event lead to such prejudice as to vitiate the trial itself. At best the procedure can be viewed as directory; as long as the Court ensures legal assistance or legal aid, implicit in Article 21 of the Constitution, the non-compliance with Article 36 (1) (b) at least in the present instance has not led to any miscarriage of justice. Therefore, the Counsel's argument that the trial of the Appellants was in contravention of the procedure established by law has no merit.

(G) Conclusion

64. We find unclinching evidence pointing un-mistakably to the guilt of all the appellants. We find no illegality or irregularity in the findings recorded by the Trial Court basing conviction of the Appellants. We see no reasons to interfere with the view taken by the Court below. The appeals are accordingly failed and are hereby dismissed.

ILR (2012) II DELHI 734
CRL. M.C.

SANJAY TRIPATHI ....PETITIONER

VERSUS

CBI ....RESPONDENT

(MUKTA GUPTA, J.)

CRL. M.C. NO. : 4042/2011, 4059/2011, 4171/2011 & CRL. M.A. NO. : 18875/2011, 18956/2011 & 19323/2011 (STAY) **DATE OF DECISION: 30.01.2012**

Indian Penal Code, 1860—Sections 4, 107 and 120B—Prevention of Corruption Act, 1988—Section 4, 11 & 12—Non acceptance of closure report—Jurisdiction—Case of prosecution that petitioner Sanjay Tripathi posted as Deputy Commissioner Income Tax, Mumbai had made assessment of Income Tax for AY 2001-02 of M/s Videocon Industries Ltd. vide order dated 30.03.2004—Sanjay Tripathi moved residence to Bengaluru on promotion and thereafter to Vasant Kunj, New Delhi—On both occasions, his household goods were transported by M/s. Prakash Packers and Movers, Mumbai for which petitioner Prakash Kitta Shetty of

Videocon contacted M/s Prakash Packers and Movers—Bills for Rs. 46,9,47 and Rs. 52,822 were raised on M/s. Videocon Industries Ltd.—Petitioner Suresh Madhav Hegde of Videocon issued cheques for said amounts—Case of prosecution that accused Sanjay Tripathi, Suresh Madhav Hegde and Prakash Kitta Shetty of M/s. Videocon Industries by entering into conspiracy committed offence u/s 12—Sanjay Tripathi while functioning as Public Servant obtained wrongful peculiarly advantage from M/s. Videocon Industries Ltd. during 2007-08 having official dealing and thus conducted mis-conduct—Contention of petitioner that in absence of sanction no cognizance of offence u/s 11 and 12 could be taken—No case for abetment u/s 107 made out as neither any overt act nor instigation on part of petitioner—Also contended that Special Judge had no territorial jurisdiction to take cognizance of offence—No part of offence committed in Delhi—Cheques issued at Mumbai—Contention of CBI that offence of conspiracy is single transaction which terminated at Delhi with the household goods of Sanjay Tripathi having being delivered at Delhi Court—Petitioner Prakash Kitta Shetty spoke to M/s Prakash Movers and Packers and arranged transportation while petitioner Suresh Madhav Hegde signed the cheques—Held, cognizance of offence u/s 12 PC Act and 120B IPC r/w. 12 PC Act will have to be taken by court within whose jurisdiction offence committed—In view of Section 4(1) of PC Act and Section 4(2) of IPC the Court competent to inquire and try offence u/s 12 PC Act would be court where offence of abetment took place—Transportation of goods from Bengaluru to Delhi not an offence but payment for said transportation by petitioners Suresh Hegde and Prakash Kitta Shetty on behalf of Videocon Industries Ltd. at Mumbai an offence—Petitioners not charged for substantive offence of conspiracy but with Section 120B r/w Section 12 PC Act—Only Court which has

jurisdiction to try offence u/s 12 r/w 120B and Section 12 is competent court in Mumbai—High Court has no power to direct transfer but it has jurisdiction to direct Special Judge to return closure report for being presented before a court of competent jurisdiction at Mumbai—Order of special judge taking cognizance for offences u/s 120B IPC r/w 12 PC Act and Section 12 PC Act set aside—Special Judge directed to return closure report to CBI to be presented to court of competent jurisdiction at Mumbai—Impugned order set aside—Petition allowed.

The abetment of an offence under Section 7 or 11 of the PC Act is a substantive offence under Section 12 of the PC Act for which no sanction is required. However, in view of Section 4(1) of the PC Act and 4(2) of the Indian Penal Code, the Court competent to enquire and try the offence under Section 12 of the PC Act would be the Court where the offence of abetment took place. There can be no dispute that transportation of goods from Bengaluru to Delhi is not an offence. The offence is the payment for the said transportation by the Petitioners Suresh M. Hegde and Pakash K. Shetty on behalf of the Videocon Industries Limited at Mumbai. The cheques were issued at Mumbai, received at Mumbai and encashed at Mumbai. It may be further noted that the Petitioners have not been charged for the substantive offence of conspiracy but with Section 120-B IPC read with 12 PC Act. Thus, the only Court which has the jurisdiction to try the offence under Section 12 PC Act read with 120B IPC and Section 12 PC Act is the Competent Court at Mumbai. **(Para 14)**

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Mr. Sidharth Luthraa, Sr. Advocate with Mr. Keshav Mohan, Mr. Arshdeep Singh, Advocates in Crl. M.C.4042/2011 & Cr. M.A. 18875/

2011 (stay) Mr. Neeraj Kishan Kaul, Sr. Adv. with Ms. Smiriti Sinha, Mr. Bhuvan Mishra, Advocate In Crl. M.C. 4059/2011 & Crl. M.A. 18956/ 2011 (stay) Mr. Amit Desai, Sr. Adv. with Mr. Shri Singh, Mr. Gopal Shenoy, Advocates in Crl. M.C. 4171/2011 & Crl. M.A. 19323/ 2011(stay)

FOR THE RESPONDENT : Ms. Sonia Mathur, SC for CBI with Mr. Vipin Kumar, IO in all above cases.

CASES REFERRED TO:

1. *Maharashtra State Electricity Distribution Co. Ltd.* vs. *Datar Switchgear Ltd.* (2010) 10 SCC 479.
2. *State through CBI* vs. *Parmeshwaran Subramani,* (2009) 9 SCC 729.
3. *P.K. Thungon and others* vs. *Central Bureau of Investigation,* 2009 II AD (Delhi) 674.
4. *Maksud Saiyed* vs. *State of Gujarat* (2008) 5 SCC 668.
5. *Ashok Sikka* vs. *State* 147 (2008) DLT 552.
6. *CBI AHD. PATNA* vs. *Braj Bhushan Prasad and Ors.* 2001 (9) SCC 432.
7. *CBI* vs. *Braj Bhushan Prasad* 2001 9 SCC 432.
8. *M.S. Lamba* vs. *State, (CBI)* 1995 (33) DRJ 58.
9. *Ajay Aggarwal* vs. *Union of India & Ors.,* 1993 (3) SCC 609.
10. *State of Haryana* vs. *Bhajan Lal,* AIR 1992 SC 604.
11. *M/s. India Carat Private Ltd.* vs. *State of Karnataka* 1989 Crl.L.J. 963.
12. *Kehar Singh and Ors.* vs. *State* (1988) 3 SCC 609.
13. *R.S. Nayak* vs. *A.R. Antulay,* 1986(2) SCC 716.
14. *Union of India* vs. *B.N. Anantha Padmanabhiah,* AIR 1971 SC 1836.
15. *N. Swaminatha Iyer and Ors.* AIR 1952 Madras 727.

RESULT: Petition allowed.

MUKTA GUPTA, J.

1. The present petitions lay a challenge to the common impugned order dated 5th November, 2011 passed by the learned Special Judge, CBI whereby he did not accept the closure report filed by the CBI and took cognizance of offences under Section 120-B IPC read with Section 12 of the Prevention of Corruption Act, 1988 (in short 'PC Act') and substantive offence under Section 12 PC Act against the Petitioners and M/s. Videocon Industries Limited through its Managing Director.

2. Learned counsel appearing for Sanjay Tripathi contends that the learned Special Judge took cognizance of the offences punishable under PC Act despite no sanction was granted by the competent authority. Section 11, PC Act is the fulcrum of the offence of which the abetment and conspiracy is alleged. In the absence of cognizance for offence under Section 11 PC Act, no cognizance for offences under Section 120-B IPC read with Section 12 of PC Act and Section 12 PC Act could have been taken. The Petitioner is a public servant and in the absence of sanction since no cognizance for offence under Section 11 PC Act could be taken, the cognizance for offence under Section 12 PC Act is also bad in law. Further the Petitioner could not have abetted the alleged offence committed by himself. On the facts of the case, even a case for abetment as defined under Section 107 IPC is not made out as neither there is an overt act nor instigation on the part of the Petitioner. Reliance is placed on **M.S. Lamba Vs. State,** (CBI) 1995 (33) DRJ 58 to contend that once sanction is not granted, the investigating agency could not have resorted to IPC offence by resorting to camouflage.

3. On behalf of the Petitioner Suresh Madhav Hegde in CRL.M.C.4059/2011 it is contended that Section 107(2) IPC requires an overt act or a manifestation thereof to perform the illegal act under Section 11 PC Act. Section 12 is not a stand alone offence and in the absence of cognizance for offence under Section 11 PC Act, no cognizance for offence under Section 12 PC Act could have been taken. The Petitioner is the authorized signatory of M/s. Videocon Industries Limited and in the

usual course of business cheques come to him for signing after the concerned department in the company has applied its mind, and the duty of the Petitioner is only to sign the cheques and invoices on the basis of documents prepared by the concerned department. While signing the cheque the Petitioner was not even aware as to for which transaction the cheque was being signed, as M/s Videocon Industries Limited was regularly using the services of M/s. Prakash Packers and Movers, Mumbai for transporting the goods from one place to another. No vicarious liability can be fastened on the Petitioner in the absence of the same being specifically provided in the Statute. Reliance is placed on **Maksud Saiyed Vs. State of Gujarat** (2008) 5 SCC 668; **Maharashtra State Electricity Distribution Co. Ltd. Vs. Datar Switchgear Ltd.** (2010) 10 SCC 479 and **Ashok Sikka Vs. State** 147 (2008) DLT 552.

4. Relying on **Kehar Singh and Ors. Vs. State** (1988) 3 SCC 609 it is contended that abetment of an offence is not an independent or stand alone offence. Thus, no cognizance could have been taken for the offence of abetment under Section 12 PC Act. The offence of abetment created under Clause (2) of Section 107 IPC requires that there must be something more than a mere conspiracy. There must be some act or illegal omission in pursuance of the conspiracy. Without a charge of the substantive offence, no offence of abetment can be made out. Further the necessary ingredients of an overt act or instigation essential for abetment are absent. It is well settled that what cannot be done directly cannot be done indirectly.

5. On behalf of the Petitioner Prakash Kitta Shetty in CRL.M.C.4171/2011 it is contended that the reliance of the learned Special Judge to summon the Petitioner on the decision of **M/s. India Carat Private Ltd. Vs. State of Karnataka** 1989 Crl.L.J. 963 is misconceived. The present is not a case where the closure report has been filed for want of evidence and thus there is a difference of opinion between the Investigating Officer and the learned Special Judge. In the present case the closure report was filed for want of sanction. The sanctioning authority after applying its mind came to the conclusion that the facts of the case do not warrant a criminal action but only a disciplinary action. The grant of sanction has a statutory purpose which permits the senior officers to consider whether the case is fit for prosecution or not. Learned Special Judge could not have relied upon **M/s. India Carat Private Ltd.** (Supra) and come to

a conclusion contrary to that of the sanctioning authority. The FIR was registered only under Section 11 PC Act. However when the sanction was not granted, resort was taken to provisions under Section 120-B IPC read with 12 PC Act. There is no allegation that Sanjay Tripathi took the claim of reimbursement from the Government. There is further no allegation that while assessing M/s. Videocon Industries Limited, Sanjay Tripathi abused his official position and thus, even the sanctioning authority thought that the same was at best a case of indiscretion. In the absence of sanction, the investigating agency and the learned Special Judge picked up ancillary and incidental offences. In fact, the investigating agency had even submitted a closure report for offences under Section 120-B read with Section 12 of the PC Act as it was conscious that it could not achieve indirectly what it could not achieve directly. Relying upon In Re: **N. Swaminatha Iyer and Ors.** AIR 1952 Madras 727 it is contended that Courts have to be conscious of the "growing conspiracy disease". The essential ingredient of Section 107(2) IPC is a conspiracy followed by an act. In view of the overlap charge not surviving, the entire order on cognizance is illegal. If the intention of the Department is not to prosecute a person, the learned Special Judge cannot overreach the same and hold that the prosecution is essential. Relying on **Kehar Singh** (supra) it is contended that the incidental offences should be dealt with the principal offences and not that in the absence of principal offences prosecution for the incidental offences should be initiated.

6. It is further contended that the learned Special Judge had no territorial jurisdiction to take cognizance of the offence in terms of Section 4 PC Act. According to Section 4(2) PC Act the offence can be tried only in the area within which it was committed. No part of offence has been committed in Delhi, as the officer was never posted at Delhi. The assessments of M/s Videocon Industries Limited were done at Mumbai. The cheques in question were issued at Mumbai. Further the officer was transferred from Mumbai to Banglore and thereafter to Ghaziabad. Reliance is placed on **CBI AHD. PATNA Vs. Braj Bhushan Prasad and Ors.** 2001 (9) SCC 432 to contend that Section 4 of the PC Act overrides Section 181 Cr.P.C. and an offence under PC Act can be tried only by the Court of Special Judge appointed for the areas within whose jurisdiction such offences were committed. It is thus prayed that the impugned order be set aside. Replying to the contentions of the learned counsel for CBI, it is stated that there is no dispute that an offence of conspiracy is a

continuing offence, however, a conspiracy comes to an end on the completion of the acts. The offending act in the present case is not the transportation of goods but the payments made for the transportation of the goods. A perusal of Sections 11 and 12 PC Act and 120B IPC reveals that the offending act comes to an end in Mumbai and no offence has taken place in Delhi. Even for conspiracy the acts either took place at Mumbai or Bengaluru or Meerut. According to the learned counsel, in fact two independent acts have been clubbed as one conspiracy. Relying on **Union of India v. B.N. Anantha Padmanabhiah,** AIR 1971 SC 1836 it is contended that this Court has no jurisdiction to transfer the case to another State and can only quash the order of cognizance.

7. Learned counsels for the Petitioners further contend that the present proceedings are an abuse of the process of the Court, initiated against the Petitioners to overcome the bar of Section 19 PC Act. Thus applying the principle laid down in **State of Haryana v. Bhajan Lal,** AIR 1992 SC 604 the proceedings deserves to be quashed. The disciplinary authority has already taken a view that the ends of justice would be met by conducting departmental proceedings against the Petitioner Sanjay Tripathi for major disciplinary action and thus the present proceedings be quashed in the interest of justice.

8. Learned Counsel for the CBI on the other contends that Section 12 of the PC Act is a substantive offence and the cognizance under Section 11 PC Act is not essential for it. Adverting to the FIR it is stated that there are clear allegations against the Petitioners for abetment of offence under Section 11 punishable under Section 12 of the PC Act for which no sanction under Section 19 PC Act is required. The statements of the witnesses recorded during investigation show that the Petitioner Sanjay Tripathi a public servant was posted as Deputy Commissioner, Income Tax Central Circle 17, at Mumbai and while working as such had made an assessment of income tax vide order dated 30th March, 2004 for the assessment year 2001-2002 of M/s. Videocon International Limited which is a Videocon Group company. Sanjay Tripathi joined Enforcement Directorate on deputation at Mumbai on 3rd June, 2004 from where he was transferred to Bengaluru on promotion and thereafter to Meerut Division. On both the occasions, the household goods of Sanjay Tripathi were transported by M/s. Prakash Packers and Movers Mumbai and for this purpose the Petitioner Prakash Kitta Shetty contacted Shri S.P. Gupta

of M/s. Prakash Packers and Movers for packaging and transporting the household goods of Sanjay Tripathi and bills thereof were raised on M/s. Videocon Industries Ltd. The Petitioner Suresh Madhav Hegde issued the cheques and thus Sanjay Tripathi, Suresh Madhav Hegde, and Prakash Kitta Shetty of M/s. Videocon Industries by entering into a conspiracy committed an offence under Section 12 of the PC Act. It is stated that there is sufficient evidence on record to show that the Petitioners were conspirators and they are not being fastened any liability vicariously. It is further contended that for an offence under Section 12 of the PC Act which punishes the abetment of an offence under Section 11, no misconduct is required. Mere association of the public servant is sufficient. Further Section 12 PC Act is a substantive offence and is not dependent on Section 11 PC Act as held in **State through CBI v. Parmeshwaran Subramani,** (2009) 9 SCC 729.

9. Learned counsel for CBI relying on **R.S. Nayak v. A.R. Antulay,** 1986(2) SCC 716, **Ajay Aggarwal v. Union of India & Ors.,** 1993 (3) SCC 609 and **P.K. Thungon and others v. Central Bureau of Investigation,** 2009 II AD (Delhi) 674 contends that the offence of conspiracy is a single transaction which terminated at Delhi and thus the Delhi Courts have jurisdiction to try the same. In the alternative it is urged that the trial can be transferred to a Court of competent jurisdiction, however, the proceedings cannot be quashed.

10. I have heard learned counsel for the parties. Briefly the case of the prosecution in the charge-sheet is that Sanjay Tripathi while functioning as a public servant had obtained wrongful pecuniary advantages from M/s. Videocon Industries Limited during the years 2007 & 2008 with whom he had official dealings and thus committed misconduct. Sanjay Tripathi was working as Deputy Commissioner of Income-Tax, Central Circle 17, Mumbai and in the said capacity he had assessed the income-tax of M/s. Videocon International Limited vide order dated 30th March, 2004 for the assessment year 2001-2002. The company was represented by C.P. Suresh before Sanjay Tripathi. M/s. Videocon Industries Limited is another company of the same Group having the same Chairman-cum-Managing Director and auditors. While Sanjay Tripathi was transferred to Bengaluru, his household goods were transported by M/s. Prakash Packers and Movers Mumbai vide goods receipt No. 1714 dated 11th May, 2007. Though the invoice for Rs. 46,967/- was raised in the name

of Sanjay Tripathi but the address of the invoice was that of M/s. Videocon International Limited. Further this amount was paid by M/s. Videocon Industries Limited from their account at Federal Bank Branch Mumbai by cheque No. 568676 dated 5th June, 2007. Further on Sanjay Tripathi being repatriated and posted as Joint Commissioner of Income Tax U.P. (West) Ghaziabad, his household goods were again transported by M/s. Prakash Packers and Movers vide goods receipt No. 2052 dated 25th June, 2008 signed by Tripathi as consigner to Flat No. 8082, Part II Sector-B, Vasant Kunj, New Delhi. The invoice was issued by M/s. Prakash Packers and Movers in the name of M/s. Videocon Industries Limited. Further the payment of Rs. 52,822/- was made by M/s. Videocon Industries from their account at Indian Bank, Nariman Branch Mumbai. Thus, Sanjay Tripathi was found accepting valuable goods in the form of transportation charges from M/s. Videocon Industries. In this regard statements of relevant witnesses have been recorded which show that on both the occasions Prakash Kitta Shetty spoke to S.P. Gupta and arranged transportation and Suresh Madhav Hegde signed the cheques. Statement of witness S.P. Gupta has been recorded who has stated about the role of the Petitioner Prakash Kitta Shetty. Gev Framroz Kaklia, Officer Accounts M/s. Videocon Industries Limited stated that while authorizing the payments Suresh Madhav Hegde used to see whether the payment is genuine and in this context verify the same from the concerned officer who passed the bill and thereafter the bill came to him for issuing the cheque.

11. The Petitioners have raised the following issues for consideration in the present petition:

(i) Whether the Court at Delhi had the jurisdiction to try the offence in terms of Section 4(1) of the PC Act.

(ii) Whether a person who has committed the main offence can be charged for abetting the said offence as well.

(iii) Whether in the absence of any allegations that Tripathi abused his position thus giving any undue advantage to M/s. Videocon Industries Limited at the time of assessment an offence for abetment under Section 12 PC Act is made out.

(iv) Whether there is prima facie evidence to show that the

Petitioners have entered into a conspiracy to instigate an offence under Section 12 of the PC Act or have been made liable vicariously.

12. The principal contention of the Petitioners is that in a case for offence under the Prevention of Corruption Act 1988, the jurisdiction to try the offence would lie with the Court where the offence is committed. In view of Section 4(2) of the PC Act, the PC Act being a special enactment, the provisions relating to jurisdiction of the Trial Court would be governed by the Special Act and not by the provisions of the Criminal Procedure Code. In **CBI Vs. Braj Bhushan Prasad** 2001 9 SCC 432 similar question came up for consideration before the Hon'ble Supreme Court wherein trials pending in the State of Bihar were transferred to the State of Jharkhand, in view of Section 89 of the Bihar Reorganization Act 2000 as the offence under the PC Act were committed within the jurisdiction of the State of Jharkhand. Their Lordships held:

> "31. Section 4 of the PC Act relates to the jurisdiction of the court for trial of offences under that Act. The first sub-section of Section 4 declares that notwithstanding anything contained in the Code or in any other law, the offences punishable under the PC Act can be tried "only" by the Special Judge, appointed under Section 3(1) of the PC Act. Now sub-section (2) of Section 4 is the important provision and it is extracted below:
>
> > "Every offence specified in sub-section (1) of section 3 shall be tried by the special Judge for the area within which it was committed, or, as the case may be, by the Special Judge appointed for the case, or, where there are more special Judges than one for such area, by such one of them as may be specified in this behalf by the Central Government."
>
> 32. Thus, the only court which has jurisdiction to try the offences under the PC Act is the court of Special Judge appointed for the areas within which such offences were committed. When such an offence is being tried sub-section (3) enables the same Special Judge to try any other offence which could as well be charged against that accused in the same trial. So the pivot of the matter is to determine the area within which the offences was committed.

33. For that purpose it is useful to look at Section 3(1) of the PC Act. It empowers the Government to appoint Special Judge to try two categories of offences. The first is, "any offence punishable under this Act" and the second is, "any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified" in the first category. So when a court has jurisdiction to try the offence punishable under the PC Act on the basis of the place where such offence was committed, the allied offences such as conspiracy, attempt or abetment to commit that offence are only to be linked with the main offence. When the main offence is committed and is required to be tried it is rather inconceivable that jurisdiction of the court will be determined on the basis of where the conspiracy or attempt or abetment of such main offence was committed. It is only when the main offence was not committed, but only the conspiracy to commit that offence or the attempt or the abetment of it alone was committed, then the question would arise whether the court of the Special Judge within whose area such conspiracy etc. was committed could try the case. For our purpose it is unnecessary to consider that aspect because the charge proceed on the assumption that the main offence was committed.

34. What is the main offence in the charges involved in all these 36 cases? It is undisputed that the main offence is under Section 13(1)(c) and also Section 13(1)(d) of the PC Act. The first among them is described thus:

> "A public servant is said to commit the offence of criminal misconduct,-
>
> (c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person to do so."

The next offence is described like this:

> "A public servant is said to commit the offence of criminal misconduct,-
>
> (d) if he,-

> (i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or
>
> (ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or
>
> (iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest."

35. We have no doubt in our mind that the hub of the act envisaged in first of those two offences is "dishonestly or fraudulently misappropriates". Similarly the hinge of the act envisaged in the second section is "obtains" for himself or for any other person, any valuable thing or pecuniary advantage by corrupt or illegal means.

36. The above acts were complete in the present cases when the money has gone out of the public treasuries and reached the hands of any one of the persons involved. Hence, so far as the offences under Section 13(1)(c) and Section 13(1)(d) are concerned the place where the offences were committed could easily be identified as the place where the treasury concerned was situated. It is an undisputed fact that in all these cases the treasuries were situated within the territories of Jharkhand State.

37. Thus, when it is certain where exactly the offence under Section 13 of the PC Act was committed it is an unnecessary exercise to ponder over the other areas wherein certain allied activities, such as conspiracy or preparation, or even the prefatory or incidental acts were done, including the consequences ensued.

38. In this context it is useful to refer to Section 181 of the Code which falls within Chapter XIII, comprising of provisions regarding jurisdiction of the criminal courts in inquiries and trials. Section 181 pertains to "place of trial in case of certain offences". Sub-section (4) thereof deals wit h the jurisdiction of the courts if the offence committed is either criminal misappropriation or criminal breach of trust. At least four different courts have been envisaged by the sub-section having jurisdiction for trial of the

said offence and anyone of which can be chosen. They are: (1) the court within whose local jurisdiction the offence was committed; (2) the court within whose local jurisdiction any part of the property which is the subject of the offence was received; (3) the court within whose local jurisdiction any part of the property which is the subject of the offence was retained; and (4) the court within whose local jurisdiction any part of the property which is subject of the offence was required to be returned or accounted for, by the accused.

39. Now, observe the distinction between Section 181(4) of the Code and Section 4(2) of the PC Act. When the former provision envisaged at least four courts having jurisdiction try a case involving misappropriation the latter provision of the PC Act has restricted it to one court i.e. the Court of the Special Judge for the area "within which the offence was committed". No other court is envisaged for trial of that offence. We pointed out above that when the charge contains the offence or offences punishable under the PC Act as well as the offence of conspiracy to commit or attempt to commit or any abetment of any such offence, the court within whose local jurisdiction the main offence was committed alone has jurisdiction.

40. Shri Kapil Sibal, learned senior counsel contended that Section 4(2) of the PC Act does not override the provisions of the Code regarding jurisdiction because among the four sub-section included in Section 4 of the said Act, only first and the last sub-section are tagged with the non obstante words "notwithstanding anything contained in the code of Criminal Procedure". In his submission the fact that sub-section (2) is freed from the non obstante words would indicate that the provisions of the Code can as well be read with that sub-section. In that context learned Senior Counsel invited our attention to Section 178 to 180 of the Code, showing that different courts having domain over different local areas have concurrent jurisdiction to inquire into or try the offences and hence the trial is permissible in any one of them.

41. Absence of a non obstante clause linked with Section 4(2) of the PC Act does not lead to a conclusion that the sub-section is subject to the provisions of the Code. A reading of Section

4(2) of the Code (not PC Act) gives the definite indication that the legal position is the other way round. Section 4 of the Code is regarding trial of offences under the Indian Penal Code and other laws. Sub-section (1) of it relates only to offences under the Indian Penal Code. Sub-section (2) relates to "all offences under any other law". It is useful to read the said sub-section at this stage: "All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

42. Thus, if the PC Act has stipulated any place for trial of the offence under that Act the provisions of the Code would stand displaced to that extent in regard to the place of trial. We have, therefore, no doubt that when the offence is under Section 13(1)(c) or Section 13(1)(d) of the PC Act the sole determinative factor regarding the court having jurisdiction is the place where the offence was committed."

13. In view of the law laid down by the Hon'ble Supreme Court it is thus settled that cognizance of an offence under Section 12 PC Act and 120B IPC read with 12 PC Act will have to be taken by the Court within whose jurisdiction the offence under PC Act has been committed. Learned counsel for the CBI has strenuously contended that in the present case since the goods of Petitioner Sanjay Tripathi were transported to Delhi and unloaded at Vasant Kunj i.e. the consequences of the conspiracy ensued at Delhi, this Court will have jurisdiction to try the same. In **Ajay Aggarwal** (supra) the Hon'ble Supreme Court was dealing with offences under the IPC. In **P.K. Thungon** (supra) while dealing with an offence under PC Act, this Court held that since receipt of illegal gratification which is the essence of the offence took place at Delhi, the Courts in Delhi had jurisdiction to try the offences.

14. The abetment of an offence under Section 7 or 11 of the PC Act is a substantive offence under Section 12 of the PC Act for which no sanction is required. However, in view of Section 4(1) of the PC Act and 4(2) of the Indian Penal Code, the Court competent to enquire and try the offence under Section 12 of the PC Act would be the Court where the offence of abetment took place. There can be no dispute that

transportation of goods from Bengaluru to Delhi is not an offence. The offence is the payment for the said transportation by the Petitioners Suresh M. Hegde and Pakash K. Shetty on behalf of the Videocon Industries Limited at Mumbai. The cheques were issued at Mumbai, received at Mumbai and encashed at Mumbai. It may be further noted that the Petitioners have not been charged for the substantive offence of conspiracy but with Section 120-B IPC read with 12 PC Act. Thus, the only Court which has the jurisdiction to try the offence under Section 12 PC Act read with 120B IPC and Section 12 PC Act is the Competent Court at Mumbai.

15. Since the petitions succeed on the first issue, this Court is not required to advert to the remaining issues. Learned counsel for the Petitioners have stated that this Court has no jurisdiction to transfer the trial from a Court at Delhi to a Court at Mumbai. Though this Court has no such power to direct transfer but it has the jurisdiction to direct the learned Special Judge, Delhi to return the closure report for being presented before a Court of competent jurisdiction at Mumbai.

16. In view of the aforesaid discussion, the order dated 5th November, 2011 passed by the learned Special Judge taking cognizance for offences under Section 120-B IPC read with Section 12 PC Act and Section 12 PC Act in RC No.AC2 2009 A 0002 is set aside. The learned Special Judge will return the closure report to the CBI to be presented to the Court of competent jurisdiction at Mumbai.

Petitions and applications are disposed of accordingly.

ILR (2012) II DELHI 750
W.P. (C)

SACHIN J. JOSHI & ANR. ....PETITIONERS

VERSUS

LT. GOVERNOR & ANR. ....RESPONDENTS

(RAJIV SAHAI ENDLAW, J.)

W.P. (C) NO. : 8496/2008 DATE OF DECISION: 02.02.2012

Delhi Devlopment Act, 1957—The petition impugns the order dated 10th November, 2008 of the respondent no. 1 acting as the Chairman of the respondent no.2 DDA, refusing the request of the petitioners for amalgamation of hotel plots No. 1&2 in Wazirpur District Center, New Delhi and seeks mandamus for such amalgamation; compensation is also claimed for withholding the permission for amalgamation—Brief Facts—DDA in the year 1994 invited bids for grant of perpetual lease right in respect of a hotel plot measuring 18000 sq. at Wazirpur, Delhi—Bid of M.S. Shoes East was accepted—It defaulted in payment and cancellation was effected—Litigation ensued and during the pendency thereof the respondent no. 2 DDA was permitted to re-auction the plot—However this time around, DDA bifurcated the plot auctioned in the year 1994 as one into two plots no. 1&2—The petitioner no.2 M/s Asrani Inns & Resorts Pvt. Ltd. of which the petitioner no.1 is one of the shareholders bid for both the plots and its bid being the highest was accepted and conveyance deeds dated 3rd November, 2006 with respect thereto executed in favour of the petitioner no. 2 Company and possession handed over, subject to the outcome of the legal proceedings initiated by M.S. Shoes East—Petitioners,

immediately after being delivered possession of the two plots and before commencing construction thereon, requested DDA for amalgamation of the two plots—Upon not receiving any response, W.P. (C) No. 4251/2007 was filed—Court vide order dated 29th may 2007 directed DDA to consider the request for amalgamation and communicate its decision within fifteen days—Chairman of the DDA vide order dated 30th July 2007 rejected the said request for amalgamation on the ground of the said request being in contravention to the condition mentioned in the auction document at Clause 3.10 (vii)—W.P.(C) No. 8101/2007 filed impugning the said order of rejection—WP was however dismissed vide judgment dated 8th April, 2008 holding *inter alia* that being a term of the auction stood incorporated in the conveyance deed, amalgamation would not be allowed—No mandamus for amalgamation could be issued—Intra—Court Appeal being LPA 210/2008 was preferred by the petitioners—LPA 210/2008 (supra) was ultimately disposed of vide judgment dated 20th October, 2008 remanding matter to Chairman of the DDA for fresh decision on the application of the petitioners for amalgamation, after considering the various factors which had emerged during the hearing before the Division Bench—Vide order dated 10th November, 2008 again the request for amalgamation was rejected—Hence present Writ Petition—Held—DDA has neither dealt with the request of the petitioners for amalgamation of the two plots, both in its name, in accordance with guidelines nor given any reasons—DDA even though in the capacity of a seller of land, is in such matters required to act reasonably and in accordance with law and any arbitrary action on its part would become subject to judicial review—Reasons given by respondent No.1, in order for rejection of request for amalgamation, amounting to change of auction conditions had already been negatived by Division Bench in earlier round of

litigation; ii) reason that amalgamation will totally change type of Hotel that can be constructed and if plots had been auctioned as one, would have invited better bids from International Hoteliers was also contrary to findings of Division Bench in earlier round of litigation that single plot was bifurcated for commercial gains of DDA and even otherwise irrelevant once resolution supra was held to apply to Hotel Plots also it may be noticed that said reasoning equally applies to plots for office buildings / shopping malls in as much as class of builders / developers thereof were also different for smaller and large plots—It may also be mentioned that though proposal leading to resolution supra was for linking charges for amalgamation to premium paid for amalgamated plot, what was approved/resolved was to link same to market rate on date of application for amalgamation If it was case of DDA that premium/market price for bigger plot would have been / be more, it would proportionately earn higher charges for amalgamation; (iii) reason that hotel plots had different architectural control than office buildings/shopping malls was irrelevant once hotel plots were included as aforesaid in commercial category It was also worth mentioning that though proposal leading to resolution supra required application for amalgamation to be referred first to Architectural Control and Building Department but resolution did not accept same and expressly stated that same was not necessary DDA neither in impugned order nor now had explained as to how amalgamation would contravene any other norms—Thus, impugned order rejecting request for amalgamation was found to be in contravention of resolution/decision of DDA itself and thus arbitrary and whimsical and did not pass test—Hence, petition allowed.

The respondent no.2 DDA has neither dealt with the request of the petitioners for amalgamation of the two plots, both in

its name, in accordance with the said guidelines nor given any reasons therefor. The respondent no.2 DDA even though in the capacity of a seller of land, is in such matters required to act reasonably and in accordance with law and any arbitrary action on its part would become subject to judicial review. Reference in this regard can be made to **R.K. Mitttal Vs. State of Uttar Pradesh** MANU/SC/1471/2011 laying down that Development Authority, as the respondent DDA is, cannot act in a arbitrary and discriminatory manner. **(Para 18)**

Of the reasons given by respondent No.1, in order dated 10.11.2008 (supra) for rejection of request for amalgamation, i) the reason of the same amounting to change of auction conditions has already been negatived by the Division Bench in earlier round of litigation; ii) the reason that amalgamation will totally change the type of Hotel that can be constructed and if the plots had been auctioned as one, would have invited better bids from International Hoteliers is also contrary to the findings of the Division Bench in the earlier round of litigation that the single plot was bifurcated for commercial gains of DDA and even otherwise irrelevant once the resolution supra is held to apply to Hotel Plots also – it may be noticed that the said reasoning equally applies to plots for office buildings / shopping malls in as much as the class of builders / developers thereof are also different for smaller and larger plots – it may also be mentioned that though the proposal leading to resolution supra was for linking the charges for amalgamation to the premium paid for amalgamated plot, what was approved / resolved was to link the same to market rate on the date of application for amalgamation – if it is the case of DDA that the premium / market price for bigger plot would have been / be more, it will proportionately earn higher charges for amalgamation; iii) the reason that hotel plots have different architectural control than office buildings / shopping malls is irrelevant once hotel plots are included as aforesaid in commercial category – it is also worth mentioning that though the

proposal leading to resolution supra required the application for amalgamation to be referred first to Architectural Control and Building Department but the resolution did not accept the same and expressly stated that the same was not necessary – DDA neither in the impugned order nor now has explained as to how amalgamation would contravene any other norms. Thus, the impugned order rejecting request for amalgamation is found to be in contravention of the resolution / decision of DDA itself and thus arbitrary and whimsical and does not pass the test of legal scrutiny. Significantly, it is not a case of the respondent no.2 DDA that amalgamation is contrary to the Master Plan or the Zonal Plan. **(Para 19)**

For all the aforesaid reasons, the petition is entitled to succeed and is allowed. Mandamus is issued to the respondents to within 10 weeks hereof grant permission to the petitioners for amalgamation in accordance with the Resolution dated 7th January, 1991. To avoid any further dispute, it is further directed that in the peculiar facts of the case the petitioner shall not be entitled to any interest on the amount of Rs. 4 crores already deposited and the petitioners shall deposit the balance amount towards amalgamation charges in accordance with the Resolution dated 7th January, 1991 (supra) within the time demanded by the respondents. It is further directed that the time allowed for construction shall stand extended by the period for which the matter remained pending in the Courts.

No order as to costs. **(Para 20)**

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Sanjay Jain, Sr. Adv., Ms. Pinky Anand, Sr. Adv. with Mr. Trideep Pais, Mr. Lokesh Bhala & Mr. Shohit Chaudhry, Advocates.

FOR THE RESPONDENT : Mr. Ajay Verma, Advocate. for DDA.

CASES REFERRED TO:

1. *R.K. Mitttal* vs. *State of Uttar Pradesh* MANU/SC/1471/2011.
2. *ITC Ltd.* vs. *State of Uttar Pradesh* (2011) 7 SCC 493.
3. *Punjab National Bank* vs. *Astamija Dash* (2008) 14 SCC 370.
4. *Clariant International Ltd.* vs. *Securities & Exhange Board of India* (2004) 8 SCC 524 (para 26,28 & 29).
5. *Universal Petrochemicals Ltd.* vs. *Rajasthan State Electricity Board* AIR 2001 Calcutta 102.

RESULT: Writ Petition Allowed.

RAJIV SAHAI ENDLAW, J.

1. The petition impugns the order dated 10th November, 2008 of the respondent no.1 acting as the Chairman of the respondent no.2 DDA, refusing the request of the petitioners for amalgamation of hotel plots No.1&2 in Wazirpur District Centre, New Delhi and seeks mandamus for such amalgamation; compensation is also claimed for withholding the permission for amalgamation. Notice of the petition was issued and pleadings have been completed. The counsels have been heard.

2. The respondent no.2 DDA had in the year 1994 invited bids for grant of perpetual lease right in respect of a hotel plot measuring 18000 sq. mtr . and with a proposed built-up area of 30000 sq. mtr. at Wazirpur, Delhi. The bid of M.S. Shoes East was accepted; however, it defaulted in payment and cancellation was effected; litigation ensued and during the pendency thereof the respondent no.2 DDA was permitted to re-auction the plot. However this time around the respondent no.2 DDA bifurcated the plot auctioned in the year 1994 as one into two plots no.1&2 aforesaid and vide auction notice dated 4th May, 2006 invited bids therefor. The petitioner no.2 M/s Asrani Inns & Resorts Pvt. Ltd. of which the petitioner no.1 is one of the shareholders bid for both the plots and its bid being the highest was accepted and conveyance deeds dated 3rd November, 2006 with respect thereto executed in favour of the petitioner no.2 Company and possession handed over, subject of course to the outcome of the legal proceedings initiated by M.S. Shoes East. The petitioner no.2 Company was also impleaded as party in the said proceedings and was

vide order dated 17th May, 2007 therein allowed to raise construction on the said plot.

3. The petitioners however, immediately after being delivered possession of the two plots and before commencing construction thereon, vide their letter dated 14th December, 2006 requested the respondent no.2 DDA for amalgamation of the two plots. Upon not receiving any response from the respondent no.2 DDA to the request for amalgamation, W.P.(C) No. 4251/2007 was filed in this Court. This Court vide order dated 29th May, 2007 therein directed the respondent no.2 DDA to consider the request for amalgamation and communicate its decision within fifteen days.

4. The respondent no.1 as Chairman of the DDA vide order dated 30th July, 2007 rejected the said request for amalgamation on the ground of the said request being in contravention to the condition mentioned in the auction document at Clause 3.10 (vii). It was further observed that since a decision had been taken to auction the erstwhile consolidated plot as two smaller size plots, the occasion to allow post auction amalgamation in violation of the auction condition did not arise.

5. The petitioners filed W.P.(C) No. 8101/2007 impugning the said order of rejection. During the pendency of the said writ petition the petitioners were permitted to submit plans for construction treating the plots to have been permitted to be amalgamated. The said writ petition was however dismissed vide judgment dated 8th April, 2008. It was *inter alia* held that it being a term of the auction and which term stood incorporated in the conveyance deed executed in favour of the petitioner no.2 Company that amalgamation would not be allowed, no mandamus for amalgamation could be issued.

6. Intra-Court Appeal being LPA 210/2008 was preferred by the petitioners. Vide interim order in the said appeal, finding that the plot was earlier sought to be sold as a single/composite one and in view of the then impending Commonwealth Games-2010, subject to the petitioners depositing Rs. 4 crores with the respondent no.2 DDA, the petitioners were permitted to construct till plinth level on the two plots on the basis of amalgamated plot. It was however made clear that in the event of failure of the appeal the petitioners will not claim any equity on account of such construction and the construction so raised shall be dismantled

forthwith. LPA 210/2008 (supra) was ultimately disposed of vide judgment dated 20th October, 2008. The Division Bench held/observed:-

A. that the records showed that the plot was originally envisaged to be used as a single plot for the purpose of construction of a five star hotel; however when the plot was sought to be sold as a single plot it did not fetch an adequate price; it was then decided to split up the single plot into two plots. It was not therefore as if the plots were always intended to be sold as two separate plots;

B. that though Clause 3.10(vii) of the terms & conditions of auction prohibited deviation in any manner from the layout plan, alteration of the size of the plot by sub-division, amalgamation or otherwise but the conveyance deeds of freehold rights in the plots executed in pursuance thereto did not contain any prohibition against amalgamation; it only prohibited alteration/addition "without written permission of the respondent no.2 DDA who may refuse or grant the same subject to such terms & conditions as may be deemed proper". It was thus held that Clause 3.10(vii) was not a fetter on the power of the respondent no.2 DDA to exercise its discretion;

C. that respondent no.2 DDA had vide its Resolution dated 7th January, 1991 provided guidance to the exercise of the power of amalgamation. However no arguments were addressed before the Learned Single Judge with respect to the Resolution dated 7th January, 1991.

D. that the counsel for the respondent no.2 DDA had not seriously pursued the argument that hotel plots are not commercial plots and therefore would not be governed by the Resolution dated 7th January, 1991;

E. that the opinion of the Lt. Governor that Clause 3.10(vii) of the auction terms constituted a prohibition against amalgamation was based on an incorrect interpretation and owing whereto the respondent no.1 as Chairman of the DDA had not considered whether the discretion vested in the respondent no.2 DDA to permit amalgamation was to be exercised or not. The matter was therefore remanded

to the respondent no.1 as Chairman of the DDA for fresh decision on the application of the petitioners for amalgamation, after considering the various factors which had emerged during the hearing before the Division Bench. Till the said decision, status quo was directed to be maintained.

7. It is pursuant to the aforesaid remand by the Division Bench in the earlier round of litigation that the respondent no.1 has vide order dated 10th November, 2008 again rejected the request for amalgamation for the following reasons:-

"(1) The auction condition as mentioned at point No. (vii) (on page 10) of the brochure for the auction of the hotel plots states that successful bidder shall not deviate in any manner from the layout plan or alter the size of the plot by sub-division, amalgamation or otherwise. Changing of auction conditions, post-auction would vitiate the entire procedure as the amalgamation will totally change the type of hotel that can be constructed on the auctioned plots.

(2) By stipulating in the auction conditions that amalgamation shall not be permitted, DDA, in fact, prevented many of the leading International Hoteliers from bidding for the plots. It would be seen that by allowing amalgamation of plots post auction, DDA has favoured the auction purchaser while keeping away the renowned international Hoteliers from participating in the auction procedure.

(3) Commercial plots and hotel plots stand on different footings, have different usages, have different architectural controls and are distinct from one another. While amalgamation is permitted in one category it is not permitted in the other. DDA in its history has not allowed amalgamation of hotel plots and by doing so would be setting a bad precedent. Hence your request for amalgamation of the plots post-auction is hereby rejected."

8. Impugning the aforesaid order the present writ petition was filed and the interim order of *status quo* was continued by way of interim order in this petition also.

9. Before considering the respective contentions, it is apposite to notice the Resolution dated 7th January, 1991 (supra) regarding grant of permission for amalgamation of "commercial plots". The same records that, some of the allottees in whose favour leases had been executed by the respondent no.2 DDA had been representing for grant of permission for amalgamation on the plea that the amalgamation did not affect the Architectural Control provisions; that the matter was examined by the screening committee of the respondent no.2 DDA which had proposed that all requests for amalgamation will be referred to Architectural Control and the Building Department who will work out details relevant to provision of building regulation and determine the remunerative area available to the party and will submit their observation/recommendation to the Land Department which will ultimately place the same before the Chairman, DDA for approval. It further proposed that the plots to be amalgamated should both have been leased in the name of the same party and no bifurcation of the amalgamated plot shall be permitted at any later stage. The rates for grant of permission were also proposed as 10% of the premium of amalgamated plot if the application is made within 10 years from the date of purchase, 20% of the premium of amalgamated plot for applications made between 10 & 20 years from the date of purchase and of 30% of the premium of amalgamated plot qua applications made after 20 years from the date of purchase. The said proposal was considered vide Resolution aforesaid of the respondent no.2 DDA and it was decided that a flat rate of 10% of the market value prevalent at the time of application be recovered irrespective of the period of lease. It was also resolved that no reference to Building Cell or any other Section of the Planning Wing was necessary. The approval of the Central Government for the modification of the lease was also sought to be obtained.

10. It is the contention of the petitioner no.2 Company in this writ petition, that the rejection of its request is inter alia on the same grounds which had not found favour in the judgment of the Division Bench in the earlier round of litigation and thus does not constitute valid reason for rejection of the request; that as per the Resolution dated 7th January, 1991/Policy of the respondent no.2 DDA upon payment of 10% of the market value of amalgamated plot at the time of making the application and which comes to about Rs. 23 crores and of which a sum of Rs. 4 crores is already paid, it is entitled to permission for amalgamation. It is further contended that it is not as if the petitioner no.2 Company will by

amalgamation get any additional FAR. It is else contended that amalgamation for construction of a single building is advantageous from all points of view.

11. The respondent no.2 DDA in its counter affidavit has reiterated the reasons for which the request for amalgamation has been rejected.

12. The senior counsels for the petitioners have relied upon **Clariant International Ltd. v. Securities & Exhange Board of India** (2004) 8 SCC 524 (para 26,28 & 29), on **Punjab National Bank v. Astamija Dash** (2008) 14 SCC 370 and on **Universal Petrochemicals Ltd. v. Rajasthan State Electricity Board** AIR 2001 Calcutta 102.

13. The finding of the Division Bench of this Court in the earlier round of litigation to the effect that there is no bar to amalgamation and on which ground the request was earlier rejected and the request for amalgamation can be considered is binding on this Bench. The next question however which arises is as to on what basis/principles the said discretion is to be exercised. The senior counsels for the petitioners contend that the request for amalgamation has to be considered as per the guidelines laid down in Resolution dated 7th January, 1991 (supra). They further contend that the Division Bench also has held the said guidelines to be applicable qua the plots in question.

14. Though no clear cut finding to this effect is found in the judgment dated 20th October, 2008 (supra) of the Division Bench but it nevertheless observed that the counsel for the respondent no.2 DDA had not seriously pursued the argument that the hotel plots are not commercial plots and therefore would not be governed by the said Resolution.

15. The Supreme Court however, is recently found to have been confronted with a similar issue in **ITC Ltd. v. State of Uttar Pradesh** (2011) 7 SCC 493 though in the context of Noida and not Delhi. The question for adjudication therein was, whether the plots earmarked for commercial purposes could be sold for the purposes of a hotel. The Supreme Court on examination of the various provisions as in force in Noida concluded that running a hotel is a commercial activity and use of a land or building for a hotel is a commercial use and allotment of plots for hotels in a commercial area was found to be in consonance with the Noida Regulations & Master Plan which earmarked areas for specific land use like industrial, residential, commercial, institutional, public, semi-

public etc. The allotment of commercial plots for setting up hotels was thus held to be valid.

16. I have examined the provisions of the Delhi Development Act, 1957 and Delhi Master Plan for 2001 to see whether the position here is any different. Section 2(b) of the Act defines building as including any structure intended to be used for residential, industrial, commercial or other purposes. The Act does not define "commercial" and the classification elsewhere also is found to be confined between residential, industrial, commercial and other purposes only. Mention in this regard may be made of the Delhi Development Master Plan & Zonal Development Plan Rules, 1959 which also provide for the land use plan to provide for utilization of land as government, commercial, industrial, residential, cultural, educational, re-creational, transportation and other activities only. Similarly DDA (Disposal of Developed Nazul Land) Rules, 1981 also provide for allotment of Nazul Land for public utilities, community facilities, open spaces, parks, playgrounds, residential purposes, industrial and commercial uses only. The mode of allotment prescribed is also for residential, industrial, commercial and public institutions, cooperative societies purpose only and for no other purpose. Thus, "other purposes" mentioned in Section 2 (b) supra translates under the Rules to public institutions, cooperative societies, in which Hotels cannot fall. The Supreme Court in judgment (supra) has already held that hotel does not fall in industrial purpose. It has not been argued by the respondent no.2 DDA nor can it fall in residential purpose or in the public institution purpose which are required to be societies/trustees. On this parity of reasoning also, as found by the Apex Court in relation to Noida, in Delhi also there is no category other than commercial in which the plots meant for hotel purpose can fall. An examination of the Master Plan also shows hotels to be falling in commercial category only.

17. Once it is found that the hotels are part of the commercial classification of the respondent no.2 DDA, and the respondent no.2 DDA otherwise being unable to show that the Resolution dated 7th January, 1991 was not intended to apply to hotels, there is no reason to hold the said Resolution not applicable to the plots in question and to be dealt thereunder.

18. The respondent no.2 DDA has neither dealt with the request of the petitioners for amalgamation of the two plots, both in its name, in

accordance with the said guidelines nor given any reasons therefor. The respondent no.2 DDA even though in the capacity of a seller of land, is in such matters required to act reasonably and in accordance with law and any arbitrary action on its part would become subject to judicial review. Reference in this regard can be made to **R.K. Mittal Vs. State of Uttar Pradesh** MANU/SC/1471/2011 laying down that Development Authority, as the respondent DDA is, cannot act in a arbitrary and discriminatory manner.

19. Of the reasons given by respondent No.1, in order dated 10.11.2008 (supra) for rejection of request for amalgamation, i) the reason of the same amounting to change of auction conditions has already been negatived by the Division Bench in earlier round of litigation; ii) the reason that amalgamation will totally change the type of Hotel that can be constructed and if the plots had been auctioned as one, would have invited better bids from International Hoteliers is also contrary to the findings of the Division Bench in the earlier round of litigation that the single plot was bifurcated for commercial gains of DDA and even otherwise irrelevant once the resolution supra is held to apply to Hotel Plots also – it may be noticed that the said reasoning equally applies to plots for office buildings / shopping malls in as much as the class of builders / developers thereof are also different for smaller and larger plots – it may also be mentioned that though the proposal leading to resolution supra was for linking the charges for amalgamation to the premium paid for amalgamated plot, what was approved / resolved was to link the same to market rate on the date of application for amalgamation – if it is the case of DDA that the premium / market price for bigger plot would have been / be more, it will proportionately earn higher charges for amalgamation; iii) the reason that hotel plots have different architectural control than office buildings / shopping malls is irrelevant once hotel plots are included as aforesaid in commercial category – it is also worth mentioning that though the proposal leading to resolution supra required the application for amalgamation to be referred first to Architectural Control and Building Department but the resolution did not accept the same and expressly stated that the same was not necessary – DDA neither in the impugned order nor now has explained as to how amalgamation would contravene any other norms. Thus, the impugned order rejecting request for amalgamation is found to be in contravention of the resolution / decision of DDA itself and thus arbitrary and whimsical and does not pass the test

of legal scrutiny. Significantly, it is not a case of the respondent no.2 DDA that amalgamation is contrary to the Master Plan or the Zonal Plan.

20. For all the aforesaid reasons, the petition is entitled to succeed and is allowed. Mandamus is issued to the respondents to within 10 weeks hereof grant permission to the petitioners for amalgamation in accordance with the Resolution dated 7th January, 1991. To avoid any further dispute, it is further directed that in the peculiar facts of the case the petitioner shall not be entitled to any interest on the amount of Rs. 4 crores already deposited and the petitioners shall deposit the balance amount towards amalgamation charges in accordance with the Resolution dated 7th January, 1991 (supra) within the time demanded by the respondents. It is further directed that the time allowed for construction shall stand extended by the period for which the matter remained pending in the Courts.

No order as to costs.

ILR (2012) II DELHI 763
OMP

UNION OF INDIA **....PETITIONER**

VERSUS

SUNRISE ENTERPRISES, PANIPAT **....RESPONDENT**

(S. MURALIDHAR, J.)

OMP NO. : 382/2006 **DATE OF DECISION: 02.02.2012**

Arbitration & Conciliation Act, 1996—Sec. 34(3)—Delay—Impugned award dated 21.02.2006; Copy of award received by petitioner on 28.02.2006; petition for setting aside the award filed within prescribed time on 22.05.2006—Upon filing the petition, the registry pointed out four defects, so petition collected from registry and refiled on 30.05.2006 without curing the defects—Registry noted that objections not removed—Pettion again collected and refiled on 05.07.2006 without curing the defects—Registry again noted that objections not removed—Petitioner again collected and refiled on 27.07.2006—Registry added objection that application seeking condonation of delay in refiling be filed—Refiling done for the fourth time on 18.08.2006 along with delay condonation application but in the application absolutely no explanation for the delay—Petitioner contended that condonation of delay in refiling should not be vigorously scrutinized so long as the main petition is in time—Held, in the matter of condoning delay in refiling the petitions under Sec. 34, the Court has to adopt stricter scrutiny as compared to matter under Sec. 5 Limitation Act and where there is a delay of more than the permissible period of 90 days plus additional 30 days under Sec. 34(3); unless there is satisfactory and credible explanation, the Court would be reluctant to condone the delay—Since no attempt made to explain delay in refiling, the delay of 75 days becomes fatal.

It appears that the Court has, in the matter of condonation of delay in re-filing the petitions under Section 34 of the Act, adopted a stricter scrutiny than it does while considering an application for condonation of delay filed under Section 5 of the Limitation Act. What weighs with the Court is the express legislative intent in Section 34 (3) of the Act, that the total permissible period within which an application can be permitted to be filed under Section 34 of the Act, is 90 days plus an additional 30 days. If the delay in re-filing the petition exceeds the above period, then the scrutiny becomes rigorous. Unless there is a satisfactory and credible explanation for the delay, the Court would be reluctant to condone it. Otherwise, the legislative object of not permitting the delay in the original filing beyond 30 days would get defeated. **(Para 13)**

Important Issue Involved: In the matter of condoning delay in refiling the petitions under Sec. 34 Arbitration & Conciliation Act, the Court has to adopt stricter scrutiny as compared to matter under Sec. 5 Limitation Act and where there is a delay of more than the permissible period of 90 days plus additional 30 days under Sec. 34(3), unless there is satisfactory and credible explanation, the Court would be reluctant to condone the delay.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Jaswinder Singh, Advocate.

FOR THE RESPONDENT : Mr. Shiv Khorana, Advocate.

CASES REFERRED TO:

1. *Union of India* vs. *M/s. Harbhagwan Harbhajan Lal* 2010 (6) RAJ 310 (Del).
2. *The Executive Engineer (Irrigation & Flood Control)* vs. *Shree Ram Construction Co.* 2010 (4) Arb LR 314 (Delhi) (DB).
3. *Union of India* vs. *Harbhagwan Harbhajan Lal & Arun Construction Co.* FAO (OS) 259 of 2010.
4. *Union of India* vs. *Ogilvy & Mather Limited FAO (OS) No. 132 of 2009.*
5. *Gautam Associates* vs. *Food Corporation of India* 2009 (111) DRJ 744.
6. *Union of India* vs. *Popular Construction Company* (2001) 8 SCC 470.
7. *D.C. Sankhla* vs. *Ashok Kumar Parmar* (1995) 1 AD (Delhi) 753.
8. *Indian Statistical Institute* vs. *M/s. Associated Builder* UJ (SC) 1977 805.

RESULT: Petition Dismissed.

S. MURALIDHAR, J.

IA No.9086/2006

1. This is an application by the Petitioner seeking condonation of delay in re-filing the petition being OMP No. 382 of 2006 under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act').

2. The facts relevant to the present application are that the impugned Award was passed on 21st February 2006. According to the Petitioner, it received a copy of the Award on 28th February 2006. In terms of Section 34 (3) of the Act, the petition for setting aside the Award had to be filed within three months from the date of receipt of the Award. Admittedly, the OMP was filed within time on 22nd May 2006.

3. The petition was scrutinized and the following defects were pointed out by the Registry: (i) Court fee of Rs. 20/-be affixed; (ii) No annexures filed with the petition; (iii) Vakalatnama not filed; and (iv) index should be properly paginated.

4. It appears that the petition was collected from the Registry and re-filed by the Petitioner first on 30th May 2006 without curing the above objections. The noting of the Registry on the file of 30th May 2006 was that "all above objections are still pending". Then for the second time the petition was re-filed on 5th July 2006. The noting on file of 6th July 2006 reads "all above objections are still not removed". For the third time, the petition was re-filed by the Petitioner on 27th July 2006. The noting on file of 30th July 2006 added another objection "the application seeking condonation of delay for re-filing be filed."

5. It requires to be noticed at this stage that as per the original scrutiny report, the objections were to be removed and the petition re-filed within one week of the Registry pointing out the defects. It is stated by Mr. Jaswinder Singh, learned counsel for the Petitioner that this rule is not rigorously applied by the Registry and usually an application for condonation of delay for re-filing is required to be filed only where the delay in re-filing is beyond 30 days. Be that as it may, in the present case, the re-filing for the fourth time took place on 18th August 2006 together with an application for condonation of delay.

6. A perusal of the said application, i.e., IA No. 9086 of 2006 reveals that it is some kind of an omnibus application which is captioned

as an application for "exemption from filing the typed copies of dim annexures". In fact, para 3 talks of dim annexures and para 4 about inadequate left margins. Para 5 of the application states: "It is also prayed that this Hon'ble Court may condone delay, if any, in re-filing of the accompanying OMP." Para 6 again talks of dim annexures and inadequate left margins. Prayers (a) and (b) are to the same effect. Prayer (c) reads: "Condone delay, if any, in re-filing of the accompanying OMP, if any."

7. In effect, therefore, there is absolutely no explanation whatsoever in the application for the delay in re-filing the OMP.

8. Although the Registry has not computed the actual delay in re-filing, it should be computed from one week after 23rd May 2006, i.e., 30th May 2006 till 18th August 2006. This is over 75 days.

9. The question that now arises is whether the above delay in re-filing should be condoned. Mr. Jaswinder Singh, learned counsel for the Petitioner urges that the delay in re-filing is not considerable and ought to be condoned. To make up for the absence of an explanation in the application for the delay in re-filing, learned counsel for the Petitioner prays that one more opportunity should be given to the Petitioner to file an affidavit to explain the delay. He relies on the decision of the Supreme Court in **Indian Statistical Institute v. M/s. Associated Builder** UJ (SC) 1977 805 to urge that the application for condonation of delay in re-filing should not be rigorously scrutinized. He submits that as long as the main petition is within time, the subsequent re-filing would relate back to the date of the original filing. As long as the delay is not extraordinary, it should be condoned. He also relies on the decision of the Division Bench of this Court in **D.C. Sankhla v. Ashok Kumar Parmar** (1995) 1 AD (Delhi) 753.

10. Mr. Shiv Khorana, learned counsel appearing for the Respondent on the other hand opposes the application by referring to the decision of the Division Bench of this Court in **The Executive Engineer (Irrigation & Flood Control) v. Shree Ram Construction Co.** 2010 (4) Arb LR 314 (Delhi) (DB) which affirms the decisions of the learned Single Judge of this Court in **Gautam Associates v. Food Corporation of India** 2009 (111) DRJ 744 and **Union of India v. M/s. Harbhagwan Harbhajan Lal** 2010 (6) RAJ 310 (Del).

11. The above submissions have been considered. There is, as already noticed, no explanation whatsoever offered in the application for seeking condonation of delay in re-filing the present petition. The application was filed way back on 18th August 2006 and has been pending for over five years. During this entire period, the Petitioner did not seek leave of the Court to file an affidavit to explain the reasons for the delay. In the circumstances, this Court does not find any reason to grant the Petitioner any indulgence to do so now. In any event, even when the application was filed on 18th August 2006, in light of the defect pointed out by the Registry, the Petitioner was aware that it had to offer some valid reason for the delay. Considering the number of times that the petition was collected and re-filed, it is not possible to excuse the totally lackadaisical manner in which no effort has been made by the Petitioner to offer an explanation let alone a credible one, for the delay in re-filing the petition. Clearly, the Petitioner was smug about the delay being condoned by the Court.

12. In The Executive Engineer (Irrigation & Flood Control) v. Shree Ram Construction Co., the Division Bench of this Court was dealing with a batch of appeals assailing the orders of the learned Single Judges declining to condone the delay in re-filing of petitions. Two of the appeals, which were considered by the Division Bench, concerned condonation of delay in re-filing petitions under Section 34 of the Act. In FAO (OS) No. 132 of 2009 (**Union of India v. Ogilvy & Mather Limited**), the facts were that the original OMP under Section 34 was filed within time. However, there was a delay of 258 days in re-filing the petition after curing the defects. After considering the decision of the Supreme Court in **Union of India v. Popular Construction Company** (2001) 8 SCC 470 it was observed by the Division Bench that "since this delay crosses the frontier of the statutory limit, that is, three months and thirty days, we need to consider whether sufficient cause had been shown for condoning the delay. The conduct of the party must pass the rigorous test of diligence, else the purpose of prescribing a definite and inelastic period limitation is rendered futile." On facts, the Division Bench concurred with the learned Single Judge that no satisfactory explanation had been furnished for the delay. In FAO (OS) 259 of 2010 (**Union of India v. Harbhagwan Harbhajan Lal & Arun Construction Co.**) also, although the OMP under Section 34 of the Act was filed within time there was a delay of 195 days in re-filing the petition. The decision of

the learned Single Judge declining to condone the delay on the ground that the deficiencies ought to have been removed "within thirty days as an outer limit", was affirmed by the Division Bench.

13. It appears that the Court has, in the matter of condonation of delay in re-filing the petitions under Section 34 of the Act, adopted a stricter scrutiny than it does while considering an application for condonation of delay filed under Section 5 of the Limitation Act. What weighs with the Court is the express legislative intent in Section 34 (3) of the Act, that the total permissible period within which an application can be permitted to be filed under Section 34 of the Act, is 90 days plus an additional 30 days. If the delay in re-filing the petition exceeds the above period, then the scrutiny becomes rigorous. Unless there is a satisfactory and credible explanation for the delay, the Court would be reluctant to condone it. Otherwise, the legislative object of not permitting the delay in the original filing beyond 30 days would get defeated.

14. In the present case, no attempt has been made to explain even a single day's delay. A delay of 75 days becomes fatal when the Petitioner does not care to offer any explanation whatsoever. The Court ought not to be taken for granted.

15. This Court is, therefore, not persuaded to condone the delay in re-filing the present petition. I.A. No. 9086 of 2006 is dismissed.

OMP No. 382 of 2006 & IA Nos. 9085, 9087/2006

16. In view of the dismissal of IA No. 9086 of 2006, this petition and the pending applications are dismissed.

ILR (2012) II DELHI 770
IA

ANJUMAN TARAQQI URDU (HIND) ....PLAINTIFF

VERSUS

VARDHMAN YARNS & THREADS LTD. ....DEFENDANT

(REVA KHETRAPAL, J.)

IA NO. : 10702/2011 IN CS (OS) NO. : 913/2011 **DATE OF DECISION: 02.02.2012**

Arbitration & Conciliation Act, 1996—Sec. 8—Suit for recovery of possession of tenanted premises with mesne profits upon expiration of lease by efflux of time, whereafter tenancy became on month to month basis, but defendant did not vacate despite service of quit notice—Defendant moved application under Sec. 8, relying upon the arbitration clause that existed in the lease deed—Held, since the lease deed was duly stamped and registered, the arbitration clause therein must be given full play and Court has no option but to refer the case to arbitration and the suit is not maintainable, so dismissed.

The lease deed in the instant case is duly registered and stamped and the arbitration clause contained therein must, therefore, be given full play. It is trite that in a case where there exists an arbitration agreement, the Court is under obligation to refer the parties to arbitration in terms of the Arbitration Agreement. The Arbitration Agreement in the instant case covers all the disputes between the parties in the suit and satisfies the requirements of Section 7 of the Act. Thus, the provisions of Section 8 of the Act become fully applicable to the facts of the present case and this Court has no other option but to refer the parties to arbitration. I, therefore, consider that the present suit is not

maintainable and plaintiff should invoke the arbitration clause and the dispute should be referred to the arbitration. This application under Section 8 of Arbitration and Conciliation Act, 1996 is, therefore, allowed. The suit filed by the plaintiff does not survive and is hereby dismissed being not maintainable. **(Para 17)**

Important Issue Involved: Arbitration clause in a duly stamped and registered lease deed must be given full play and Court has no option but to refer the case to arbitration and the suit is not maintainable, so liable to be dismissed.

[Gi Ka]

APPEARANCES:

FOR THE PLAINTIFF : Mr. A.K. Singla, Sr. Advocate with Mr. J.K. Sharma, Advocate.

FOR THE RESPONDENT : Mr. Dalip KUmar Sharma, Advocate.

CASES REFERRED TO:

1. *M/s SMS Tea Estates Pvt. Ltd.* vs. *M/s Chandmari Tea Co. Pvt. Ltd.,* 2011 (7) SCALE 747.
2. *Agri Gold Exims Ltd.* vs. *Sri Lakshmi Knits & Wovens and Others,* (2007) 3 Supreme Court Cases 686.
3. *Hindustan Petroleum Corporation Limited* vs. *M/s. Pinkcity Midway Petroleums,* AIR 2003 Supreme Court 2881.
4. *P. Anand Gajapathi Raju and others* vs. *P.V.G. Raju (died) and others,* AIR 2000 Supreme Court 1886.
5. *M/s Architectural Innovations* vs. *Rajasthan Co-op. Group Housing Society,* 77 (1999) Delhi Law Times 403.

RESULT: Application Allowed.

REVA KHETRAPAL, J.

1. The defendant in the aforementioned suit has filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 for reference of the disputes between the parties to arbitration.

2. Notice of the application was issued to the learned counsel for the plaintiff, who has chosen not to file a reply and to make oral submissions opposing the application.

3. The factual background in which the application is filed is as follows.

4. The plaintiff, which is a society registered under the Societies Registration Act, has filed the present suit against the defendant for recovery of possession of the premises known as 'Urdu Ghar', 212, Deen Dayal Upadhyay Marg, New Delhi consisting of the entire first floor measuring 3505 Sq. Ft. inclusive of balcony measuring 682 Sq. Ft. and mezzanine floor measuring 1300 Sq. Ft. totalling 5487 Sq. Ft., let out to the defendant company–M/s Vardhman Yarns & Threads Limited (then incorporated as M/s Mahavir Spinning Mills Limited) on a monthly rent of Rs.1,23,086/- (Rupees one lakh twenty three thousand and eighty six only) inclusive of maintenance charges. Apart from the recovery of possession of the aforesaid immovable property, the plaintiff also claims recovery of damages by way of mesne profit for the pre-suit period as well as the post-suit period.

5. The lease-deed executed between the parties was signed on 09.06.2005 containing therein the record of terms and conditions agreed upon between the parties. The lease period was for a term of five years as stated in the lease-deed to be reckoned from 19.07.2004, i.e. upto 18.07.2009. The aforesaid lease came to an end with the efflux of the period given thereunder, that is, with effect from 18.07.2009, and from that date the occupation of premises by the defendant company is on a month to month basis according to the English calendar month, since no renewed lease-deed is registered between the parties. The plaintiff by issue of notice dated 05.02.2011 terminated the defendant.s tenancy under Section 106 of the Transfer of Property Act. The defendant sent reply dated 25.02.2011 stating therein that vide letter dated 01.06.2009, the defendant had made a written request to the plaintiff to exercise its option with an increase of 15% in the rent for a further period of five years, which was confirmed by the plaintiff on 04.06.09, who has since been receiving and accepting the revised rent. The defendant, in its reply, further alleged that the lease could not be determined before the expiry of the lease period, which was to expire on 18.07.2014. However, before legal proceedings pursuant to the said notice could be instituted by the

plaintiff, the defendant obtained receipt No. 656 dated 07.03.2011 from the plaintiff.s bank account, wherein the receipt of defendant.s cheque No. 715338/715339 dated 01.03.2011 totalling Rs.1,23,086/- (Rupees one lakh twenty three thousand and eighty six only) is acknowledged. According to the plaintiff, the cheque described in the said receipt was accidently deposited for encashment by the plaintiff.s officials and consequently payment thereunder was received.

6. In the above circumstances, the plaintiff issued fresh notice of termination of tenancy under Section 106 of the Transfer of Property Act dated 15.03.2011 intimating the defendant that after expiry of 15 days from the receipt of the notice, occupation of premises by the defendant will be unauthorized, and that in case defendant fails to hand over vacant peaceful possession of the premises within the aforesaid period, the plaintiff would institute proceedings for recovery of possession holding the defendant liable for damages/compensation calculated at the rate of Rs.100/- per sq.ft. per day. It is, thus, the case of the plaintiff that with the notice of termination dated 15.03.2011, the defendant has no right to hold possession of the property and the occupation of the defendant in respect of the suit premises is illegal and unauthorized. The defendant in its reply dated 30.03.2011 reiterated the contents of its reply dated 25.02.2011.

7. As already indicated above, the defendant has filed the present application for dismissal of the suit in the light of the existence of an arbitration clause in the lease deed dated 09.06.2005 executed between the parties, being Clause (c) whereby the parties have mutually agreed as under:-

> "That all disputes arising out of or pertaining to this lese (sic.) shall be settled by negotiations. If negotiations do not succeed the dispute shall be referable to arbitration as per the provisions of Arbitration Act, 1940 or any statutory modification thereof, for the time being in force."

8. Mr. Dalip Kumar Sharma on behalf of the defendant contends that the dispute in the present suit is liable to be referred to arbitration in view of the aforesaid specific clause for arbitration contained in the registered lease deed dated 09.06.2005. He relies upon a large number of judicial pronouncements to further contend that the provisions of Section

8 of the Arbitration and Conciliation Act, 1996 are pre-emptory in nature and where the provisions of the said Section become fully applicable, the Court has no other option but to refer the parties to arbitration in terms thereof. In particular, he referred to the decisions rendered in **M/s Architectural Innovations Vs. Rajasthan Co-op. Group Housing Society,** 77 (1999) Delhi Law Times 403; **P. Anand Gajapathi Raju and others Vs. P.V.G. Raju (died) and others,** AIR 2000 Supreme Court 1886; and **Agri Gold Exims Ltd. Vs. Sri Lakshmi Knits & Wovens and Others,** (2007) 3 Supreme Court Cases 686.

9. Mr. Sharma further contends, relying upon the decision of the Supreme Court in **Hindustan Petroleum Corporation Limited Vs. M/s. Pinkcity Midway Petroleums,** AIR 2003 Supreme Court 2881, that it is clear from the language of the Section 16 of the Act that the Civil Court should not embark upon an inquiry in regard to the applicability of the arbitration clause to the facts of the case, in that the said Section of the Arbitration and Conciliation Act empowers the Arbitral Tribunal to rule "on any objections with respect to the existence or validity of the arbitration agreement".

10. Mr. A.K. Singla, the learned senior counsel for the plaintiff, to rebut the contentions of Mr. Sharma, relies upon the decision rendered by the Supreme Court in **M/s SMS Tea Estates Pvt. Ltd. Vs. M/s Chandmari Tea Co. Pvt. Ltd.,** 2011 (7) SCALE 747, and in particular on the portion extracted herein below:-

> "Having regard to the limited scope of the said arbitration agreement (restricting it to disputes in relation to or in any manner touching upon the lease deed), the arbitrator will have no jurisdiction to decide any dispute which does not relate to the lease deed."

11. Mr. Singla contends that the application filed by the defendant for reference of the dispute to arbitration is liable to be dismissed as clause 35 of the lease deed in the said case and the arbitration clause in the present case are in identical terms.

12. The aforesaid reliance placed by Mr. Singla upon the judgment of the Supreme Court in the case of **M/s SMS Tea Estates Pvt. Ltd.** (Supra) is altogether misplaced. In the said case, the question which arose for consideration of the Supreme Court was whether the Arbitration

Agreement contained in an unregistered instrument, which is not duly stamped, is valid and enforceable. It was the contention of the respondents in the said case that the lease deed executed between the parties was unenforceable having regard to Section 107 of Transfer of Property Act, 1882 and Section 17 & Section 49 of the Registration Act, 1908; that the said lease-deed was not duly stamped and was, therefore, invalid, unenforceable and not binding, having regard to the Section 35 of the Indian Stamp Act, 1899; that clause 35 providing for arbitration, being part of the said lease deed, was also invalid and unenforceable.

13. As regards the non-registration of lease deed, which contained the Arbitration Agreement, the Supreme Court held as follows:-

> "An arbitration agreement does not require registration under the Registration Act. Even if it is found as one of the clauses in a contract or instrument, it is an independent agreement to refer the disputes to arbitration, which is independent of the main contract or instrument. Therefore having regard to the proviso to section 49 of Registration Act read with section 16(1)(a) of the Act, an arbitration agreement in an unregistered but compulsorily registrable document can be acted upon and enforced for the purpose of dispute resolution by arbitration".

14. Further, examining the provisions of Section 33 and Section 35 of the Stamp Act, the Supreme Court in paragraph 12 of its judgment summed up the position as follows:-

> "(i) The court should, before admitting any document into evidence or acting upon such document, examine whether the instrument/document is duly stamped and whether it is an instrument which is compulsorily registrable.
>
> (ii) If the document is found to be not duly stamped, Section 35 of Stamp Act bars the said document being acted upon. Consequently, even the arbitration clause therein cannot be acted upon. The court should then proceed to impound the document under Section 33 of the Stamp Act and follow the procedure under Section 35 and 38 of the Stamp Act.
>
> (iii) If the document is found to be duly stamped, or if the deficit stamp duty and penalty is paid, either before the Court or before the Collector (as contemplated in Section 35 or 40 of the Stamp Act), and the defect with reference to deficit stamp is cured, the court may treat the document as duly stamped.
>
> (iv) Once the document is found to be duly stamped, the court shall proceed to consider whether the document is compulsorily registrable. If the document is found to be not compulsorily registrable, the court can act upon the arbitration agreement, without any impediment.
>
> (v) If the document is not registered, but is compulsorily registrable, having regard to section 16(1)(a) of the Act, the court can de-link the arbitration agreement from the main document, as an agreement independent of the other terms of the document, even if the document itself cannot in any way affect the property or cannot be received as evidence of any transaction affecting such property. The only exception is where the respondent in the application demonstrates that the arbitration agreement is also void and unenforceable, as pointed out in para 8 above. If the respondent raises any objection that the arbitration agreement was invalid, the court will consider the said objection before proceeding to appoint an arbitrator.
>
> (vi) Where the document is compulsorily registrable, but is not registered, but the arbitration agreement is valid and separable, what is required to be borne in mind is that the Arbitrator appointed in such a matter cannot rely upon the unregistered instrument except for two purposes, that is (a) as evidence of contract in a claim for specific performance and (b) as evidence of any collateral transaction which does not require registration."

15. It was, thus, in the context of an unregistered and unstamped lease deed that the Supreme Court held that the arbitrator will have no jurisdiction to decide any dispute which does not relate to the lease-deed. This is further elaborated upon by the Court in paragraph 13 of its judgment, which is extracted herein below:-

> "13. Where a lease deed is for a term of thirty years and is unregistered, the terms of such a deed cannot be relied upon to claim or enforce any right under or in respect of such lease. It can be relied upon for the limited purposes of showing that the

possession of the lessee is lawful possession or as evidence of some collateral transaction. Even if an arbitrator is appointed, he cannot rely upon or enforce any term of the unregistered lease deed. Where the arbitration agreement is not wide and does not provide for arbitration in regard to all and whatsoever disputes, but provides only for settlement of **disputes and differences arising in relation to the lease deed, the arbitration clause though available in theory is of little practical assistance, as it cannot be used for deciding any dispute or difference with reference to the unregistered deed."**

16. The judgment in the case of **M/s SMS Tea Estates Pvt. Ltd.** (Supra) is, therefore, of no avail to the plaintiff.

17. The lease deed in the instant case is duly registered and stamped and the arbitration clause contained therein must, therefore, be given full play. It is trite that in a case where there exists an arbitration agreement, the Court is under obligation to refer the parties to arbitration in terms of the Arbitration Agreement. The Arbitration Agreement in the instant case covers all the disputes between the parties in the suit and satisfies the requirements of Section 7 of the Act. Thus, the provisions of Section 8 of the Act become fully applicable to the facts of the present case and this Court has no other option but to refer the parties to arbitration. I, therefore, consider that the present suit is not maintainable and plaintiff should invoke the arbitration clause and the dispute should be referred to the arbitration. This application under Section 8 of Arbitration and Conciliation Act, 1996 is, therefore, allowed. The suit filed by the plaintiff does not survive and is hereby dismissed being not maintainable.

ILR (2012) II DELHI 778
W.P. (C)

UNION OF INDIA THROUGH SECRETARY & ORS. ....PETITIONERS

VERSUS

DHUM SINGH & ORS. ....RESPONDENTS

(BADAR DURREZ AHMED & G.P. MITTAL, JJ.)

W.P. (C) NO. : 662/2012 DATE OF DECISION: 03.02.2012

Service Law—Aggrieved petitioner challenged order passed by Central Administrative Tribunal directing petitioner to grant Assured Career Progression (ACP) benefits along with arrears and re-fixation of retiral benefits dues to Respondent no.1—Petitioner urged, Respondent no.1 did not achieve requisite benchmark grading in ACR, so not entitled to benefits—On the other hand, Respondent no.1 claimed that relevant ACRs were not communicated to him which ought not to be considered for granting him benefits—Held:- Denial of a service benefit otherwise due to an employee, on the basis of un-communicated ACR, would be violative of the principles of natural justice.

For the first time, the ACRs were sought to be communicated on 25.04.2011. However, the respondent No.1, who is present in person, states that the ACRs were never communicated and it is only through the order dated 06.04.2011 that he was informed that his ACRs were below the benchmark. It is in this backdrop that the Tribunal has concluded that the ACRs cannot be looked at for denying the ACP benefits to the respondent No.1. **(Para 5)**

Consequently, the Tribunal, after setting aside the

order impugned before it, directed that the present case was a fit one in which the respondents ought to be directed not to take the below benchmark ACRs into consideration inasmuch as the same had not been communicated to the respondent No.1. Resultantly, the Tribunal directed that the ACP benefits should be given to the respondent No.1 from 01.08.2011 along with the arrears and re-fixation of the retiral dues. **(Para 6)**

Important Issue Involved: Denial of a service benefit otherwise due to an employee, on the basis of un-communicated ACR, would be violative of the principles of natural justice.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONERS : Ms. Sonia Sharma.

FOR THE RESPONDENTS : Repondent-in-Person.

RESULT: Writ Petition dismissed.

BADAR DURREZ AHMED (ORAL)

CM 1432/2012(exemption)

Allowed, subject to all just exceptions. The application stands disposed of.

W.P.(C) 662/2012 & CM 1431/2012(stay)

1. This writ petition is directed against the order dated 07.09.2011 passed in OA No.1620/2011 by the Central Administrative Tribunal, Principal Bench, New Delhi, whereby the said Original Application of the respondent No.1 was partly allowed by directing that the condition of below benchmark ACRs ought not to be considered and that he be granted the Assured Career Progression (ACP) benefits from 09.08.1999 along with arrears and re-fixation of the retiral dues. The Tribunal, however, did not grant the respondent interest, award of damages and costs as the same were found to be unacceptable in the given

circumstances.

2. The respondent No.1 had initially been appointed through the UPSC in 1973 as an Assistant Research Officer under the respondent No.3. That post was a Group 'B' post. In 1999, he was promoted as Dairy and Agriculture Chemist which post was in the grade of Rs 10,000-325-15200. The respondent No.1 took voluntary retirement on 31.7.2000. Pursuant to the Fifth CPC recommendations, the ACP Scheme was introduced with effect from 09.08.1999. The respondent No.1 claimed that he was entitled for the second financial upgradation in the grade of Rs.12000-375-16500 on completion of 24 years of service. The respondent No.1 had been agitating the said claims and had filed Original Applications and representations. The representations of the respondent No.1 were rejected from time to time because the benefits under the ACP Scheme were restricted to Group 'B' employees only and had not been extended to Group 'A' employees. Since the respondent No.1 had already been promoted to a Group 'A' post, the benefits were not extended to him. However, in the light of his repeated requests, the claim of the respondent No.1 had been forwarded to the Ministry of Defence and in consultation with the DoPT, a view had been taken to consider his case for grant of ACP on a special basis. This was because the said post was an isolated one and there were no further promotional avenues for the officers of Group 'A'.

3. Accordingly, the matter had been considered by the Screening Committee but the petitioners' case was not accepted inasmuch as the requisite benchmark grading for the said scale being five overall gradings of "Very Good" had not been attained by the respondent No.1.

4. The only point of contention before the Tribunal and before us is whether the non-attainment of the benchmark could be held against the respondent No.1 in view of the fact that the relevant ACRs had not been communicated to him. Even before the Tribunal, the respondent No.1 had contended that the said remarks in the ACRs have never been communicated to him. It is noted in the impugned order that though the learned counsel for the petitioners herein made an oral submission to the contrary, there was no supporting averment in the counter-affidavit or any documentary proof of the ACRs having been communicated to the respondent No.1 prior to his retirement. It is in the absence of communication of the said ACRs that the Tribunal came to the conclusion

that the same could not be relied upon to deny the benefits of the ACP Scheme to the respondent No.1. The exact words used by the Tribunal are as under:

> "9. As per the settled proposition of law, denial of a service benefit otherwise due to an employee, on the basis of un-communicated ACR, would be violative of the principles of natural justice.
>
> Ordinarily, in such a situation, as per the law laid down by the Apex Court in **Dev Dutt's** case, the natural course for us would have been to issue directions to the respondents to communicate to the officer the below benchmark uncommunicated ACRs on account of which he had not been found fit for the ACP benefits. In the given circumstances, such an exercise would tantamount to be a futile one. This is because the rationale behind communication of the ACRs in question is to give a meaningful opportunity to the employee to be able to represent against them and to the employer to consider them taking into account the comments of the assessing authorities. However, given the fact that these ACRs would now pertain to a period more than 10-15 years back, no useful purpose would, therefore, be served. We also note that as per the Screening Committee Minutes, there is no other bar against the applicant. The fact of the present OA being the third round of litigation, the applicant being a senior citizen and the denial of ACP affecting the pensionary dues also weigh with us.
>
> In the totality of the circumstances, the impugned orders are set aside. We find the present one a fit case to give the respondents directions to ignore the below benchmark ACRs and grant him the ACP benefit from 9.8.1999 along with arrears and re-fixation of the retiral dues. However, the prayers for the interest, award of damages and costs are not found to be acceptable in the given circumstances.
>
> Thus, the OA is partly allowed in terms of our aforesaid directions which are to be complied with by the respondents within a period of three months from the date of receipt of a copy of this order. No order as to costs."

5. For the first time, the ACRs were sought to be communicated

on 25.04.2011. However, the respondent No.1, who is present in person, states that the ACRs were never communicated and it is only through the order dated 06.04.2011 that he was informed that his ACRs were below the benchmark. It is in this backdrop that the Tribunal has concluded that the ACRs cannot be looked at for denying the ACP benefits to the respondent No.1.

6. Consequently, the Tribunal, after setting aside the order impugned before it, directed that the present case was a fit one in which the respondents ought to be directed not to take the below benchmark ACRs into consideration inasmuch as the same had not been communicated to the respondent No.1. Resultantly, the Tribunal directed that the ACP benefits should be given to the respondent No.1 from 01.08.2011 along with the arrears and re-fixation of the retiral dues.

7. We see no reason to interfere with the impugned order as we find no illegality in the same. The writ petition is dismissed. There shall be no order as to costs.

ILR (2012) II DELHI 782
CRL. A.

MANOJ SHUKLA @ PREM ....APPELLANT

VERSUS

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

(S. RAVINDRA BHAT AND S.P. GARG, JJ.)

CRL. A. NO. : 1117/2011, DATE OF DECISION: 03.02.2012
CRL. M. (BAIL) 1579/2011
& CRL. M.A. NO. : 10682/2011

(A) Indian Penal Code, 1860—Section, 302—Appellant challenged his conviction under Section 302 IPC urging testimony of eye witness relied upon by Trial Court

unbelievable which was also not corroborated by other evidence—On behalf of State it was submitted, appellant earlier convicted for having murdered two constables and he was sentenced to undergo life imprisonment—Consequently, while serving sentence he was released on parole for three weeks but he failed to surrender and went on to commit murder in said case—These facts not denied by appellant—Held:- Prosecution version in relying on the testimony of a witness who claims to have witnessed an incident, or crime, has to be critically examined—Thus, assessment of testimony for purpose of weighing its credibility is not confined to satisfying that the witness was merely consistent in his testimony; it extends to a critical examination of the entire probability of the facts deposed to, as well as conduct of the witness himself—If any of these reveal suspicious or improbable circumstances, court mat be justified in rejecting his testimony altogether.

Although a court trying a criminal charge has to assess the material before it, and it is not safe to rely on the quantity of evidence, since what matters is the quality or credibility, yet, the prosecution version in relying on the testimony of a witness who claims to have witnessed an incident, or the crime, has to be critically examined. Thus, assessment of the testimony for the purpose of weighing its credibility is not confined to satisfying that the witness was merely consistent in his testimony; it extends to a critical examination of the entire probability of the facts deposed to, as well as the conduct of the witness himself. If any of these reveal suspicious or improbable circumstances, the court may be justified in rejecting his testimony altogether (**State of Orissa vs. Brahmananda** – AIR 1976 SC 2488; **Harbans Lal vs. State of Punjab** 1996 SCC (Cri) 312; **Joseph vs. State of Kerala** 2003 SCC (Cri) 356; **Badam Singh vs. State of M.P.** AIR 2004 SC 26). In the present case, the conduct of PW-8 was suspect; it was highly unnatural to say the least.

Furthermore, the materials relied on by the prosecution during the trial did not lend corroboration to his deposition. He was, in this court's opinion, an unreliable witness, on whose deposition, the Appellant could not have been convicted. **(Para 13)**

(B) Indian Penal Code—1860—Section 302—Appellant convicted under Section 302—He challenged his conviction—On behalf of State it was urged, appellant did not deny his previous conviction or fact he had over stayed his parole, therefore his conduct is also important to deny him the relief—Held:- Mere absconding by itself does not necessarily lead to a firm conclusion of guilt—Act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case.

Therefore, the Appellant's absconding arrest or evading the police or even his having jumped parole, cannot be considered as circumstances adverse to him. His previous conviction (since there is no doubt about it, as he admitted it, in the course of his statement under Section 313, Cr. PC) would certainly mean that he would have to serve the remainder of that sentence, unless it is reversed in a manner known to law. **(Para 14)**

Important Issue Involved: (A) The assessment of testimony of eye witness for purpose of weighing its credibility is not confined to satisfying that the witness was merely consistent in his testimony; it extends to a critical examination of the entire probability of the facts deposed to, as well as conduct of the witness himself—If any of these reveal suspicious or improbable circumstances, court may be justified in rejecting his testimony altogether.

(B) Mere absconding by itself does not necessarily lead to a firm conclusion of guilty—Act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Bhupesh Narula, Advocate.

FOR THE RESPONDENT : Mr. Sanjay Lao, APP. for the state.

CASES REFERRED TO:

1. *State of M.P.* vs. *Paltan Mallah & Ors.* AIR 2005 SC 733.
2. *Badam Singh* vs. *State of M.P.* AIR 2004 SC 26).
3. *Joseph* vs. *State of Kerala* 2003 SCC (Cri) 356.
4. *Harbans Lal* vs. *State of Punjab* 1996 SCC (Cri) 312.
5. *State of Orissa* vs. *Brahmananda* – AIR 1976 SC 2488.
6. *Rahman* vs. *State of U.P.* AIR 1972 SC 110.
7. *Matru @ Girish Chandra* vs. *The State of U.P.* AIR 1971 SC 1050.

RESULT: Appeal allowed.

S. RAVINDRA BHAT, J.

1. By this judgment, the Court would be disposing of an appeal directed against the judgment and order of learned Additional Sessions Judge dated 27.01.2011 in SC No.58/2010 by which the Appellant Manoj Shukla was convicted for committing the offence punishable under Section 302 IPC.

2. According to the prosecution, intimation was received by way of DD2A (marked as Ex. PW3/A) on 12.02.2006 at 8.28 AM that the body of an unknown person -who looked like a labourer-was lying near shop No.1496 Gali No.5, Wazir Nagar, Kotla Mubarakpur. PW-22, I.O. and HC Bhim Singh (PW-5) reached the spot and took charge of the body

as well as the blood stained earth and stone-like lump of cement which lay near the body. One Sarla Gupta claimed to be the employer of the deceased-he was identified as Suresh Kumar, her driver. On the basis of this information the FIR (Ex. Pw-16/A) was lodged. According to the police, 5 or 6 members of the public were at the spot; however no statement was recorded. The body was sent for post-mortem examination. It was alleged that PW-8, Jairam Pandey later reached the Police Station and his statement under Section 161 Cr.P.C. was recorded. The police also recorded the statement of one Shyam Kishore; both these individuals claimed to have witnessed the incident which led to the death of Suresh Kumar. They both implicated the present appellant for the crime. The appellant was arrested on 19.07.2006 near the Delhi-U.P. border. After conclusion of investigation, he was charged with committing the offence. He entered the plea of not guilty and claimed trial.

3. The prosecution relied on the testimonies of 22 witnesses to prove the allegations against the appellant. It also placed on record other materials such as the FSL reports, post mortem report and seizure memos pertaining to the recovery of articles from the accused as well as from the crime scene. Upon an overall consideration of these materials and testimonies of witnesses the Trial Court convicted the appellant and sentenced him in the manner described earlier.

4. Mr. Bhupesh Narula, learned counsel for the appellant appearing on behalf of the Delhi High Court Legal Services Committee submitted that the prosecution story cannot be believed. It was urged that the testimony of PW-7 regarding the presence of the appellant is unreliable, because of various reasons. He merely claimed to have been present when the accused and PW-8 were drinking earlier in the evening of 11.02.2006 at 7.00 PM. When he later left the premises, the accused, the deceased and PW-8 were there. More crucially the statement of this witness was not recorded immediately or within reasonable time despite the fact that PW-8 had mentioned him. His statement under Section 161 Cr.P.C. was recorded 1520 days after the incident, as admitted by PW-7 in the cross-examination.

5. Learned counsel next urged that the only testimony which held weight with the Trial Court was that of the alleged eye witness PW-8, who corroborated having drank with the deceased and the appellant as well as PW-7 earlier. However, PW-8 also claimed that the appellant had

quarreled around 8.00 PM on 11.02.2006 with the deceased, and that the deceased was heavily drunk. He also deposed that quarrel was resolved and all of them later slept. The counsel emphasized that PW-8 claimed to have heard an explosion (dhamaka) around 1.00 AM and seen the appellant fleeing from the spot. This formed the basis of the trial court's judgment convicting the appellant. Mr. Narula submitted that the testimony of PW-8 cannot be believed at all. He submitted that according to post-mortem report, the death possibly occurred one and a half days before the commencement of the proceeding (i.e. 36 hours before 11.00 AM on 13.02.2006). So reckoned, death occurred around 11.00 PM of 11.02.2006, contrary to the prosecution story.

6. Learned counsel also urged that PW-8 admitted in the cross-examination that apart from him, deceased; and the appellant, two others (i.e. Harish and Bengali) present at the spot, also consumed liquor and slept in the premises that night. However, the Police made no effort to corroborate PW-8's version with the testimonies of those individuals; they were not even asked to join in the proceedings. Furthermore, urged counsel, that the testimony of PW-8 is also unreliable because his conduct was suspicious and unnatural. Having allegedly witnessed the immediate aftermath of an attack and also seen the deceased bleeding profusely from the head, he made no effort either to raise an alarm or even to go to the rescue of the injured. Counsel submitted that PW-8 admitted that he alerted the shop keeper at 5.00 or 6.00 AM which meant that this witness went back to sleep for another four hours. Furthermore the testimony of PW-8 was undermined by the fact that the earliest intimation supposedly received by the Police was at 8.30 AM and when they reached the spot no eye witness including PW-8 was present. Counsel also argued that the deceased's employer Sarla Gupta did not join the investigation. On the contrary PW-8's evidence was in fact contradicted by PW-6, the shop owner who deposed having received information about the dead body lying outside his shop on the morning of 12.02.2006, at the pavement and having passed on the information to the Police.

7. The learned APP urged that the findings of the trial court should not be interfered with. Counsel argued that the appellant used to work as Constable in the BSF and had been convicted for the murder of two constables in an incident which took place on 20.12.1999. His conviction was recorded on 14.07.2000 and he was sentenced to undergo life

imprisonment in a duly constituted proceeding, which was confirmed by the Inspector General of BSF on 12.10.2000. Consequently he was serving his sentence in Central Jail, Reva (M.P.); he was released on parole on 05.05.2003 for three weeks. However, he failed to surrender and went on to commit this murder for which he stood trial in the present case. Learned APP emphasized that the appellant did not deny the previous conviction and sentence or even the fact that he had over-stayed his parole and had not undergone the entirety of the previous sentence.

8. It was argued that the testimony of PW-8 clinched the prosecution allegations against the present appellant. The witness was clear that he, the appellant and the deceased were together when a quarrel took place between the latter two over some trivial matter. Although that was resolved, and all the three went to bed, the witness was woken up with a loud sound and he saw the appellant running away from the spot. He simultaneously saw the deceased in a seriously injured condition and bleeding profusely from the head. This testimony was sufficient for the court to conclude that the appellant was guilty. The prosecution corroborated this testimony with the seizure of articles such as a piece of concrete which was used to injure and the pieces of earth control etc. Counsel submitted that there was absolutely no delay in recording the information; intimation was received at about 8.20 AM, the FIR was lodged and the statement of PW-8 too was recorded on the same day. In view of these facts, there was no question of appellant being falsely implicated by the police.

9. Learned counsel urged that the appellant owed an explanation as to why he was missing from the spot for almost six months till his arrest on 19.07.2006. Equally his statement under Section 313 Cr.P.C. admitted to the conviction and sentence of imprisonment for life awarded in the previous incident and as well as the fact that he had jumped parole. In these circumstances, the Trial Court was justified in concluding that the appellant was guilty as charged and awarded the sentence of imprisonment for life.

10. From the above discussion, it is apparent that the most crucial evidence in this case is the testimony of PW-8. The material parts of his depositions are extracted below :

"In the month of February, but I do not remember the exact date and year. I along with Shyam Kishore, accused Manoj @ Prem and Suresh (deceased) had taken the drink at shop no. 1496, Kotla Mubarakpur. Shyam Kishore took his liquor. We all took out liquor and drink. A quarrel had taken place between accused (present in court today) and deceased on using a blanket at about 08.00 PM. We intervened into the matter after that we slept. At about 12.00/02.00 AM, again said at 01.00 AM, I heard a noise of Dhamaka. I woke up immediately and I saw accused Manoj Shukla was running from there but he could not be apprehended. I went to the deceased and saw that blood was oozing out from his head. One stone was lying upon the deceased. In the morning the shopkeeper called at Police Station. Police officials reached the spot and took away the dead body of deceased. I had identified the accused present in court today in Police Station Kotla Mubarakpur. I had shown to the police the place of incident."

In the cross-examination, the witness stated inter alia as follows:

"On 11.02.2006, two other persons namely Harish and Bengali also had taken drink with us. We were five persons in numbers. The dispute had taken place between the deceased and the accused. Deceased was under influence of heavy liquor XXXXXX and (not legible) he was not in position to walk. Six persons were sleeping in the night. We used to sleep on the dala of tempo. We were sleeping on the floor of aforesaid shop. Suresh was sleeping with a karvat. The stone was lying upon him. I had not called the police. After the incident, I immediately made the other persons to awake who were sleeping there and all the persons awaken and gathered. At about 5.00/06.00 AM the shopkeeper called the police and till the time I remained at the spot....."

11. We notice that even though PW-8 had mentioned the presence of the deceased, himself and the appellant on 11-02-2006, yet in cross examination, he admitted that two others were also present; all the five went to bed. It is also an admitted fact that the deceased was highly drunk. Apparently a quarrel had taken place between the Appellant and the deceased, at about 08:00 PM that night, over a blanket; but the witness stated that the quarrel had been resolved, and all those in the

room, went to sleep. He next mentioned about hearing an explosion. Now, this part of the testimony is curious, because the prosecution did not allege any incident that could have resulted in a loud bang or explosion like noise, in the dead of the night. Even if one assumes that this is not of any consequence, the conduct of PW-8, who saw the Appellant fleeing the spot, is most unnatural. He admitted to going back to sleep, after seeing the Appellant running away, and after having seen the deceased bleeding profusely. Similarly he does not mention the reaction of any of the other two; they too had slept with the Appellant, PW-8 and the deceased. The next statement is that the shopkeeper was informed at 5:00 or 6:00 AM on the morning of 12-02-2006. However, the shopkeeper, PW-6 deposed having been told by someone over telephone that a dead body was lying outside his shop, and then having informed the police. This is corroborated by the earliest DD entry, which is at 08.28 AM. PW-8 is silent about what he did after informing the police; he is equally reticent about what the other two (Bangali and Harish) did. According to the IO, PW-22, no one was at the spot, when he reached there. This conduct, i.e. having witnessed the Appellant fleeing the spot, going back to sleep, and delaying informing the police – and most importantly, not taking any steps to provide medical assistance of any kind to the deceased, who was profusely bleeding – raises more questions than clarifies the situation. It is inconceivable for someone who witnesses an accused fleeing the spot, leaving in his wake, a person in a seriously injured condition, to remain unaffected; he would certainly not go back to sleep. That PW-8 claims to have done so, even though he knew the deceased, and had a few hours before the incident, shared dinner and a few drinks with him, renders the whole deposition, beyond the realms of probability. If one adds to these, the circumstance, that the prosecution made no attempt to involve the other two – Harish and Bengali, either in the investigation, or the trial, the prosecution story is rendered unbelievable. Even the external evidence, in the form of the DD entry, as well as the testimony of PW-6, contradict the deposition of PW-8 about the time when the police was informed; this is not a minor contradiction, because PW-6 clearly stated that he informed the police immediately after receiving information that a dead body lay outside his shop that morning.

12. There is also some merit in the Appellant's submission that the time of death alleged against him, is not borne out by the post-mortem report. According to PW-8, the sound of a loud bang was heard at

around 12:00 AM or 1:00 AM, in the night intervening 11-12/2/2006. The post mortem examination and report however fixed the time of death at around 11:00 PM of 11-02-2006. Ordinarily, this discrepancy would not have been material; however, in view of the circumstances surrounding the deposition of PW-8 and the strong possibility of his not actually witnessing the incident, this time difference too had to be explained satisfactorily by the prosecution. No effort was, however, made in that regard.

13. Although a court trying a criminal charge has to assess the material before it, and it is not safe to rely on the quantity of evidence, since what matters is the quality or credibility, yet, the prosecution version in relying on the testimony of a witness who claims to have witnessed an incident, or the crime, has to be critically examined. Thus, assessment of the testimony for the purpose of weighing its credibility is not confined to satisfying that the witness was merely consistent in his testimony; it extends to a critical examination of the entire probability of the facts deposed to, as well as the conduct of the witness himself. If any of these reveal suspicious or improbable circumstances, the court may be justified in rejecting his testimony altogether (**State of Orissa vs. Brahmananda** – AIR 1976 SC 2488; **Harbans Lal vs. State of Punjab** 1996 SCC (Cri) 312; **Joseph vs. State of Kerala** 2003 SCC (Cri) 356; **Badam Singh vs. State of M.P.** AIR 2004 SC 26). In the present case, the conduct of PW-8 was suspect; it was highly unnatural to say the least. Furthermore, the materials relied on by the prosecution during the trial did not lend corroboration to his deposition. He was, in this court's opinion, an unreliable witness, on whose deposition, the Appellant could not have been convicted.

14. This court is of the opinion that the Appellant's explanation why he jumped parole while undergoing sentence in a previous case, is unacceptable. His explanation given under Section 313 too cannot be believed. However, neither these circumstances, nor the fact that he was missing for nearly six months, can be factors amounting to proof of his guilt beyond reasonable doubt. In this context, the Supreme Court observed, -on the circumstance that an accused had absconded, or evaded arrest, that such a fact is ipso facto weak, and cannot be given too much importance-in **Matru @ Girish Chandra v. The State of U.P.** [AIR 1971 SC 1050] holding that:

> 'The appellant's conduct in absconding was also relied upon. Now, mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime such is the instinct of self-preservation. The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Normally the courts are disinclined to attach much importance to the act of absconding, treating it as a very small item in the evidence for sustaining conviction. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the guilt of the accused. In the present case the appellant was with Ram Chandra till the FIR was lodged. If thereafter he felt that he was being wrongly suspected and he tried to keep out of the way we do not think this circumstance can be considered to be necessarily evidence of a guilty mind attempting to evade justice. It is not inconsistent with his innocence.'

A similar view has been reiterated in **Rahman v. State of U.P.** [AIR 1972 SC 110]; and **State of M.P. v. Paltan Mallah & Ors.** [AIR 2005 SC 733]. Therefore, the Appellant's absconding arrest or evading the police or even his having jumped parole, cannot be considered as circumstances adverse to him. His previous conviction (since there is no doubt about it, as he admitted it, in the course of his statement under Section 313, Cr. PC) would certainly mean that he would have to serve the remainder of that sentence, unless it is reversed in a manner known to law.

15. For the foregoing reasons, the Appeal has to succeed. Judgment and order dated 27.01.2011 of learned Additional Sessions Judge are set aside. Since the Appellant has to serve the remainder of his sentence in connection with another crime, the Jail Superintendent shall ascertain the necessary facts, and ensure that he is transferred to the concerned jail, where he shall undergo the remainder of the sentence awarded to him. The Appeal is disposed of in these terms. All pending applications also stand disposed of.

ILR (2012) II DELHI 793
MAC. APP.

NATIONAL INSURANCE CO. LTD. ....APPELLANT

VERSUS

RAJBALA & ORS. ....RESPONDENTS

(G.P. MITTAL, J.)

MAC. APP. NO. : 748/2010 DATE OF DECISION: 06.02.2012

Motor Vehicles Act, 1988—Code of Civil Procedure, 1908—Order 12 Rule 8—Claims Tribunal awarded compensation—Appeal for reduction of compensation filed by Insurer before High Court—Plea taken, in absence of any evidence as to future prospects, same should not have been added—Driver did not possess any driving license at time of accident—A notice was served upon owner and driver to produce driving license—Non production of license would show that driver did not possess any driving license—Appellant should not have been saddled with liability to pay compensation—Held—In absence of any evidence as to deceased's permanent employment, Tribunal faulted in considering future prospects while computing loss of dependency—It is true that a notice was claimed to have been served upon driver and owner—However, no evidence with regard to same was produced—It is well settled that onus to prove breach of policy condition is on insurer—Simply stating that a notice under Order 12 Rule 8 of CPC was sent is not sufficient to discharge onus that driver did not possess any driving license to drive vehicle—Insurer cannot avoid liability to pay compensation.

During inquiry before the Tribunal, the first Respondent Rajbala entered the witness box as PW1. She deposed that

her son Umesh Kumar was working as an electrician with M/s. Mac Engineering Pvt. Ltd., Delhi and was earning Rs. 10,000/- per month. She deposed that he was 12th pass and his salary was increasing day by day. In cross-examination, the Respondent admitted that she had not filed any certificate to the effect that the deceased Umesh Kumar was working as an electrician with Mac Engineering Pvt. Ltd., Delhi and earning Rs. 10,000/- per month. She testified that she filed the document with regard to the deceased's qualification as an electrician. She produced the certificate of apprenticeship, training Ex.PW1/G, the certificate of ITI Ex.PW1/H and the national trade certificate issued by the Ministry of Labour as Ex.PW1/J. Some documents were also placed on record to show that the Appellant did apprenticeship with Uptron Powertronics an undertaking of government of UP. for a period of 01.11.1999 to 31.01.2000. In the circumstances, the Tribunal's assessment that the deceased must be earning at least Rs. 6,000/- per month cannot be faulted. At the same time, in the absence of any evidence as to the deceased's permanent employment, the Tribunal faulted in considering the future prospects while computing the loss of dependency. **(Para 4)**

It is urged by the learned counsel for the Appellant that a notice under Order 12 Rule 8 CPC was served upon the owner and driver of the vehicle to produce the driving licence. The non-production of the licence would show that the driver did not possess any driving licence. The Appellant, therefore, should not have been saddled with the liability to pay the compensation. It is true that a notice under Order 12 Rule 8 CPC was claimed to have been served upon the driver and the owner. However, no evidence with regard to the same was produced. It is well-settled that the onus to prove the breach of the policy condition is on the insurer. Simply stating that a notice under Order 12 Rule 8 CPC was sent was not sufficient to discharge the onus that the fourth Respondent did not possess any driving licence to drive the vehicle. In this view of the matter, The Appellant National Insurance Co. Ltd. cannot avoid the liability to pay the

compensation. **(Para 7)**

Important Issue Involved: (A) In the absence of any evidence as to deceased's permanent employment, future propects cannot be considered while computing loss of dependency.

(B) Where a notice under Order 12 Rule 8 CPC was claimed to have been served upon the driver/owner to produce the driving license, simply stating that a notice was sent without any evidence with regard to same being produced, is not sufficient to discharge the onus that the driver did not possess any driving license to drive the vehicle.

[Ar Bh]

APPEARANCES:

FOR THE APPELLANT : Ms. Shantha Devi Raman, Advocate.

FOR THE RESPONDENT : Mr. S.N. Parashar, Advocate.

RESULT: Appeal dismissed.

G. P. MITTAL, J.

1. This Appeal is for reduction of compensation of Rs. 5,16,000/- granted for the death of Umesh Kumar aged 30 years who died in an accident which took place on 11.02.2007.

2. The Motor Accident Claims Tribunal (the Claims Tribunal) by the impugned order accepted the deceased income to be Rs. 6000/- per month, added 50% towards future prospects, deducted + towards the personal and living expenses and applied the multiplier of 9 to compute the loss of dependency as Rs. 4,86,000/-.

3. Following contentions are raised on behalf of the Appellant:

(i) There was no document to show that the deceased was earning Rs. 6,000/- per month. In any case, in the absence of any evidence as to future prospects, the same should not have been added.

(ii) The deceased's mother was more than 60 years of age; the multiplier of 7 should have been taken instead of 9 as applied by the Tribunal.

(iii) The driver did not possess any driving licence at the time of the accident; the Appellant could not have been fastened with the liability to pay the compensation.

4. During inquiry before the Tribunal, the first Respondent Rajbala entered the witness box as PW1. She deposed that her son Umesh Kumar was working as an electrician with M/s. Mac Engineering Pvt. Ltd., Delhi and was earning Rs. 10,000/- per month. She deposed that he was 12th pass and his salary was increasing day by day. In cross-examination, the Respondent admitted that she had not filed any certificate to the effect that the deceased Umesh Kumar was working as an electrician with Mac Engineering Pvt. Ltd., Delhi and earning Rs. 10,000/- per month. She testified that she filed the document with regard to the deceased's qualification as an electrician. She produced the certificate of apprenticeship, training Ex.PW1/G, the certificate of ITI Ex.PW1/H and the national trade certificate issued by the Ministry of Labour as Ex.PW1/J. Some documents were also placed on record to show that the Appellant did apprenticeship with Uptron Powertronics an undertaking of government of UP. for a period of 01.11.1999 to 31.01.2000. In the circumstances, the Tribunal's assessment that the deceased must be earning at least Rs. 6,000/- per month cannot be faulted. At the same time, in the absence of any evidence as to the deceased's permanent employment, the Tribunal faulted in considering the future prospects while computing the loss of dependency.

5. As per the ration card, Rajbala was born in the year 1946. The accident took place on 11.02.2007 i.e. just in the beginning of the year. The age of Rajbala can be taken to be just above 60 years. In the circumstances, the multiplier of 9 taken by the Tribunal cannot be faulted. Thus, the loss of dependency would come to Rs. 3,24,000/-(6000 X + X 12 X 9). I would further add Rs. 25,000/- towards loss of love and affection, Rs. 10,000/- towards funeral expenses and ' 10,000/- towards loss of estate. The overall compensation comes to Rs. 3,69,000/-.

6. Thus, the compensation is reduced from Rs. 5,16,000/- to Rs. 3,69,000/-.

7. It is urged by the learned counsel for the Appellant that a notice under Order 12 Rule 8 CPC was served upon the owner and driver of the vehicle to produce the driving licence. The non-production of the licence would show that the driver did not possess any driving licence. The Appellant, therefore, should not have been saddled with the liability to pay the compensation. It is true that a notice under Order 12 Rule 8 CPC was claimed to have been served upon the driver and the owner. However, no evidence with regard to the same was produced. It is well-settled that the onus to prove the breach of the policy condition is on the insurer. Simply stating that a notice under Order 12 Rule 8 CPC was sent was not sufficient to discharge the onus that the fourth Respondent did not possess any driving licence to drive the vehicle. In this view of the matter, The Appellant National Insurance Co. Ltd. cannot avoid the liability to pay the compensation.

8. A sum of Rs. 46,000/- along with proportionate interest payable to the second Respondent shall be released to the second Respondent forthwith. Rest of the compensation along with proportionate interest shall be payable to the first respondent. 40% of the amount payable to the first respondent shall be released immediately, rest 60% shall be held in three equal Fixed Deposits in UCO Bank, Delhi High Court Branch for one year, two years and three years respectively.

9. The excess compensation deposited shall be returned to the Appellant National Insurance Co. Ltd. with interest, if any, earned during the pendency of the Appeal.

10. The statutory amount of Rs. 25,000/- shall also be refunded to the Appellant.

11. The Appeal is allowed in above terms.

IRL (2012) DELHI 798
CRL. REV.

RAKESH KANOJIA ....PETITIONER

VERSUS

STATE GOVT. OF NCT OF DELHI & ANR. ....RESPONDENTS

(MUKTA GUPTA, J.)

CRL. REV. P. NO. : 782/2010 DATE OF DECISION: 07.02.2012
& CRL. M.A. NO. : 18672/2010
(STAY)

Code of Criminal Procedure, 1973—Sections 319 & 353—Indian Penal Code, 1860—Sections 307, 498A and 34—Summoning u/s 319—Case filed u/s 498A/406—Judgment passed convicting three of the family members of petitioner u/s 498-A & 406 along with order summoning him u/s 319—Contention of petitioner that order u/s 319 can only be passed during trial and not after judgment dictated/pronounced—Contention of prosecution that trial court while pronouncing of judgment on other family members of petitioner, on same day passed orders summoning petitioner u/s 319 Cr.P.C and since both orders were passed simultaneously, so it could not be said that impugned order was passed after trial was concluded—Held, although application u/s 319 was filed by Public Prosecutor during course for trial, order on application passed after pronouncement of judgment convicting other family members of Petitioner—According to Section 353 after arguments are heard, trial came to an end and pronouncement of judgement is post culmination of trial procedure—Judgment having been pronounced, trial came to an end and trial court became functus officio—Trial court could not have

passed orders on application u/s 319 after pronouncing judgment—Evidence on record against petitioner would not entail conviction of, petitioner—Impugned order does not even spell out offence for which petitioner has been summoned—Impugned order summoning petitioner, quashed—Petition Allowed.

Further Section 353 Cr.P.C. states that after the arguments are heard the trial comes to an end and pronouncement of judgment is a post culmination trial procedure. Though the application was filed prior to the conclusion of the trial, there is no doubt that the impugned order was passed after the pronouncement of the judgment of conviction of the other family members of the Petitioner though on the same day. In any case the judgment having been pronounced, the trial had come to an end and the trial Court had become functus officio. The trial Court could not have passed order on the application under Section 319 Cr.P.C. after pronouncing the judgment. **(Para 8)**

Important Issue Involved: Court cannot passed order on application u/s 319 Cr. P.C. after pronouncing judgment on co-accused.

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Mr. Anurag Ahluwalia and Mr. Rahul Dhankar, Advocates.

FOR THE RESPONDENT : Mr. Manoj Ohri, APP for the State SI Rajeev, P.S Dabri Advocates.

CASES REFERRED TO:

1. *Prasanna Das and another* vs. *State of Orissa,* 2004 (13) SCC 30.

2. *Samartha Ram* vs. *State of Rajasthan and others,* 2002 (2) Crimes 536.

3. *Michael Machado and another* vs. *Central Bureau of Investigation and another,* AIR 2000 SC 1127.

4. *Gopal Krishna* vs. *State of Bihar,* 1987 CRI. L.J. 1487.

5. *Municipal Corporation of Delhi* vs. *Ram Kishan Rohtag*i, (1983) 1 SCC 1: (AIR 1983 SC 67: 1983 Cri L J 159).

RESULT: Petition Allowed.

MUKTA GUPTA, J.

1. The Petitioner in the present petition is aggrieved by the order dated 20th November, 2010 passed by the learned Additional Sessions Judge in Sessions Case No. 2/2009 summoning the Petitioner as an accused in the case under Section 319 Cr.P.C.

2. The contention of the learned counsel for the Petitioner is that an order under Section 319 Cr.P.C. can be passed only during the pendency of the trial. Once the judgment is dictated/pronounced the trial comes to an end and the Court has no jurisdiction to summon an additional accused under Section 319 Cr.P.C. It is contended that the impugned order dated 20th November, 2010 summoning the Petitioner was passed after the learned Additional Sessions Judge dictated and pronounced the judgment in the abovementioned Sessions Case convicting the other family members of the Petitioner, that is, Munni Devi, Archana and Rajesh for offences under Sections 307/498A/34 IPC. In this regard reference is made to Section 353 Cr.P.C. which states that the judgment in every trial shall be pronounced by the Presiding Officer immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleader. Reliance in this regard is placed on **Michael Machado and another vs. Central Bureau of Investigation and another,** AIR 2000 SC 1127; **Prasanna Das and another vs. State of Orissa,** 2004 (13) SCC 30; **Gopal Krishna vs. State of Bihar,** 1987 CRI. L.J. 1487; and **Samartha Ram vs. State of Rajasthan and others,** 2002 (2) Crimes 536.

3. It is further stated that the statement of the Complainant completely exonerates the Petitioner who is the husband and hence the Petitioner could not have been summoned even on merits. The Complainant had

filed another FIR under Sections 498A/406 IPC at PS Patel Nagar, Dehradun. The proceedings therein have been stayed by the Hon'ble High Court of Uttaranchal at Nainital.

4. Learned APP for the State on the other hand contends that the application for summoning the Petitioner under Section 319 Cr.P.C. was filed by the public prosecutor on 21st October, 2010 when the trial was going on. However, the learned Magistrate directed that this application will be decided along with the main case. The learned Trial Court thus while pronouncing the judgment of conviction of the other family members of the Petitioner on the same day passed the order summoning the Petitioner under Section 319 Cr.P.C. Since the two orders were passed simultaneously it cannot be said that the impugned order passed after the trial was concluded. It is thus contended that there is no merit in the petition and the petition be dismissed.

5. I have heard learned counsel for the parties.

6. The impugned order dated 20th November, 2010 reads as under: -

> "Vide separate judgment dictated and announced in Open Court, all the four accused Bishan Lal, Munni Devi, Archna and Rajesh are convicted U/s 498-A read with Section 34 IPC. Besides that, accused Munni Devi, Archna and Rajesh are also convicted u/s 307/34 IPC.
>
> Accused Archna and Rajesh be taken into custody. Since accused Munni Devi is also liable to the taken in to custody, but keeping in view her age and ill health, she is not taken into custody at present.
>
> I have also considered the application filed by Ld. APP on 21.10.10 U/s 319 Cr.P.C. with the prayer for summoning Rakesh, husband of Complainant Renu as accused in this case.
>
> While dictating the judgment against the aforesaid accused, I have found that there is sufficient evidence again the husband of the Complainant Sh. Rakesh also. Therefore, summons be issued to Sh. Rakesh, son of Sh. Bishan Lal, R/o 1134, Gali No. 5/6, Main Sagarpur, New Delhi, for the next date of hearing."

7. Thus it is evident that this order on the application was passed after the pronouncement of judgment in Sessions Case No. 2/2009 convicting Munni Devi, Archna and Rajesh, though the application had been filed on 21st October, 2010 by the Public Prosecutor when the trial was still pending.

In **Michael Machado** (Supra) their Lordships held that:

> "10. Powers under Section 319 of the Code can be invoked in appropriate situations. This section is extracted below:
>
> "319. Power to proceed against other persons appearing to be guilty of offence. - (1) Where, in the course of any inquiry Into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried with the accused, the Court may proceed against such person for the offence which he appears to have committed.
>
> (2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.
>
> (3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.
>
> (4) Where the Court proceeds against any person under Sub-section (1) then -
>
> (a) the proceedings in respect of such person shall be commenced afresh, and witnesses re-heard;
>
> (b) subject to the provisions of Clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

11. The basic requirements for invoking the above section is that it should appear to the Court from the evidence collected during trial or in the inquiry that some other person, who is not arraigned as an accused in that case, had committed an offence for which that person could be tried together with the accused already arraigned. It is not enough that the Court entertained some doubt, from the evidence, about the involvement of another person in the offence. In other words, the Court must have reasonable satisfaction from the evidence already collected regarding two aspects. First is that the other person has committed an offence. Second is that for such offence that other person could as well be tried along with the already arraigned accused.

12. But even then, what is conferred on the Court is only a discretion as could be discerned from the words "the Court may proceed against such person". The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the Court should turn against another person whenever it comes across evidence connecting that another person also with the offence. A judicial exercise is called for keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the Court had spent for collecting such evidence. It must be remembered that there is no compelling duty in the Court to proceed against other persons.

13. In **Municipal Corporation of Delhi v. Ram Kishan Rohtagi,** (1983) 1 SCC 1: (AIR 1983 SC 67: 1983 Cri L J 159) this Court has struck a note of caution, while considering whether prosecution can produce evidence to satisfy the Court that other accused against whom proceedings have been quashed or those who have not been arrayed as accused, have also committed an offence in order to enable the Court to take cognizance against them and try them along with the other accused. This was how learned Judges then cautioned:

"But we would hasten to add that this is really an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking

cognizance against the other person against whom action has not been taken."

14. The Court while deciding whether to invoke the power under Section 319 of the Code, must address itself about the other constraints imposed by the first limb of Sub-section (4), that proceedings in respect of newly added persons shall be commenced afresh and the witnesses re-examined. The whole proceedings must be re-commenced from the beginning of the trial, summon the witnesses once again and examine them and cross-examine them in order to reach the stage where It had reached earlier. If the witnesses already examined are quite a large in number the Court must seriously consider whether the objects sought to be achieved by such exercise is worth wasting the whole labour already undertaken. Unless the Court is hopeful that there is reasonable prospect of the case as against the newly brought accused ending in conviction of the offence concerned we would say that the Court should refrain from adopting such a course of action."

8. Further Section 353 Cr.P.C. states that after the arguments are heard the trial comes to an end and pronouncement of judgment is a post culmination trial procedure. Though the application was filed prior to the conclusion of the trial, there is no doubt that the impugned order was passed after the pronouncement of the judgment of conviction of the other family members of the Petitioner though on the same day. In any case the judgment having been pronounced, the trial had come to an end and the trial Court had become functus officio. The trial Court could not have passed order on the application under Section 319 Cr.P.C. after pronouncing the judgment.

9. In the present case the Complainant in her statement to the SDM clearly exonerated the Petitioner. To reproduce the words of the Complainant it was stated "in all this there was no hand of my husband Rakesh, he used to remain quite. My husband Rakesh never troubled me for anything". Thus the SDM directed registration of FIR only against Munni Devi, Rajesh and Archna, that is, the mother, brother and sister of the Petitioner. When the Complainant appeared in the witness box on 28th August, 2009 she implicated the Petitioner also stating that on the

first day her husband, sister-in-law, brothers-in-law, father-in-law and mother-in-law commented that car and cash of Rs. 1 lakh had not been given though all the articles were given as per their choice. The further allegations in the statement against the Petitioner are that in the second week of December her husband had gone to Dehradun when he told her father that they have to sell the old house and purchase a new one and asked him to give Rs.5 lakhs for the purchase of new house, which the father of the Complainant refused. It is further stated that when they reached Delhi, her husband, father-in- law, mother-in-law, brothers-in-law and unmarried sister-in-law stated that the Complainant had not brought car and cash. The Complainant further stated that her husband, that is, the Petitioner did not utter any word and kept mum though he had told her father that she would not be harassed. On 13th March, 2003 the Complainant's father-in-law, mother-in-law, husband, brothers-in-law and sister-in-law created an atmosphere of lawlessness and her father-in-law after directing her to get the demand fulfilled from her father left the house to attend his duties. Thereafter her other in-laws excluding her father-in-law in the presence of her husband gave beatings to her and taunted her. At about 9.00-9.30 P.M. on 13th March her mother-in-law, sister-in-law caught hold of her hand forcibly and Rajesh, the brother-in-law forcibly administered her the bottle and forced her to drink harpic. Her husband, the Petitioner herein instead of saving her started closing the doors and windows. She fell unconscious and regained consciousness in the hospital where her husband and brother-in-law Rajesh were present who extended threats that on arrival of SDM she should not name them or otherwise they will kill her.

10. A perusal of the allegations before the Court also shows that the grievance of the Complainant was that the Petitioner was a silent spectator and did nothing. This is what she stated to the SDM in her first statement. There is no overt act of the Petitioner in causing injury to the Complainant. Further the demand of a loan of Rs. 5 lakhs for purchasing the new house, as held in catena of judgments, is not demand of dowry. I find that the evidence on record against the Petitioner in view of improvements would not entail conviction of the Petitioner. A perusal of the impugned order dated 20th November, 2010 does not even spell out the offence for which the Petitioner has been summoned.

11. In view of the law laid down by the Hon'ble Supreme Court,

since the proceedings before the learned Trial Court had come to an end and even on the merits no case for summoning is made out, I find merit in the contention of the learned counsel for the Petitioner.

12. In view of the aforesaid discussion, the impugned order dated 20th November, 2010 summoning the Petitioner is hereby quashed. The petition and the application are disposed of accordingly.

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376	No Equivalent	143	2012 (1) AD (D) 310	
148	No Equivalent	143	2012 (2) JCC 1182	
412	No Equivalent	205	No Equivalent	
318	2012 (186) DLT 502	342	No Equivalent	
318	2012 (1) AD (D) 808	254	No Equivalent	
333	2012 (3) RAJ 38	308	2012 (186) DLT 496	
333	2011 (184) DLT 720	115	2012 (128) DRJ 154	
333	2012 (1) AD (D) 57	93	No Equivalent	
53	2011 (184) DLT 130	274	2012 (2) AD (D) 560	
386	2012 (2) RAJ 69	369	No Equivalent	
386	2012 (136) DLT 489	191	No Equivalent	
386	2012 (1) AD (D) 789	284	No Equivalent	
58	2011(184) DLT 160	423	2012 (189) DLT 601	
58	2011 (10) AD (D) 372	153	No Equivalent	
58	2012 (1) JCC 37	183	2012 (1) AD (D) 305	
83	No Equivalent	183	2012 (127) DRJ 230	
350	2012 (186) DLT 462	651	2012 (187) DLT 90	
350	2012 (127) DRJ 477	770	2012 (3) RAJ 97	

770	2012 (2) AD (D) 536	798	2012 (4) AD (D)	
618	No Equivalent	626	No Equivalent	
806	2012 (3) RAJ 568	750	2012 (187) DLT 317	
806	2012 (49) PTC 525	750	2012 (128) DRJ 140	
541	2012 (2) AD (D) 381	750	2012 (5)AD (D) 72	
525	2012 (187) DLT 80	734	2012 (2) AD (D) 763	
525	2012 (128) DRJ 551	734	2012 (1) JCC 767	
646	2012 (187) DLT 729	674	2012 (2) AD (D) 263	
646	2012 (5) AD (D) 286	476	2012 (186) DLT 429	
503	2012 (186) DLT 443	476	2012 (4) AD (D) 156	
503	2012 (4) AD (D) 69	607	No Equivalent	
711	2012 (2) AD (D) 366	573	2012 (1) AD (D) 837	
782	2012(2) AD (D) 331	581	2012 (187) DLT 229	
782	2012 (128) DRJ 147	581	2012 Cr LJ 1598	
693	No Equivalent	581	2012 (4) AD (D) 492	
490	2012 (1) JCC 457	599	2012 (2) AD (D) 175	
793	No Equivalent	599	2012 (2) JCC 797	
562	2012 (186) DLT 455	599	2012 (189) DLT 780	
589	2012 (187) DLT 107	630	2012(187) DLT 575	
589	2012 (127) DRJ 709	630	2012 (1) AD (D) 889	
467	2012 (187) DLT 164	630	2012 (127) DRJ 588	
467	2012 (2) AD (D) 97	630	2012 (1) JCC 734	
467	2012 (128) DRJ 545	687	2012 (187) DLT 241	
461	2012 (186) JCC 638	687	2012 (4) AD (D) 526	
534	2012 (1) JCC 688	763	2012 (3) RAJ 304	
516	2012 (187) DLT 5	763	2012 (187) DLT 244	
798	2012 (129) DRJ 187	763	2012 (2) AD (D) 268	
798	2012 (2) JCC 782	778	No Equivalent	

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2011 (184) DLT 720	=	ILR (DS) 2012 (II)	333
2012 (1) AD (D) 57	=	ILR (DS) 2012 (II)	333
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2012 (136) DLT 489	=	ILR (DS) 2012 (II)	386
2012 (1) AD (D) 789	=	ILR (DS) 2012 (II)	386
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2012 (186) DLT 443	=	ILR (DS) 2012 (II)	503
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2012 (186) DLT 429	=	ILR (DS) 2012 (II)	476
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2012 (1) AD (D) 837	=	ILR (DS) 2012 (II)	573
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2012 (4) AD (D) 492	=	ILR (DS) 2012 (II)	581
2012 (2) AD (D) 175	=	ILR (DS) 2012 (II)	599
2012 (2) JCC 797	=	ILR (DS) 2012 (II)	599
2012 (189) DLT 780	=	ILR (DS) 2012 (II)	599
2012(187) DLT 575	=	ILR (DS) 2012 (II)	630
2012 (1) AD (D) 889	=	ILR (DS) 2012 (II)	630
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2012 (187) DLT 241	=	ILR (DS) 2012 (II)	687
2012 (4) AD (D) 526	=	ILR (DS) 2012 (II)	687
2012 (3) RAJ 304	=	ILR (DS) 2012 (II)	763
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2012 (2) AD (D) 268	=	ILR (DS) 2012 (II)	763

HIGH COURT OF DELHI: NEW DELHI
Corrigendum
New Delhi, the 7th March, 2012

No.231/Rules/DHC.—Some printing errors have occurred in the English version of the Notification No. 578/Rules/DHC dated 14th December, 2011 published in Delhi Gazette (Extraordinary), No. 202, Part IV, (NCTD No. 223) dated 14th December, 2011. It should be read as under:-

1. After the title "Order XX-B", in the heading the word "of" should be inserted between the words "Recognition and "Electronically Signed".

2. After the title "Order XX-B", in the heading the word "Judgment" between the words and expression "Order," and "and Decrees" should be read as "Judgments".

By Order of the Court.

V.P. Vaish, Registrar General

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Section 30 the respondent No. 1 COA has been further vested with the jurisdiction to hold an enquiry into allegations of professional misconduct against the Architects—There is no other provision in the Act where under respondent No. 1 COA can trace its power to prescribe minimum standards for grant of qualifications other than the recognized qualification. Section 45 of the Architects Act to which also reference has been made, empowers the respondent No. 1 COA to make regulations but only with the approval of the Central Government. However, the said Regulations again have to be with respect to recognized qualifications and not others—What emerges from aforesaid is that the source of power to prescribe minimum standards for the courses of M. Arch. (Urban & Regional Planning), M. Arch. (Transportation Planning & Design) and M. Arch. (Housing) which are not recognized qualifications under The Architects Act, and as has been done vide impugned guidelines cannot be traced to the Architects Act—The respondent No. 1 COA is a statutory body. It can exercise only such powers as are vested in it none other. There is nothing to show that the respondent No.1 COA was intended to or is the sole repository of the education in the field of Architecture—Had the legislature intended to so empower the COA it would not have restricted its power to recognized qualifications mentioned in the Schedule. On the contrary, Section 14(2) of the Architectural Act vests the power to grant recognition to any architectural qualification in the Central Government and which power is to be exercised after consultation with the COA. Thus, when COA is not even empowered to recognize any architectural qualification, it cannot certainly be held to be empowered to prescribe minimum standards therefore.

Institute of Town Planners, India v. *Council of URE & Ors.* *503*

ARMS ACT, 1959—Section 27—Case of prosecution that accused was fighting with deceased (his wife) when both were working in the factory and threatened to kill her—He stabbed her on her neck and stomach, taking out chura from underneath his shirt—He also stabbed himself with chura and fell down—PW3 sister-in-law of accused who witnessed incident raised alarm and police telephonically called by owner of factory PW6—Trial Court convicted accused u/s 302, 309 IPC and Section 27 Arms Act—Held, accused did not dispute his presence at the site of occurrence—Although defence taken was that accused objected to the deceased having illicit relations with one Debu and the incident took place because of Debu in his presence, none of the prosecution witnesses, including owner of factory (PW6), testified about the presence of Debu—No suggestion put to any of the witnesses regarding any altercation between appellant and Debu—PW5, daughter of accused and deceased an eye-witness of incident testified against father—No motive imputed to PW5 for deposing falsely against father—PW3 sister-in-law of accused supported case of prosecution on all material facts and implicated appellant for causing stab injuries on vital organs of deceased in her presence—Appellant named by PW3 in her statement recorded at earliest point of time—No major deviation in version given by PW3 in her statement and testimony before court—PW6 supported prosecution and corroborated deposition of PW3—Injury sustained by accused at the spot lends credence to prosecution case—Oral evidence coupled with medical evidence, proved that accused caused injuries to deceased—However no evidence to infer that prior to incident accused attempted to cause serious injuries to deceased or threatened the deceased with weapon—No injuries were ever caused by accused to deceased prior to incident with any sharp object—Cannot be ruled out that knife Ex. P-1 was picked up by accused from the spot, as PW5 disclosed

that deceased was doing tailoring job of rexine—No evidence on record pointing to any serious quarrel between appellant and deceased before incident, prompting appellant to commit murder—Evidence revealed that quarrel had started between appellant and deceased at about 11.30 a.m. and in that quarrel, appellant stabbed deceased—Appellant did not abscond from spot but attempted to commit suicide by stabbing himself—This reaction shows that quarrel/fight/altercation between appellant and deceased took place suddenly for which both the parties were more or less to be blamed—No previous deliberation or determination to fight—Circumstances rule out that appellant planned to murder deceased and had intention to kill her—Occurrence took place all of a sudden on trivial issue in which appellant in heat of passion on account of deprivation of self control stabbed deceased—Considering nature of injuries, how they were caused, weapon of assault and conduct of accused whereby he caused himself grievous hurt to commit suicide, this not a case u/s 302—However, number of injuries inflicted by appellant on vital parts of deceased proved commission of offence punishable u/s 304 Part I—Appeal partly allowed—Conviction modified from Section 302 to 304 Part I, IPC.

Sukhpal v. *State* *573*

BENAMI TRANSACTION (PROHIBITION) ACT, 1988—Section 4—Respondent/plaintiff filed two suits one for possession filed on 18.04.1988 and the other for injunction filed on 21.11.1987—Claims to be owner of the suit property—Benami Transaction (Prohibition) Act, 1988 came into force on 19.05.1988—Written Statements filed on 28.07.1988 and 18.07.1988 respectively—Plea taken that the property held benami and respondent/plaintiff not the real owner of the property—Funds for purchase of property given by

their father—Held no document proved giving of funds by the father for purchase of property—Suits decreed—Aggrieved, defendant no.1/appellant filed the two appeals—Held suits filed before coming into force of the Act—The Defence taken by the defendant no.1 appellant is hit by the provision of Section 4(2) of the Act—Appeal dismissed.

P.E. Lyall v. *Balwant Singh* *467*

BORDER SECURITY FORCE ACT, 1968—Order dated 21st October, 2011 of the Border Security Force was impugned, whereby the petitioner's request to give him one more chance to qualify the FPETs was declined. Held: Relief granted by Court must be tenable within the legal framework of law and should not be based on misplaced sympathy, benevolence and generosity. Petitioner failed thrice even after intensive physical training—Reversion of petitioner to the rank of constable as he was, prior to his appointment as sub-Inspector, cannot be faulted.

Mewa Singh Dhaliwal v. *Union of India & Ors.* *328*

CCS (PENSION) RULES, 1972—Rule 9—Petitioner appointed as Security Guard with Respondent Delhi Transport Corporation (DTC) was promoted as Havaldar and then to the post of Assistant Security Inspector (ASI)—He finally retired after attaining age of superannuation and all his retiral benefits were released to him—After about 7 months of retirement, charge sheet was issued to petitioner seeking explanation from him that why proceedings should not be initiated against him for producing forged educational documents at time of his promotion as ASI—Petitioner conceded that certificate produced by him showing he had passed High School Examination on basis of which he was promoted as ASI was forged but challenged issuance of charge

sheet against him as being time barred, Also the period of limitation to initiate the proceedings was 4 years—Tribunal observed, Rule 9 (2)(b)(ii) of Pension Rule prescribing limitation of 4 years did not apply as it did not amount to misconduct and delinquency in performance of his duty, but, also held that his promotion was nonest and set aside his promotion as ASI—Petitioner challenged said order—Held:- When the appointment is obtained by fraud, even if the incumbent had worked for number of years that would not be a mitigating circumstance and such an appointment which is null and void, can always be terminated—However, finding of the Tribunal that act of seeking promotion by fraud is not a misconduct was set aside and also observed—Departmental proceedings could be initiated when fraud came to notice of Respondents and they should have acted promptly to serve charge sheet before retirement of petitioner—Since misconduct happened more than four years before the institution of departmental proceedings & had become time barred—Departmental proceedings quashed.

Rajinder Singh v. *DTC & Ors.* *404*

CCS (CCA) RULES, 1965—Rule 14—Respondent while working as Commissioner of Income Tax (Appeals) discharged quasi-judicial service and decided petition filed by assessee against order of Income Tax Officer (I.T.O) after inviting report from I.T.O.—Thereafter, said I.T.O. filed complaint against Respondent alleging, Respondent changed comments in his ACR and he had shown undue favour to assessee against whom ITO had passed orders—Investigation was held which revealed, Respondent allowed unauthorized relief to said assessee—In response to charge sheet, Respondent justified passing of his orders—However, matter was referred to Central Vigilance Commission which advised for initiation of major penalty proceeding against Respondent—

Accordingly, competent authority initiated disciplinary proceedings against Respondent under Rule 14—Thereupon, Respondent preferred OA before Tribunal seeking quashing of charge sheet urging, he discharged quasi-judicial duties while disposing of the petition of assessee and his order was justified on merits—Also, his reply was not looked into by concerned authority—Tribunal allowed application and quashed charge sheet on ground of violation of principles of natural justice and petitioner was granted liberty to examine explanation furnished by Respondent carefully—Assailing said order, petitioner preferred writ petition and urged disciplinary proceedings could be initiated even against employee who committed misconduct while discharging his quasi judicial duties—Held:- Disciplinary proceedings can be initiated only if an action of Officer indicates culpability—A close scrutiny of his action is required and a great caution is to be adopted before initiating disciplinary proceedings.

Union of India & Anr. v. *Baljit Singh Sondhi* *274*

— Rule 10—Fundamental Rules, 1922—Rule 54B—Petitioner challenged their 25 years long continued suspension by filing O.A. before Tribunal—Respondent contested it alleging that it was time barred—Tribunal though set aside their suspension but declined to grant them back wages—Aggrieved petitioners challenged said order by way of writ petition—They urged, even though Respondents withdrew their dismissal, however, even after lapse of 27 years they were neither reinstated nor any departmental proceedings were initiated against them so they were entitled for back wages—Held:- The Government servant whose suspension is revoked, is not entitled to get full back wages on reinstatement as an absolute right.

Hukum Singh & Ors. v. *Central Public Works Department & Anr.* *412*

CODE OF CIVIL PROCEDURE, 1908—Benami Transaction (Prohibition) Act, 1988—Section 4—Respondent/plaintiff filed two suits one for possession filed on 18.04.1988 and the other for injunction filed on 21.11.1987—Claims to be owner of the suit property—Benami Transaction (Prohibition) Act, 1988 came into force on 19.05.1988—Written Statements filed on 28.07.1988 and 18.07.1988 respectively—Plea taken that the property held benami and respondent/plaintiff not the real owner of the property—Funds for purchase of property given by their father—Held no document proved giving of funds by the father for purchase of property—Suits decreed—Aggrieved, defendant no.1/appellant filed the two appeals—Held suits filed before coming into force of the Act—The Defence taken by the defendant no.1 appellant is hit by the provision of Section 4(2) of the Act—Appeal dismissed.

P.E. Lyall v. *Balwant Singh* *467*

— Order 23, Rule 3 (Proviso)—Compromise—Order XLIII Rule 1A—Suit for partition, injunction and rendition of accounts—Plaintiffs nos. 1 to 6 and defendant no.1 successors in interest of the original owner vide decree dated 25.11.1975 in suit no. 640-A/1974—Both were recognized as 50% co-owners of the property—Collaboration agreement with defendant nos. 4 and 5 and predecessors of defendant no.2 to construct flats—Collaborators to receive 50% of the sale proceeds—Construction not completed within the stipulated period—defendant no.2 terminated the agency of defendants nos. 4 and 5 vide legal notice dated 17.10.1992 and public notice dated 24.03.1994—Defendants nos. 4 and 5 inducted defendant no.6 as licencee and parted with possession to defendant no. 6—Suit instituted by defendant nos. 4 and 5 for breach of collaboration agreement—Dismissed in default—No steps taken for its restoration—Compromise amongst 6 plaintiffs and defendant nos. 1 to 3—Final decree of partition

determining their rights and shares and preliminary decree for rendition of accounts passed in presence of counsel for defendant nos. 4 to 6 defendants nos. 4 to 6 moved application under proviso to Order 23 Rule 3 challenging the compromise—Compromise stated to be collusive and against the interest of defendant no. 4 to 6 under the terms of collaboration agreement—Held—Defendants nos. 4 and 5 were acting only as agent of defendant no. 2—Agency stand terminated by notice and public notice—Agent has no right to remain in possession after termination of his agency—Termination of contract would be challenged by an independent claim party to the compromise alone can challenge the compromise under proviso to Order 23 Rule 3—Defendants nos. 4 to 6 not party to compromise—Cannot challenge the compromise under proviso to Order 23 Rule 3—Only remedy available is by way of appeal—Application dismissed.

Pushpa Builder Ltd. v. *Dr. Vikram Hingorani & Ors.* *589*

— Order 12 Rule 8—Claims Tribunal awarded compensation—Appeal for reduction of compensation filed by Insurer before High Court—Plea taken, in absence of any evidence as to future prospects, same should not have been added—Driver did not possess any driving license at time of accident—A notice was served upon owner and driver to produce driving license—Non production of license would show that driver did not possess any driving license—Appellant should not have been saddled with liability to pay compensation—Held—In absence of any evidence as to deceased's permanent employment, Tribunal faulted in considering future prospects while computing loss of dependency—It is true that a notice was claimed to have been served upon driver and owner—However, no evidence with regard to same was produced—

It is well settled that onus to prove breach of policy condition is on insurer—Simply stating that a notice under Order 12 Rule 8 of CPC was sent is not sufficient to discharge onus that driver did not possess any driving license to drive vehicle—Insurer cannot avoid liability to pay compensation.

National Insurance Co. Ltd. v. *Rajbala & Ors.* *793*

— Order 20 Rule 12—Delhi Rent Control Act, 1958—Section 6A and 8—Transfer of Property Act, 1882—Section 106—Appellant/defendant a tenant from 1979 at a monthly rent of Rs.1161.60—Rent increased from time to time under section 6A and 8—Rent Rs.2489.30 w.e.f 23.04.2004—legal notice dated 07.05.2007 enhancing rent to Rs. 3618.23 inclusive of maintenance charges Rs.880/- w.e.f. 23.04.2007—tenancy terminated by legal notice dated 07.09.2007—failure to vacate the premises—Suit for possession and mesne profits—Plea taken, notice dated 07.05.2007 defective as sought to increase the rent retrospectively—Notice dated 07.05.2007 not served—Held, even if language defective it will operate to increase the rent by 10% after 30 days of service of notice—Notice was served—Suit decreed—Aggrieved by the judgment the appellant/defendant preferred the regular first appal—Held—Notices were sent at seven addresses by registered AD post and UPC—The addresses were correct—Notice deemed to have been served—Notice has a necessary legal effect of increasing rent 30 days after receipt of notice—Order 20 Rule 12 does not mandate that the court shall first take evidence only an aspect of illegality of possession and decree the suit for possession and only thereafter will go for trial with respect of mesne profits—Appeal dismissed.

Sewa International Fashions & Ors. v. *Meenakshi Anand* *607*

— Respondent/plaintiff filed suit for recovery of advance tailoring charges—Appellant/defendant filed counter claim—appellant/defendant appointed as tailoring contractor vide agreement date 30.07.1976 for a period of one year—Contract Period extended for six months and thereafter twice for two months each—Appellant/defendant was paid Rs 14,70,459.08 against which bills for Rs. 13,20,533/- submitted—Credit for another bill for Rs. 18,662/- also given—Rs. 1,31,263.98 found to be paid in excess—Legal notice dated 07.08.1978 served—Did not pay—Suit filed for recovery—Defence taken the payments were made only length wise whereas under the agreement payment were to be made lengthwise as well as breadth wise—Held:- during the entire period of contracts appellant/defendant raised bills on the basis of length of the cloth and payments were made lengthwise—Parties understood the schedule rates in particular manner, payments received in the manner understood i.e. only lengthwise—Cannot claim payment lengthwise as well as breadth wise—Suit decreed and counter claim dismissed—Aggrieved by the order filed the present appeal—Held—Not open to say that the contract did not mean what the parties had acted upon under the contract—Appeal dismissed.

Rati Ram v. *D.C.M. Shroram Consolidatd Ltd.* *516*

— Order XL and Order XXXIX Rule 1&2—Suit for declaration and mandatory injunction, alleging financial irregularities committed by the defendants—Trial Court granted ad interim injunction and appointed receiver to look after the affairs of defendant no.1 society—Appellate Court reversed the findings and set aside the order of trial Court—Challenged—Held, the alleged financial irregularities mentioned in plaint are more or less general allegations and plaintiffs themselves are facing criminal cases and record indicates that affairs of defendant no. 1 were being better managed by the defendants as

compared to the management by the receiver; so applying the stringent tests laid down by the apex Court in the case of *Smt. Damyanti Naranga vs UOI,* AIR 1971 SC 966, there is no irregularity in the appellate order whereby appointment of receiver was set aside.

Bankey Bihari Lal & Ors. v. *Shiv Mandir (Gufawala) Sabha (Regd) & Ors.* *65*

— Section 10—First suit was for declaration that Plaintiffs had right to get membership of the society renewed, permanent injunction for restraining the defendants from creating third party interest in the temple property, and rendition of accounts, calling upon the defendants running temple to render accounts—During progress of the First suit, a Second suit was filed under Sec. 91 & 92 CPC after obtaining leave, praying for declaration that the defendants had no right to manage and control administration of the temple and direction to open membership of the society to the residents of the area—Held, trial Court rightly stayed the Second Suit under Sec. 10 CPC, since both the suits related to the same matter in issue.

Bankey Bihari Lal Aggarwal & Ors. v. *Shiv Mandir (Gufawala)& Ors.* *80*

— Adverse Possession—Plaintiff filed suit for possession, alleging that plaintiff purchased the suit property and allowed his brother, the defendant at request, to use the suit property for running a shop and thereafter the defendant purchased his own property but refused to vacate—Defendant pleaded that the suit property was allowed to be retained by him under a settlement and set up an alternative defence of adverse possession—Suit decreed in favour of plaintiff—Appeal—In appeal, only adverse possession ground raised—Held, not a

single document filed by defendant to prove his case of adverse possession and claim of defendant in evidence affidavit is only with respect to the alleged settlement, with no specific date or month or year as to when the possession was notified to be hostile to plaintiff and mere long possession cannot be adverse possession.

Madan Lal v. *Sunder Lal* *83*

— Partition—Preliminary decree passed by trial Court ascertaining respective shares of parties, not challenged—Local Commissioner appointed by trial Court who gave a report, but the same rejected due to dissatisfaction expressed by both parties—Thereafter, parties agreed to arriving at valuation of the suit property by inter se bidding, in which plaintiff offered higher bid than defendant, who did not raise his bid despite several opportunities—Trial Court passed Final Decree, determining the value payable by the plaintiff to the defendants—Appeal—Appellant's contention that preliminary decree wrongly determines shares of parties rejected on the ground that since the appellant never appealed against the preliminary decree, the same has now become final—Appellant's other contention that final decree could be passed only after obtaining valuation report of the property also rejected, holding that valuation report is one of the methods of determining the value of the suit property for the purposes of passing final decree, but that is only one of the methods and inter se bidding by the parties is also one of the well recognized methods, so appellants having agreed to inter se bidding and having lost in the same, cannot now object.

Rakesh Rawat & Anr. v. *Rajesh Kumar Rawat & Ors.* *177*

— Order 41 Rule 24—Claim petition dismissed on ground that appellants failed to establish that accident was caused on

account of rash and negligent driving of driver of offending vehicle—Order challenged before High Court—Plea taken, accident was caused on account of rash and negligent driving of driver of offending vehicle—Testimony of eye witness could not have been rejected in absence of any rebuttal by examining driver of vehicle—High Court being court of First Appeal is empowered to decide quantum of compensation instead of remanding case to Tribunal for its decision on issue—Per contra, plea taken Tribunal's finding that negligence on part of driver of offending vehicle not established cannot be faulted because it was not possible for a person to see accident from a distance of 3000 yards—Held—Driver of offending vehicle admitted involvement of truck and its being driven by him at time of accident—Yet driver and owner did not prefer to file any written statement—Driver did not prefer to controvert allegations of negligence deposed by eye witness—Negligence has to be proved by claimants on touchstone of preponderance of probability and not beyond shadow of all reasonable doubts—Tribunal ought to have relied on testimony of eye witness to reach conclusion that accident was caused on account of rash and negligent driving of driver of truck—Even if no finding on quantum of compensation is given by Tribunal, High Court as Court of First Appeal can appreciate evidence and compute compensation—Compensation granted in favour of appellants.

Santosh Bindal & Ors. v. *National Insurance Co. Ltd. & Ors.* *342*

— Execution Petition filed by the Decree Holder (hereinafter referred to as DH) seeking direction to the Judgment Debtor (hereinafter referred to as JD) to pay a sum of Rs. 5,99,21,028 in terms of the Arbitral Award and order dated 8th April 2010 wherein JD was to pay the DH US$ 14,35,006 as well as Rs. 45,10,798 within two months from the date

of the Award failing which simple interest @ 12% per annum. However the award was modified to a limited extent by the order passed by the Court on 8th April 2010 while disposing of OMP Nos. 262 of 2003 and 88 of 2006. Issue: Whether the executing Court can modify or alter the decree, which extinguishes the right of the DH to receive the full decretal amount? Decision: The executing Court cannot go behind the decree or seek to modify or alter the decree. Therefore, even while this Court in its order dated 5th August 2010 noted that with the payment of the sum of Rs. 7,12,27,629/- plus interest accrued thereon in the fixed deposit the decree would stand satisfied, it did not extinguish the right of the DH to receive the full decretal amount i.e. the interest at 12% on Award amount (as modified by the order dated 8th April 2010) till the date of payment.

Klen & Marshalls Manufacturers and Exporters Ltd. v. *Power Grid Corporation Debtor India Ltd.* *386*

CODE OF CRIMINAL PROCEDURE, 1973—Section—156, 200—Petitioner filed complaint in Police Station for registration of FIR against Respondent no. 2 alleging Respondent No.2 in conspiracy with other Respondents misappropriated Flat in Rohini by concealing Will bequeathing said Flat exclusively to him—FIR not registered—Petitioner, then filed complaint under Section 200 Cr.. P.C. along with application under Section 156 (3) before Metropolitan Magistrate (MM)—Application dismissed by learned MM expressing view, investigation not required by police and he directed petitioner to lead pre-summoning evidence—Aggrieved by said order, petitioner filed criminal revision before court of learned Additional Sessions Judge which was also dismissed—Petitioner assailed said order in Criminal M.CA—He urged, investigation by police necessary as part of record was maintained by DDA and Sub—Registrar, Amritsar which could

not be collected by petitioner and could only be unearthed through police investigation—Held—Section 156 (3) of the Code empowers to Magistrate to direct the police to register a case and initiate investigation but this power has to be exercised judiciously on proper grounds and not in a mechanical manner. In those cases where the allegations are not very serious and the complainant himself is in possession of evidence to prove his allegations there should be no need to pass order under Section 156(3) of the Code.

Vikrant Kapoor v. *The State & Ors.* *687*

— Sec.197 and Delhi Police Act, 1978 Sec. 140—Magistrate ordered under Section 156 (3) CrPC for registration of FIR for offences under Sec. 193/196/200/209 IPC against petitioner, working as Sub Inspector with Delhi Police on the allegations that in conspiracy with few others, the petitioner framed incorrect record in FIR No. 99/01—Challenged—Held, since petitioner was a government servant and is still working as Inspector in Delhi Police, the alleged acts have reasonable connection with duties of the office held by him, so prosecution without obtaining sanction is bad in law—Magisterial order quashed.

Mukesh Kumar v. *State* *490*

— Sections 319 & 353—Indian Penal Code, 1860—Sections 307, 498A and 34—Summoning u/s 319—Case filed u/s 498A/406—Judgment passed convicting three of the family members of petitioner u/s 498-A & 406 along with order summoning him u/s 319—Contention of petitioner that order u/s 319 can only be passed during trial and not after judgment dictated/pronounced—Contention of prosecution that trial court while pronouncing of judgment on other family members of petitioner, on same day passed orders summoning petitioner

u/s 319 Cr.P.C and since both orders were passed simultaneously, so it could not be said that impugned order was passed after trial was concluded—Held, although application u/s 319 was filed by Public Prosecutor during course for trial, order on application passed after pronouncement of judgment convicting other family members of Petitioner—According to Section 353 after arguments are heard, trial came to an end and pronouncement of judgement is post culmination of trial procedure—Judgment having been pronounced, trial came to an end and trial court became functus officio—Trial court could not have passed orders on application u/s 319 after pronouncing judgment—Evidence on record against petitioner would not entail conviction of, petitioner—Impugned order does not even spell out offence for which petitioner has been summoned—Impugned order summoning petitioner, quashed—Petition Allowed.

Rakesh Kanojia v. *State Govt. of NCT of Delhi & Anr.* *798*

— Section—227—Petitioner charged for having committed offences punishable under Section 307, 406, 498A—By way of Criminal Revision, he Challenged impugned order urging, only slight suspicion was against petitioner for committing offence punishable under Section 307 IPC so he should not have been charged under said section—Held :- If at the initial stage there is a strong suspicion which leads the Court to think that there is a ground for presumption that the accused had committed the offence, then it is not open to the Court to say that there is no sufficient ground for proceeding against accused—However, in present case, no strong proof to frame charge under Section 307 IPC against petitioner.

Amit Dahiya v. *State* *73*

— Sections 164, 306, 438—Prevention of Corruption Act, 1988—Sections 7 & 9—Petitioner charge sheeted for offences punishable under Section 7 & 9 of Act on allegations that he accepted illegal gratification from journalist of tehelka.com posing as arms dealers—During course of investigation, statement of Respondent no.2 was recorded under Section 164 Cr.P.C. and he was also granted anticipatory bail—Before filing of charge sheet, CBI moved application seeking pardon for Respondent no.2 to make him witness/approver—Application allowed—Aggrieved petitioner challenged order granting pardon which was upheld in SLP—Then petitioner filed application for taking Respondent no.2 into custody, in terms of Section 306 (4)(b) as he was made approver—Application dismissed—Petitioner challenged order and urged Respondent no.2 was granted anticipatory bail contemplating his release on bail in event of arrest—Thus, he was never arrested before grant of pardon and as per provisions of Section 306(4)(b) unless he is already on bail, he is required to be detained in custody until termination of trial—Since he was not arrested so he was never granted bail—Held:- Though it is mandatory to keep the approver in custody unless on bail, however, Court is empowered in the interest of justice to avoid abuse of process of law and for the right of life and liberty of an approver, to grant bail if not granted earlier—Pardon does not get vitiated on this count.

Bangaru Laxman v. *State Thr. CBI & Anr.* *102*

CONSTITUTION OF INDIA, 1950—The Indian Succession Act, 1925—Section 375 which requires such security to be furnished is impugned only on the ground that it is rigorous and is coming in the way of the petitioners from enjoying the money bequeathed to them and is thus ultra vires the Constitution of India—The provision for taking security bond with surety is intended to ensure safety of the debts received

by the grantee of the Succession Certificate or Letters of Administration. The provision requires the grantee of Succession Certificate and/or Letters of Administration to furnish security to protect the right of heir inter se so that the person who is ultimately found to be entitled to the whole or part of the debts is indemnified—The law thus requires him under Section 375 supra to furnish security to ensure that no loss is caused to the rightful heirs. The petitioners in the petition have been unable to plead as to how such provision protecting the interest of the heirs is bad—The right to property under the Constitution is always subject to reasonable restrictions and we find the aforesaid provision to be a reasonable one—Not only so, a bare perusal of Section 375 further shows that the furnishing of security itself is in the discretion of the Court. It is always open to the grantee to seek exemption from furnishing of such security—Held that the challenge to the *vires* of Section 375 of the Indian Succession Act, 1925 predicated on the same being mandatory is misconceived and in ignorance of law.

Rajesh Kumar Sharma & Anr. v. *Estate of Late Sh. Raj Pal Sharma & Anr.*..... *461*

— Article 226—Delhi School Education Act, 1973—Section 8(1), 8(3), 8(4), 10 & 11—Delhi Education Rules, 1973—Rules 118 & 120—The respondents were appointed as Assistant Teachers in the petitioner, an unaided minority school recognised under Delhi School Education Act, 1973—The respondents charged of grave misconduct and criminal trespass—Enquiry conducted—Ordered to be removed from service—Appeal before the Delhi School Tribunal—Tribunal allowed the appeal holding dismissal to be illegal and against the principles of natural justice—Petition challenged the order of the Tribunal—Petitioner's contention—The Rule 118 &

120 DSER did not apply to unaided school—The judgment of the Tribunal fundamentally flawed and liable to be set aside—Respondents submitted that even if Rule 118 DSER is not applicable to Unaided Minority School Rule 120 would nevertheless apply—Prior approval of DoE for imposition of major penalty was required—Held—There can be no manner of doubt that the Supreme Court excluded Section 8(2) from its application to unaided minority schools—Corresponding to Section 8(2) are Rules 96 to 121 of Chapter VIII of the DSER—Consistent with Section 12 read with Section 8(2) DSEA, Rule 96(1) DSER clearly states "nothing contained in this Chapter shall apply to an unaided minority school"—Rule 118 and 120 figure in Chapter VIII which, as clearly stated in Rule 96(1), does not apply to unaided minority schools.

Managing Committee Frank Anthony Public School & Anr. v. *C.S. Clarke & Ors.* *35*

— Article 226—Delhi School Education Act, 1973—Section 8(1), 8(3), 8(4), 10 & 11—Delhi School Education Rules, 1973—Rules 118 & 120—The respondents were appointed as Assistant Teachers in the petitioner, an unaided minority school recognised under Delhi School Education Act, 1973—The respondents charged of grave misconduct and criminal trespass—Enquiry conducted ordered to be removed from the service—Appeal before the Delhi School Tribunal—Tribunal allowed the appeal—Holding dismissal to be illegal and against the principles of natural justice—Petition challenging the order of the Tribunal—Petitioner contend on merit that adequate opportunities were granted to the respondent to defend themselves before the Enquiry Officer—Charges found proved and were grave—Imposition of major penalty justified—Respondents contend that proceedings were malafide and vindictive and statements were not properly recorded—Held—The scope of the jurisdiction of this Court

under Article 226 to examine the validity of the enquiry proceedings is limited—The procedure followed would have to be shown to be unjust or violative of the principles of natural justice—On merits, the report of enquiry would have to be shown to be perverse or based on no evidence—As regards the procedure adopted by the Enquiry Officer in the instant case, Rule 120 DSER did not apply to the enquiry proceedings—The Enquiry Officer was nevertheless expected to observe the principles of natural justice—Although the strict rules of evidence and procedure as envisaged in Court proceedings need not apply, the procedure adopted had to be just, fair and reasonable—The enquiry in the present case was held by a retired Principal of a Public School—The enquiry proceedings show that sufficient opportunity was given to Mr. & Mrs. Clarke to defend themselves—It is not possible to conclude that the procedure adopted by the Enquiry Officer in the instant case was not just, fair and reasonable—Merely because the Principal was also the PO does not result in the violation of the principles of natural justice—It is not shown how any prejudice was caused to the Clarkes on that score—Also, they appear to have been given access to those documents that were relevant to the articles of charge—The conclusion arrived at by the Enquiry Officer cannot be held to be based on no evidence or perverse warranting interference by this Court under Article 226 of the Constitution—For the aforementioned reasons, impugned order of the Tribunal allowing the appeals of the Clarkes set aside—Writ petition allowed.

Managing Committee Frank Anthony Public School & Anr. v. *C.S. Clarke & Ors.* *35*

— Article 226—Public Tenders—Writ Petition filed by petitioner, challenged the revised price bid invited by the Respondent No. 2 i.e. Airport Authority of India (AAI) vide its

communication dated 04.03.2011. Petitioner contended that it was in its capacity as the L-1 called for renegotiation of the price by Respondent No. 2, on 19.11.2010 which resulted in scaling down of its offer by Rs 125 lacs. The Petitioner contended that the impugned communication calling for revised bids paved the way for re-entry of R-3 (Eldis) and R-4 (Raytheon) into the bidding process, which was impermissible. The bid was for radar equipment for various AAI controlled airports, The Technical Evaluation Committee (TEC) had shortlisted the Petitioner and Raytheon, eliminating Eldis. Eldis had filed complaints against exclusion alleging bias towards the petitioner. Ministry of Civil Aviation requested Chairman AAI to inquire into Eldis' complaint. There was a divergence of opinion on the evaluation process between the TEC and the independent External Monitors ("IEM"). AAI sought Central Vigilance Commission (CVC) guidance, which was declined—Ministry advised AAI to take its administrative decision. At a meeting on 28.02 2011 of the Procurement Advisory Board (PAB) summoned by Chairman AAI a decision was taken to invite "snap bids" from technically qualified bidders. Held: decision taken at the meeting of the PAB, was not arrived at for an oblique motive, or was violative of any provisions(s) of the Tender. Amongst other aspects, PAB had at its meeting of 28.02.2011, attached criticality to an express inclusion of the source code in the price bid. Before that, IEM in its report dated 07.12.2010 had highlighted, amongst others, this aspect of the matter. Further it was held that critical component of the financial bid cannot be assumed to be included on the basis of assumptions as, this could lead to disruption in the execution of the Tender at a later stage. For the aforesaid reasons, held that there was no merit in the submission that decision made at the meeting of the PAB held on 28.02.2011, was flawed. Therefore, the decision to call for "snap bids" as against cancellation of the

Tender can also not be found fault with in view of the urgency expressed in both meetings of the PAB. Therefore, the necessary corollary of this would be that the impugned letter dated 04.03.2011 would have to be sustained.

Thales Air Systems S.A. v. *Union of India & Ors.* ... *115*

— Administrative Law—Dismissal from service—Petitioner appointed as constable—Declared as a proclaimed offender and departmental proceeding initiated against him alleging him to be a deserter on three different occasions—The petitioner contended that the charges of desertion were framed against him despite the knowledge of the respondents that the wife of the petitioner was unwell and was suffering from acute vulnerable diseases as Typhoid and Poly menherea leading to her abortion of two months pregnancy—The Enquiry officer, after considering the evidence which was produced during the enquiry proceedings and noting the fact that the petitioner did not appear despite an opportunity given to him, proceeded ex-parte against the petitioner and gave the findings that the charges against the petitioner were made out—The disciplinary authority accepted the report of the enquiry officer and awarded the punishment of dismissal from service after the petitioner failed to file reply to show cause notice given to the petitioner—Petitioner challenged his dismissal on the ground that throughout his service career from 2001 to 2006 there was no adverse entry in his service record and he had an unblemished record and the charges of desertion against him in the circumstances are false—He is the only earning member and his wife has been suffering from diseases since the year 2005 and, therefore, he had applied for leave which was not granted—Complete set of documents were not provided to him nor any show cause notice had been issued to him initiating departmental proceedings and charge sheet—Violated the principles of natural justice—Punishment of

dismissal is disproportionate to the misconduct attributable to the petitioner. Held—Since the petitioner did not appear despite the notices sent to him, he cannot make any grievance about not receiving the copies of the documents which were produced during the enquiry proceedings—No grounds have been made on behalf of petitioner for setting aside the ex-parte proceedings—Petitioner remained absent from 2002 upto 2005 and again from April, 2006 to December, 2006 for various periods—No grounds disclosed by the petitioner showing sufficient cause for non appearance of the petitioner during November, 2006 and December, 2006 when notices were sent to him to appear before the enquiry officer—If the petitioner could not appear on account of alleged medical condition of his wife, the petitioner should have replied to the allegations made against him—The enquiry officer, the disciplinary authority, appellate authority and the Revisional authority has noted the unauthorized absence of the petitioner—Petitioner has been absconding and deserting the service without any just and sufficient reason—In any case for whatsoever reason, if the leave of the petitioner was not sanctioned, the petitioner was not entitled to leave the service un-authorizedly.

Pradeep Kumar Singh v. *Union of India & Anr.* *161*

— Article 32—Public Interest Litigation—Petitioner alleged misuse of land by DMRC allotted to it for Vishwa Vidhyalaya Metro Station by allowing construction of residential units thereon by respondent no. 4 while the said land was earlier being used for purposes of parking vehicles by the Metro commuters—Documents filed by petitioner show that it was registered as a society barely a couple of months before filing the petition and there is nothing to show as to how many and who are its members or that it has been incorporated to protect the interest of Metro commuters or that opportunity

was given to Metro commuters to become members—Documents also show that construction of residential units commenced in the year 2007, if not earlier after the government accorded permission to DMRC to generate resources through development on the transferred land—Held, often it is found that the petitions in public interest are filed out of commercial rivalry and /or oblique motives, so in the absence of material to show that petitioner is representative of Metro commuters, Court not inclined to entertain this petition and which may ultimately adversely effect development and functioning of Metrorail.

Association of Metro Commuters & Anr. v. *Delhi Metro Rail Corporation & Ors.* *172*

— Writ impugns the order dated 25.05.2011 of the Central Administrative Tribunal which directed the Petitioner to treat the Respondent as a validly selected candidate and to offer him appointment to the post of sub-inspector (EXE) Male. Held: Court cannot interfere in the assessment made by the Delhi Police as employer, as to who is suitable and who is not for serving in the force which is required to constantly interact and render assistance to public. Tribunal in the impugned order erroneously followed the dicta in *Sandeep Kumar* in which no assessment of suitability was done by the Screening Committee, as was done in the present case.

Commissioner of Police v. *Ranvir Singh*..... *197*

— Article 226—Public Tenders—Writ Petition filed by petitioner, aggrieved by the fact that, the Global Tender Enquiry Document dated 07.07.2010 (hereinafter referred to as the "Tender"), which had technical specifications stipulated therein, inter alia, in respect of products described in Schedule 10, 13 and 47 (qua which bids were invited) were altered by

Respondent no. 3, post pre-bid meeting dated 18.07.2011, to their detriment. In so far as products referred to in Schedules 10 and 47 are concerned, they are governed by condition no. 7.1 under said heading, which being identical read as follows: "Should be FDA/CE or BIS approved product". In so far as product referred to in Schedule 13 is concerned the relevant condition is 7.2, which reads as follows: "should be FDA/CE approved product". After a pre-bid meeting of the bidders convened by respondent no. 3 on 18.07.2011, corrigendums were issued on 26.07.2011 and 28.07.2011 in respect of the aforementioned conditions qua the products referred to above, which altered the standardization specification requirement exclusively to USFDA. This alteration in the Tender conditions, the petitioner alleges, has been brought about to exclude Indian bidders and/or all such bidders who do not market their products in the USA. Respondent No. 3 writ petition contended that the petition ought to be rejected since it fails to implead Department of Medical Education and Research, Government of Punjab, which was a necessary party. Held: The present action is bound to fail for reason of non-joinder of necessary parties coupled with the fact that there is, admittedly, an absence of concomitant pleadings in that regard.

— Writ—Examination Malpractice—Petitioner impugned the order dated 03.03.2011 passed by respondent No.2/Controller of Examinations, Jamia Millia Islamia University, whereby the Examination Committee constituted by respondent No.1/ University decided to penalize the petitioner for indulging in use of unfair means while writing Examination—MBA (Evening), Part-II, Paper—MBA-2011 held on 18.01.2011, by cancelling all the papers of the semester/year in which the

petitioner had appeared and thus declining to promote him to the next academic year. However the incriminating material had gone missing from the custody of the concerned officer, i.e., the Deputy Controller of Examinations. Held: in the present facts and circumstances the Court had no option but to hold that the benefit of doubt has to be given to the petitioner by accepting the status report dated 25.08.2011 submitted by the Addl.CP/Vigilance, Delhi Police to the effect that incriminating document allegedly confiscated by the members of the flying squad from the petitioner was not a seized property due to a lapse on the part of the Invigilator and the Assistant Superintendent and that proper procedure was not followed by respondent No.1/University as required by it before passing the impugned order dated 03.03.2011.

— Article 226, 227—Petition against award of Industrial Adjudicator holding that the employer has failed to prove any grounds for dismissal of service of petitioner workman—Petitioner contend that in a dispute pertaining to termination of employment and where the employer relies on a domestic inquiry preceding the termination, the Industrial Adjudicator is mandatorily required to first adjudicate the validity of termination order only after the domestic enquiry has been held to be vitiated. Practice as informed to be prevalent till now before the Industrial Adjudicators of conducting the proceedings in two stages need not continue merely for the reason of having been practiced for long. In today's days when Courts and the Industrial Adjudicators are struggling with docket explosion and are overburdened, need has arisen to have a fresh look at procedures which are found to be causing delays. Law cannot be a fossil. The Industrial Adjudicator upon completion of pleadings is required to

proceed in the following manner:

(a) To examine whether a domestic inquiry preceding the punishment is pleaded to have been held and documents in support thereof filed.

(b) If the domestic inquiry is pleaded and documents in support thereof filed and the workman has challenged the validity of the said domestic inquiry, to determine whether such challenge is on any factual or purely legal grounds and frame issues on the same.

(c) However if domestic inquiry is not pleaded or if pleaded but no documents in support thereof filed, the question of framing any issue as to domestic inquiry does not arise.

(d) If an issue as aforesaid to the domestic inquiry has been framed and the employer has also sought opportunity to in the alternative establish misconduct before the Industrial Adjudicator, to frame issue thereon also, simultaneously with framing issues on validity of inquiry.

(e) To, after hearing the parties consider whether in the facts of the case any prejudice (other than as above) is likely to be caused to either of the parties if evidence on both sets of issues is led together. Only on finding, by a reasoned order, a case of such prejudice or any other reason, is the trial to be bifurcated into two stages. Else, the parties to be directed to lead evidence on both sets of issues together.

(f) To, if the evidence on both sets of issues has been recorded together, to first consider the evidence only on the aspect of validity of the inquiry and without being influenced in any manner whatsoever by the depositions of the witnesses on the merits of the dispute i.e. misconduct with which the workman was charged with. If the inquiry is found to be valid, the question of rendering a finding on the merits does

not arise. However if the domestic inquiry is found to be vitiated and a finding in that regard is returned, the Industrial Adjudicator may then proceed to adjudicate on the basis of evidence in that respect, whether misconduct has been established or not.

(g) The Industrial Adjudicator to, on case to case basis, decide whether the arguments on both aspects are to be heard together or at different stages. However as aforesaid an endeavour is to be made to record the evidence of the witnesses on both issues in one go only.

— Respondent no.1 while posted as IG, North Bengal Frontier, on deputation with Border Security Force (BSF), was served with charge memo containing 8 charges followed by Departmental Enquiry into those charges—Inquiry Officer submitted report holding three charges as partially proved and 5 charges not proved—Disciplinary Authority disagreed with report holding out of five charges, two charges fully proved and one charge partially proved and out of three charges, one charge was totally proved and for remaining charges, Disciplinary Authority concurred with findings given by report of Inquiry Officer—Whereas, Tribunal ruled, none of charges proved or partially proved against Respondent no. 1—Petitioner challenged said order of Tribunal setting aside dismissal order of Respondent no.1 and reinstating him in service with consequential benefits—It urged Respondent no.1 helped one of his native in enrollment in BSF by fraudulent means and also amended the Board proceedings by commenting upon medical fitness which he could not do—Tribunal noted that allegations were not subject matter of charge, therefore, no finding of guilt could be recorded on

basis of such allegations—Held:- Inquiry Officer is not permitted to travel beyond charges and any punishment imposed on basis of finding which was not subject matter of charges is wholly illegal.

UOI v. *SR Tewari and Anr.*..... *423*

COPYRIGHT ACT, 1957—Sec.197 and Delhi Police Act, 1978 Sec. 140—Magistrate ordered under Section 156 (3) CrPC for registration of FIR for offences under Sec. 193/196/200/209 IPC against petitioner, working as Sub Inspector with Delhi Police on the allegations that in conspiracy with few others, the petitioner framed incorrect record in FIR No. 99/01—Challenged—Held, since petitioner was a government servant and is still working as Inspector in Delhi Police, the alleged acts have reasonable connection with duties of the office held by him, so prosecution without obtaining sanction is bad in law—Magisterial order quashed.

Mukesh Kumar v. *State* *490*

DELHI DEVLOPMENT ACT, 1957—The petition impugns the order dated 10th November, 2008 of the respondent no. 1 acting as the Chairman of the respondent no.2 DDA, refusing the request of the petitioners for amalgamation of hotel plots No. 1&2 in Wazirpur District Center, New Delhi and seeks mandamus for such amalgamation; compensation is also claimed for withholding the permission for amalgamation—Brief Facts—DDA in the year 1994 invited bids for grant of perpetual lease right in respect of a hotel plot measuring 18000 sq. at Wazirpur, Delhi—Bid of M.S. Shoes East was accepted—It defaulted in payment and cancellation was effected—Litigation ensued and during the pendency thereof the respondent no. 2 DDA was permitted to re-auction the plot—However this time around, DDA bifurcated the plot

auctioned in the year 1994 as one into two plots no. 1&2—The petitioner no.2 M/s Asrani Inns & Resorts Pvt. Ltd. of which the petitioner no.1 is one of the shareholders bid for both the plots and its bid being the highest was accepted and conveyance deeds dated 3rd November, 2006 with respect thereto executed in favour of the petitioner no. 2 Company and possession handed over, subject to the outcome of the legal proceedings initiated by M.S. Shoes East—Petitioners, immediately after being delivered possession of the two plots and before commencing construction thereon, requested DDA for amalgamation of the two plots—Upon not receiving any response, W.P. (C) No. 4251/2007 was filed—Court vide order dated 29th may 2007 directed DDA to consider the request for amalgamation and communicate its decision within fifteen days—Chairman of the DDA vide order dated 30th July 2007 rejected the said request for amalgamation on the ground of the said request being in contravention to the condition mentioned in the auction document at Clause 3.10 (vii)—W.P.(C) No. 8101/2007 filed impugning the said order of rejection—WP was however dismissed vide judgment dated 8th April, 2008 holding *inter alia* that being a term of the auction stood incorporated in the conveyance deed, amalgamation would not be allowed—No mandamus for amalgamation could be issued—Intra—Court Appeal being LPA 210/2008 was preferred by the petitioners—LPA 210/2008 (supra) was ultimately disposed of vide judgment dated 20th October, 2008 remanding matter to Chairman of the DDA for fresh decision on the application of the petitioners for amalgamation, after considering the various factors which had emerged during the hearing before the Division Bench—Vide order dated 10th November, 2008 again the request for amalgamation was rejected—Hence present Writ Petition—Held—DDA has neither dealt with the request of

the petitioners for amalgamation of the two plots, both in its name, in accordance with guidelines nor given any reasons—DDA even though in the capacity of a seller of land, is in such matters required to act reasonably and in accordance with law and any arbitrary action on its part would become subject to judicial review—Reasons given by respondent No.1, in order for rejection of request for amalgamation, amounting to change of auction conditions had already been negatived by Division Bench in earlier round of litigation; ii) reason that amalgamation will totally change type of Hotel that can be constructed and if plots had been auctioned as one, would have invited better bids from International Hoteliers was also contrary to findings of Division Bench in earlier round of litigation that single plot was bifurcated for commercial gains of DDA and even otherwise irrelevant once resolution supra was held to apply to Hotel Plots also it may be noticed that said reasoning equally applies to plots for office buildings / shopping malls in as much as class of builders / developers thereof were also different for smaller and large plots—It may also be mentioned that though proposal leading to resolution supra was for linking charges for amalgamation to premium paid for amalgamated plot, what was approved/ resolved was to link same to market rate on date of application for amalgamation If it was case of DDA that premium/market price for bigger plot would have been / be more, it would proportionately earn higher charges for amalgamation; (iii) reason that hotel plots had different architectural control than office buildings/shopping malls was irrelevant once hotel plots were included as aforesaid in commercial category It was also worth mentioning that though proposal leading to resolution supra required application for amalgamation to be referred first to Architectural Control and Building Department but resolution did not accept same and expressly stated that same was not necessary DDA neither in impugned order nor

now had explained as to how amalgamation would contravene any other norms—Thus, impugned order rejecting request for amalgamation was found to be in contravention of resolution/decision of DDA itself and thus arbitrary and whimsical and did not pass test—Hence, petition allowed.

Sachin J. Joshi & Anr. v. *LT. Governor & Anr. 750*

DELHI MUNICIPAL CORPORATION ACT, 1957—Sec. 478 (2)—Plaintiff had three agreements with the defendants for watch & ward (security) under which defendant paid some money after making deductions on account of loss on account of theft in the properties—Plaintiff's suit for recovery of money dismissed by Trial Court on the ground that the suit was instituted beyond the period of six months provided under Sec. 478 (2) of the Act—Appeal—Held, test for applying the period stipulated under Sec. 478 (2) of the Act is whether the Act was done in statutory capacity or the act has been performed under the colour of statutory duty—Since in the present case the deductions done by the defendant were under an agreement and not under the statute, the suit could not be held time barred by invoking Sec. 478(2).

Well Protect Manpower Services Pvt. Ltd. v. *Commissioner Municipal Corporation of Delhi & Anr. 183*

DELHI POLICE ACT, 1978—Sec. 140—Magistrate ordered under Section 156 (3) CrPC for registration of FIR for offences under Sec. 193/196/200/209 IPC against petitioner, working as Sub Inspector with Delhi Police on the allegations that in conspiracy with few others, the petitioner framed incorrect record in FIR No. 99/01—Challenged—Held, since petitioner was a government servant and is still working as Inspector in Delhi Police, the alleged acts have reasonable connection with duties of the office held by him, so

prosecution without obtaining sanction is bad in law—Magisterial order quashed.

Mukesh Kumar v. *State* *490*

— Section 66 (B)—Bus of petitioner impounded by police—Petitioner made complaints to Commissioner of Police and concerned ACP regarding articles removed from his bus while in custody of police, but no action taken—Petitioner then moved application before learned Metropolitan Magistrate (MM) for direction to TI and ACP, to take photographs of damaged Bus, to get prepared inventory of articles removed by police, and to get damage assessed from Government approved valuer—MM though allowed prayer to take photographs but did not pass any order for preparation of inventory—Petitioner then filed suit for recovery of damages against traffic police officials and also filed criminal complaint against them—Petitioner again moved application before MM praying for same relief which was dismissed as infructous—Being aggrieved he preferred Cr. M.C. Held :- As per Section 66 (2) of Delhi Police Act police on taking charge of an unclaimed property, is supposed to prepare inventory and send the same to Commissioner of Police.

A.K. Singh v. *State* *88*

DELHI PROFESSIONAL COLLEGES OR INSTITUTION (PROHIBITION OF CAPITAL FEE, REGULATION OF ADMISSION FIXATION OF NON-EXPLOITATIVE FEE & OTHER MEASURES TO ENSURE EQUITY AND EXCELLENCE) ACT, 2007—Sections 19(1)—Petition filed for quashing of the order dated 29.12.2009 passed by a Committee whereby a penalty of Rs. 10.00 Lacs was imposed on the petitioner/Institute for compounding an offence punishable under Section 18 of the Act on Account of non-

compliance of Rule 8(2)(a)(ii) of the Rules contravening the provisions of the aforesaid Act—Brief facts—Petitioner/Institute, a society engaged in providing education to students and affiliated to respondent No. 3./University—For the academic year 2008-09 for MCA course, the petitioner had advertised the management quota seats through its website and its notice board, instead of advertising the said seats in two leading newspapers (one in Hindi and one in English) as required under Rule 8(2)(a)(ii) of the Rules—Aforesaid deficiency noticed by respondent No. 3/University—Petitioner/Institute called upon to furnish explanation—Peititioner/Institute admitted to having breached the aforesaid Rule and sought condonation of the lapse and expressed its sincere regret—Respondent No. 1/Director of Higher Education was requested to take a lenient view in the matter and impose minimum penalty as the Institute had already apologized for the error—Respondent No.1/Director of Higher Education issued a notice to show cause to the petitioner/Institute stating *inter alia* that a meeting of the Committee constituted under Section 19 of the Act was held to compound an offence under Section 18 of the Act—Noticed that the petitioner/Institute had not advertised the admission notice of the management quota seats for the MCA course in two leading newspapers as required under the said rules—The petitioner/Institute submitted its reply stating inter alia that the admission notice was displayed in the website of the Institute and on the notice board but on account of an inadvertent omission, the petitioner/Institute did not advertise the admission notice in two daily newspapers—Further explained that despite the fact that the advertisement could not be published in newspapers, there was a very good response from applicants as indicated by the fact that the Institute received 96 applications against 6 seats under the management quota—Under such circumstances, condonation of the omission was

sough by the petitioner/Institute—Committee took into account the fact that it was the first time that the Institute had committed such an offence after the Act had come into force, therefore, by the impugned order dated 29.12.2009 decided to compound the offence by imposing a penalty of Rs. 10 lacs on the petitioner/Institute for contravening Rule 8(2)(a)(ii) of the Rules—Hence the present petition on the ground that the breach in the present case was purely technical in nature and no penalty ought to have been imposed on it—Held—Petitioner/Institute not complied with requirement of advertising the management quota seats in two leading newspapers—Instead, chose to display the advertisement only on its website and on the notice board—The breach committed by the petitioner/Institute cannot be treated to be only technical in nature—The mode and manner of filling-up the management quota seats has been clearly laid out under Rule 8(2)(a)(ii) of the Rules. Once the petitioner/Institute decided to advertise the management quota seats and fill up the same, then Rule 8 of the Rules would automatically come into play and in such circumstances the term "may" used in the proviso to Section 13 as a prefix to the phrase, "be advertised and filled-up" has to be read only in the context of Rule 8(2)(a)(ii) of the Rules, which mandates that an institution ought to issue an advertisement in the prescribed manner—The petitioner/Institute cannot be permitted to interpret the said Rule to state that displaying an advertisement on its website and on its notice board should be treated as sufficient for the purpose of advertisement—The purpose and intent of the aforesaid Rule is to ensure that the notice of filling up the management quota seats gets as wide a publicity as possible—It is for this reason that the advertisements are required to be carried in two languages, Hindi and English and not only in local newspapers, but in two leading daily newspapers, besides displaying the same on the institution's website and its notice

board, as prescribed in the Act and Rules.

Management Education & Research Institute v. *Director Higher Education & Ors.* *693*

DELHI RENT CONTROL ACT, 1958—Sections 14 (1) (b) and 38—Eviction petition u/s 14 (1) (b) filed by landlord/petitioner with regard to tenanted premises—Case of landlord that tenant had sub-let whole of premises with possession without consent in writing of landlord—Plea of tenant/respondent no.1 company that premises had been taken for residence of its employees and that its employees had been occupying tenanted premises—Respondent no. 2 (employee) had resigned from service and handed over vacant possession to respondent no. 1—ARC held no case of sub-letting and dismissed eviction petition—In appeal, judgment of ARC reversed on ground that retention of premises by respondent no. 2 even after his resignation amounted to sub-letting and eviction petition of landlord decreed—Held sub-letting means that owner has completed divested himself of the suit property and is in no manner connected with the same—Evidence established that there was *inter se* dispute between respondent no. 1 and respondent no. 2 relating to dues of respondent no. 2—Respondent no.2 had asked for clearance of dues and extension of time up to 6 months for vacating suit premises in resignation letter—This not a case where respondent no.1 had lost control over tenanted premises—The wife of respondent no. 2 was admittedly employee of respondent no. 1 and tenanted premises was for use of employees of respondent no. 1—Not a case where respondent no.2 was claiming independent title qua suit property—Mischief of Section 14 (1) (b) not attracted—Impugned order set aside—Petition filed by landlord u/s. (1)(b) dismissed.

Dhoota Papeshwar Industries Ltd. v. *Atma Ram & Anr.* *525*

— Section 6A and 8—Transfer of Property Act, 1882—Section 106—Appellant/defendant a tenant from 1979 at a monthly rent of Rs.1161.60—Rent increased from time to time under section 6A and 8—Rent Rs.2489.30 w.e.f 23.04.2004—legal notice dated 07.05.2007 enhancing rent to Rs. 3618.23 inclusive of maintenance charges Rs.880/- w.e.f. 23.04.2007—tenancy terminated by legal notice dated 07.09.2007—failure to vacate the premises—Suit for possession and mesne profits—Plea taken, notice dated 07.05.2007 defective as sought to increase the rent retrospectively—Notice dated 07.05.2007 not served—Held, even if language defective it will operate to increase the rent by 10% after 30 days of service of notice—Notice was served—Suit decreed—Aggrieved by the judgment the appellant/defendant preferred the regular first appal—Held—Notices were sent at seven addresses by registered AD post and UPC—The addresses were correct—Notice deemed to have been served—Notice has a necessary legal effect of increasing rent 30 days after receipt of notice—Order 20 Rule 12 does not mandate that the court shall first take evidence only an aspect of illegality of possession and decree the suit for possession and only thereafter will go for trial with respect of mesne profits—Appeal dismissed.

Sewa International Fashions & Ors. v. *Meenakshi Anand* *607*

— Section 14(1) (e)—Bonafide requirement—Petitioner landlord of tenanted property comprising one room, kitchen with common use of latrine and bathroom at ground floor—Petitioner in occupation of three rooms on ground room with common courtyard and one room on first floor—Petitioner's family comprised of himself, one married son and his three children—Petitioner's contention that he was 80 years of age and needed separate room for himself—His son aged 45 years

had two daughters aged 21 years and 15 years and a son aged 10 years—They were living together in said property—His other son resided in Germany and visited them, however there was no space for him to stay—The accommodation presently available was not sufficient for them—RCT dismissed petition—Held, Landlord only had three rooms, out of which one was occupied by him, one by his son Inderjeet and third was used by the two daughters and son of Inderjeet—There was no space available with the children to take tuitions or to sleep and meet their friends—The second son of the landlord who visited his father from Germany had to stay at the house of a neighbour PW3—Testimony of maid servant PW2 has corroborated the testimony of PW1 landlord—During pendency of petition landlord died and family of Inderjeet living in premises—Even assuming that two daughters can be accommodated in a single room, son required one room and Inderjeet and his wife also required a room—He also required one guest room to accommodate his brother who was co-owner of said premises as it cannot be expected that all the time he will continue to live in the house of a neighbour—Bonafide requirement proved—Impugned order set aside—Eviction petition of landlord decreed.

Dayal Chand and Anr. v. *Gulshan Kumar & Anr.* *618*

— Sections 14(1)(e) & 25 (B)—Eviction petition on the ground of bonafide requirement of tenanted premises forming part of 4479-80, Dav Bazar, Cloth Market, Delhi—Petitioner is 34 years of age; has experience in business of sale and purchase of sarees and other textiles and handicrafts as he was a partner of M/s Ankit Saree—Petitioner has no immovable property in Delhi—Intends to start his own business—Wants eviction of suit premises—Leave to defend filed—Petitioner is not the owner—Other partners of the firm not joined hence bad for

non-joinder of parties—The requirement of landlord is not bonafide —Landlord is owner of one shop No. 969, Bhojpura, Maliwara, Chandni Chowk, Delhi, under the name and style of M/s. P.S. Creation an is carrying on his business from there—Another building No. 1186, Kucha Mahajani, Chandni Chowk, comprising 30 shops—Leave to defend dismissed—Petition—Held—The contention of the landlord was specifically to the effect that he is not the owner of either of the two premises; contention being that Smt. Bhagwati Devi in terms of her Will date 14.07.1982 had bequeathed the disputed property i.e. Shop No. 4479-80, Dau Bazar, Cloth Market, Delhi to the respondent; he has no other immovable property; this is his only immovable property; further contention being that property bearing No. 969, Bhojpura, Maliwara, Chandni Chowk, Delhi was owned by his father; the property i.e. building No. 1186, Kucha Mahajani, Chandni Chowk, Delhi has been bequeathed by his grandfather in the name of his brother—The assertion of the landlord that he is bona fide requiring this premises for his commission business which he has started in the year 1997 has also been substantiated by documentary evidence—Income tax returns in respect of his commission business have been placed on record—In these circumstances, the Court had rightly noted that no triable issue having arisen between the parties, the application for leave to defend was rightly dismissed.

Kishori Lal Krishan Kumar v. *Ankit Rastogi* *53*

DELHI SCHOOL EDUCATION RULES, 1973—Rule 120 (1)(d) (ii)—Brief facts—Petitioner, an employee of respondent No. 3 Air Force Bal Bharti School charged with, in spite of being married, having an illicit relationship with another married woman—An inquiry held and as per the report of the Inquiry Officer, the charge stood proved—Disciplinary Authority formed an opinion that a major penalty of removal from

service be imposed and served notice under Rule 120(1)(d)(ii) of the Rules—Disciplinary Authority imposed the punishment as proposed—However, instead of preferring the statutory appeal under Section 8(3) of the Delhi School Education Act, 1973 present writ petition is filed and the *vires* of the aforesaid Rule is also challenged contending that Rule 120 (1) (d), in so far as requires the Disciplinary Authority to, immediately after receiving the report of the inquiry and even before giving a chance to the charged employee to represent there against, from an opinion as to the penalty if any to be imposed, amounts to pre-judging the matter and is violative of the principles of natural justice and is contrary to the decision taken by the Supreme Court in *Managing Director, ECIL, Hyderabad Vs. B. Karunakar* (1993) 4 SCC 727. Held—The Apex Court in *Managing Director, ECIL, Hyderabad* was considering the effect of the 42nd Amendment to the Constitution whereby Article 311 of the Constitution of India was amended and came to the conclusion that in consonance with the principles of natural justice, still there would be requirement to serve upon the delinquent employee a copy of the inquiry report and give him an opportunity to make the representation against the findings recorded by the Inquiry Officer and thereafter take a decision whether to accept the findings of the Inquiry Officer or not—That would not mean that if there is a provision in any other law, Statue or Rules which still exists for affording an opportunity even against the proposed penalty, that becomes bad in law—It was a provision which was made in favour of the employee, though the same is taken away insofar as position under Article 311 of the Constitution of India qua civil servants is concerned—However such a provision available under Rule 120(1)(d)(ii) supra to the employees of School cannot be said to be contrary to the provisions of the Constitution.—Merely because punishment is proposed in the show cause notice, the Disciplinary

Authority cannot be said to have pre-judged the matter or that the same results in the representation there against being considered with a closed mind or infructuous—Opinion formed at that stage is a tentative opinion formed only on the basis of the record of the inquiry proceedings and subject to the consideration of the representation by the employee there against—Formation of the said opinion does not stop the Disciplinary Authority from forming another opinion or changing the earlier opinion after considering the representation of the employee—Such a provision is favourable to the employee and cannot be treated as bad in law—Rule 120(1)(d) gives a right of hearing to the employee not only during the inquiry but also at the stage when those findings are considered by the Disciplinary Authority—Rule 120(1)(d) expressly provides for giving to the delinquent employee notice of the opinion formed and action proposed to be taken and calling upon him to submit his representation against the proposed action and for "determining" the penalty if any to be imposed only after considering such representation of the delinquent employee—The procedure laid down leaves no manner of doubt that the opinion to be formed on consideration of the record of the inquiry is a tentative opinion and the final "determination" of guilt and penalty if any to be imposed is to take place only after considering the representation of the employee—Such a procedure is found to be fair and merely because a tentative opinion is required to be formed to enable cause to be shown there against, cannot be said to be a violation of principles of natural justice and rather such a procedure sub serves the principle.

Satyadin Maurya v. *Directorate of Education & Ors.* *674*

— Section 8(1), 8(3), 8(4), 10 & 11—Delhi Education Rules, 1973—Rules 118 & 120—The respondents were appointed

as Assistant Teachers in the petitioner, an unaided minority school recognised under Delhi School Education Act, 1973—The respondents charged of grave misconduct and criminal trespass—Enquiry conducted—Ordered to be removed from service—Appeal before the Delhi School Tribunal—Tribunal allowed the appeal holding dismissal to be illegal and against the principles of natural justice—Petition challenged the order of the Tribunal—Petitioner's contention—The Rule 118 & 120 DSER did not apply to unaided school—The judgment of the Tribunal fundamentally flawed and liable to be set aside—Respondents submitted that even if Rule 118 DSER is not applicable to Unaided Minority School Rule 120 would nevertheless apply—Prior approval of DoE for imposition of major penalty was required—Held—There can be no manner of doubt that the Supreme Court excluded Section 8(2) from its application to unaided minority schools—Corresponding to Section 8(2) are Rules 96 to 121 of Chapter VIII of the DSER—Consistent with Section 12 read with Section 8(2) DSEA, Rule 96(1) DSER clearly states "nothing contained in this Chapter shall apply to an unaided minority school"—Rule 118 and 120 figure in Chapter VIII which, as clearly stated in Rule 96(1), does not apply to unaided minority schools.

Managing Committee Frank Anthony Public School & Anr. v. *C.S. Clarke & Ors.* *35*

— Section 8(1), 8(3), 8(4), 10 & 11—Delhi School Education Rules, 1973—Rules 118 & 120—The respondents were appointed as Assistant Teachers in the petitioner, an unaided minority school recognised under Delhi School Education Act, 1973—The respondents charged of grave misconduct and criminal trespass—Enquiry conducted ordered to be removed from the service—Appeal before the Delhi School Tribunal—Tribunal allowed the appeal—Holding dismissal to be illegal and against the principles of natural justice—Petition

challenging the order of the Tribunal—Petitioner contend on merit that adequate opportunities were granted to the respondent to defend themselves before the Enquiry Officer—Charges found proved and were grave—Imposition of major penalty justified—Respondents contend that proceedings were malafide and vindictive and statements were not properly recorded—Held—The scope of the jurisdiction of this Court under Article 226 to examine the validity of the enquiry proceedings is limited—The procedure followed would have to be shown to be unjust or violative of the principles of natural justice—On merits, the report of enquiry would have to be shown to be perverse or based on no evidence—As regards the procedure adopted by the Enquiry Officer in the instant case, Rule 120 DSER did not apply to the enquiry proceedings—The Enquiry Officer was nevertheless expected to observe the principles of natural justice—Although the strict rules of evidence and procedure as envisaged in Court proceedings need not apply, the procedure adopted had to be just, fair and reasonable—The enquiry in the present case was held by a retired Principal of a Public School—The enquiry proceedings show that sufficient opportunity was given to Mr. & Mrs. Clarke to defend themselves—It is not possible to conclude that the procedure adopted by the Enquiry Officer in the instant case was not just, fair and reasonable—Merely because the Principal was also the PO does not result in the violation of the principles of natural justice—It is not shown how any prejudice was caused to the Clarkes on that score—Also, they appear to have been given access to those documents that were relevant to the articles of charge—The conclusion arrived at by the Enquiry Officer cannot be held to be based on no evidence or perverse warranting interference by this Court under Article 226 of the Constitution—For the aforementioned reasons, impugned order of the Tribunal

allowing the appeals of the Clarkes set aside—Writ petition allowed.

Managing Committee Frank Anthony Public School & Anr. v. *C.S. Clarke & Ors.* *35*

INCOME TAX ACT, 1961—Section 147, Section 80 HHC Proceedings under Section 147 of the Act were initiated by issue of notice dated 5th July, 2004 as it was noticed that the petitioner had claimed excessive deduction under Section 80 HHC. The petitioner had business loss in exports of Rs. 7,16,189/- but this was ignored for computation of deduction under Section 80 HHC—Levy of interest is no such amount, which the assessee withholds and does not pay to the Revenue and makes use of the said amount and therefore, is liable to pay compensatory interest. It is meant to off set the loss or prejudice caused to the Revenue on account of non-payment of the taxable amount. The levy in question is automatic and is attracted the moment there is a default—Deduction under Section 80 HHC is to be arrived at and claimed on profits earned from both export of self-manufactured goods and trading goods and profits and loss of both traders have to be taken into consideration. If after the adjustment there is positive profit, then only deduction under Section 80 HHC can be claimed. If there is loss, there cannot be any entitlement. The provisio did not act as a detriment or negate or reduce the claim of deduction.

Raju Bhojwani v. *Chief Commissioner of Income Tax-XI* *22*

INDIAN CONTRACT ACT, 1872—The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for—In assessing damages the Court has,

subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles.

Ghanshyam Dass Gupta v. *Makhan Lal* *376*

INDIAN EVIDENCE ACT, 1872—Section 27—Circumstantial Evidence—As per prosecution case, gunny bag containing deadbody of teenaged male found in Railway Coach—On same day, PW16 (who was assigned case) met Mohd. Najim who furnished information about offenders—At his instance two accused arrested (one of them is appellant), later two more accused arrested—Police received secret information about involvement of another person who was also arrested—On disclosure statement of appellant, blood stained ustra recovered from tin-shade of platform—One of the accused Raj Kumar had received burn injuries during incident and died—Deposed by Autopsy Surgeon that deceased had 13 c.m. long cut injury on his neck and 9.5 cm. long injury in occipital region which was sufficient to cause death—Trial Court convicted accused u/s 302, 201 and 120B IPC—Held, prosecution case based on direct eye-witness account of Mohd. Najim—However eye-witness Mohd. Najim did not depose in court—Incriminating circumstances largely based on recovery from place which was public and accessible to all—The recovery of ustra not much consequence—Prosecution made no attempt to link recovery with accused—Prosecution made no attempt to prove motive—Prosecution failed to prove offences against appellant—Accused acquitted—Appeal

allowed.

Surjit Kumar @ Shakir Ali @ Ganja v. *State (Govt. of NCT of Delhi)* *599*

INDIAN PENAL CODE, 1860—Sections 328, 376 & 34—As per prosecution case, appellants called prosecutrix and offered her could drink laced with substance which she consumed and became unconscious—After she regained consciousness, she realised appellants had raped her—Appellant Ram Saran left her at her jhuggi in naked condition—Next day appellant Ram Saran sent message to prosecutrix not to make complaint and offered to pay money which she refused, she was threatened to be killed—Case was registered and statement of prosecutrix recorded u/s 164 Cr.P.C.—Trial Court convicted appellants u/s 376/34—Held, PW5, husband of prosecutrix did not support story of prosecution—Contradictions in testimony of prosecutrix and PW5-PW8 who as per the prosecutrix had seen the appellant Ram Saran taking the prosecutrix to his jhuggi was declared hostile—No injury marks found on body of prosecutrix—No semen found on clothes or private parts—Delay of 9 days in lodging FIR—Appellants were acquitted u/s 328 IPC and not even charged u/s 506 IPC—Incident allegedly took place on Diwali, so highly impossible that there would be no public witness—Prosecutrix claimed 2-3 other persons being present at the time of offence, who were neither made accused nor witnesses—Prosecution case doubtful—Appellants acquitted—Appeal allowed.

Ram Saran & Anr. v. *State N.C.T. of Delhi* *534*

— Section 364-A & 34—As per prosecution case, PW-1 driving back from work when accused Mukesh dressed in police uniform accompanied by accused Rehan asked for lift—

Rehan pointed country made pistol at PW1 and asked him to stop PW1 overpowered by them and was taken to Rehan's house—Complainant (PW2, son of PW1) filed complaint that his father PW1 left factory for house at 9.30 p.m. but did not reach home and that he received ransom call for Rs. 15 lakhs—PW2 made arrangement for ransom amount—Kidnapper did not disclose exact location where ransom was to be handed over—Currency notes after being marked handed over to PW4, PW8 and PW9 who assumed false identities and as directed by kidnappers, boarded Delhi-Saharanpur train—When train crossed New Ghaziabad Railway Station, they were asked to throw money bag containing ransom amount, which they did—Next day, PW1 released—Accused persons arrested—Mukesh got recovered police uniform, mobile and charger besides Rs.2,67,500—Accused Sukhram Pal got recovered from his house Rs. 10,000/- Accused Rehan got recovered Rs. 31000/- and belt of PW1—Trial Court convicted accused for committing offence u/s 364-A/34—On facts held, PW1 had clearly identified Mukesh and Rehan—He also identified family members and location of Rehan's house—Chance-prints taken from Maruti car matched those of Rehan and Mukesh—Prosecution relied on tape-recordings of telephonic conversation made by PW2 and handed over to police during investigation, however, authenticity of recorded conversation not proved—Transcripts of tape-recordings not proved—Thus Trial Court erred in relying upon tape-recordings to conclude that they contained conversations with accused—Identification of Mukesh and Rehan by PW1, the arrest and disclosure statements leading to recovery of marked currency notes and finger print report only proved guilt of Mukesh and Rehan—Although huge amount of Rs. 9,49,500/- recovered pursuant to disclosure statement of accused Deepak, the prosecution allegation that his disclosure led to arrest of other accused or that his statements led to recoveries

from Rehan's premises cannot be basis of concluding that he was guilty for offence u/s 364A—No charge for conspiracy framed against Deepak, therefore, he could not be convicted u/s 364A, however he owed duty to explain how he possessed cash u/s 106 IEA—U/s 114 IEA, act Deepak pointed to his culpable mind or atleast knowledge and awareness that money was obtained by unlawful means—On application of Section 222 Cr.P.C., held that though Deepak not guilty of offence u/s 364A he was guilty for offence u/s 365 and 411—As per prosecution, accused Sukh Ram Pal was guarding premises in which PW-1 held PW-1 did not depose about role of accused Sukh Ram Pal—PW1 did not mention about premises where he was detained being guarded by anyone—None of the currency notes recovered at instance of Sukh Ram Pal, contained signatures or markings—Although prosecution case was that he guarded the place where PW1 was kept in captivity and had been paid Rs. 10,000/-, the amount recovered at his behest was Rs. 19,000/-—No charge u/s 120 B framed against accused Sukh Ram Pal—Appeals of accused Mukesh and Rehan dismissed—Conviction of Deepak modified to one u/s 365/34 IPC read with Section 411 IPC—Appeal of accused Deepak partly allowed and sentence reduced—Appeal of accused Sukh Ram Pal allowed and accordingly acquitted.

Deepak Kumar @ Bittoo v. *State*..... *541*

— Sections 307, 498A and 34—Summoning u/s 319—Case filed u/s 498A/406—Judgment passed convicting three of the family members of petitioner u/s 498-A & 406 along with order summoning him u/s 319—Contention of petitioner that order u/s 319 can only be passed during trial and not after judgment dictated/pronounced—Contention of prosecution that trial court while pronouncing of judgment on other family members

of petitioner, on same day passed orders summoning petitioner u/s 319 Cr.P.C and since both orders were passed simultaneously, so it could not be said that impugned order was passed after trial was concluded—Held, although application u/s 319 was filed by Public Prosecutor during course for trial, order on application passed after pronouncement of judgment convicting other family members of Petitioner—According to Section 353 after arguments are heard, trial came to an end and pronouncement of judgement is post culmination of trial procedure—Judgment having been pronounced, trial came to an end and trial court became functus officio—Trial court could not have passed orders on application u/s 319 after pronouncing judgment—Evidence on record against petitioner would not entail conviction of, petitioner—Impugned order does not even spell out offence for which petitioner has been summoned—Impugned order summoning petitioner, quashed—Petition Allowed.

Rakesh Kanojia v. *State Govt. of NCT of Delhi & Anr.* *798*

— Section 302, 324, 323 & 149—As per prosecution PW1 and deceased were brothers—Their minor sister Rekha eloped with one Latoori—PW2 told them that the appellant Puran might be able to give some clues regarding whereabouts of their sister—PW2 went to appellant Puran's house and gave him deceased's telephone no—Puran telephoned deceased to go to him as he had found his sister's whereabouts—PW1 took PW2 and the deceased with him on his motorcycle to where appellant lived—PW1, PW2 and the deceased saw appellant Puran along with his associates—The appellants stated that the deceased was a police informer and would inform about their activities and therefore he should be done to death—Raja (P.O.) took out sword and attacked PW1 and PW2 who got injured—accused Kalia and Minte held deceased by both

his arms and appellant gave several knife blows to deceased—Deceased started bleeding profusely and fell down—All five assailants escaped while PW1 and PW2 rushed to Police station—Police accompanied them to the spot—By that time deceased removed to DDU hospital by PCR—Appellant Pooran was arrested and he got recovered knife—Appellants Deepak and Ajay @ Minte were also arrested—Trial Court convicted appellants u/s 302/324/323/149 IPC—Held, as per PW1 and PW2, they were attacked by a sword by Raja (P.O) in concert with accused persons—However, medical evidence showed nature of injury as being abrasion and bruises caused by blunt object—Delay of six hours in lodging FIR—Contradictions in statements of PW1 and PW2 with regard to who held whom and how injuries were inflicted—Prosecution version doubtful PW31 (second IO) or PW30 did not depose about appellants being involved in any criminal activity making them suspicious about deceased's conduct as a police informer—Although prosecution claimed that number of public persons present at the spot, no person examined as witness—Normal human conduct would have induced PW1 to immediately remove his brother to the hospital who was seriously injured without waste of time instead of going to police station—Grave doubt in prosecution version—Appellants given benefit of doubt—Acquitted—Appeal allowed.

Puran @ Manoj & Ors. v. *The State (Govt. of N.C.T. of Delhi)* *562*

— Sections 302 & 309—Arms Act, 1959—Section 27—Case of prosecution that accused was fighting with deceased (his wife) when both were working in the factory and threatened to kill her—He stabbed her on her neck and stomach, taking out chura from underneath his shirt—He also stabbed himself with chura and fell down—PW3 sister-in-law of accused who witnessed incident raised alarm and police telephonically called

by owner of factory PW6—Trial Court convicted accused u/s 302, 309 IPC and Section 27 Arms Act—Held, accused did not dispute his presence at the site of occurrence—Although defence taken was that accused objected to the deceased having illicit relations with one Debu and the incident took place because of Debu in his presence, none of the prosecution witnesses, including owner of factory (PW6), testified about the presence of Debu—No suggestion put to any of the witnesses regarding any altercation between appellant and Debu—PW5, daughter of accused and deceased an eye-witness of incident testified against father—No motive imputed to PW5 for deposing falsely against father—PW3 sister-in-law of accused supported case of prosecution on all material facts and implicated appellant for causing stab injuries on vital organs of deceased in her presence—Appellant named by PW3 in her statement recorded at earliest point of time—No major deviation in version given by PW3 in her statement and testimony before court—PW6 supported prosecution and corroborated deposition of PW3—Injury sustained by accused at the spot lends credence to prosecution case—Oral evidence coupled with medical evidence, proved that accused caused injuries to deceased—However no evidence to infer that prior to incident accused attempted to cause serious injuries to deceased or threatened the deceased with weapon—No injuries were ever caused by accused to deceased prior to incident with any sharp object—Cannot be ruled out that knife Ex. P-1 was picked up by accused from the spot, as PW5 disclosed that deceased was doing tailoring job of rexine—No evidence on record pointing to any serious quarrel between appellant and deceased before incident, prompting appellant to commit murder—Evidence revealed that quarrel had started between appellant and deceased at about 11.30 a.m. and in that quarrel, appellant stabbed deceased—Appellant did not abscond from spot but attempted to commit suicide

by stabbing himself—This reaction shows that quarrel/fight/altercation between appellant and deceased took place suddenly for which both the parties were more or less to be blamed—No previous deliberation or determination to fight—Circumstances rule out that appellant planned to murder deceased and had intention to kill her—Occurrence took place all of a sudden on trivial issue in which appellant in heat of passion on account of deprivation of self control stabbed deceased—Considering nature of injuries, how they were caused, weapon of assault and conduct of accused whereby he caused himself grievous hurt to commit suicide, this not a case u/s 302—However, number of injuries inflicted by appellant on vital parts of deceased proved commission of offence punishable u/s 304 Part I—Appeal partly allowed—Conviction modified from Section 302 to 304 Part I, IPC.

Sukhpal v. *State* *573*

— Sections 302, 201 and- 120B—Indian Evidence Act, 1872—Section 27—Circumstantial Evidence—As per prosecution case, gunny bag containing deadbody of teenaged male found in Railway Coach—On same day, PW16 (who was assigned case) met Mohd. Najim who furnished information about offenders—At his instance two accused arrested (one of them is appellant), later two more accused arrested—Police received secret information about involvement of another person who was also arrested—On disclosure statement of appellant, blood stained ustra recovered from tin-shade of platform—One of the accused Raj Kumar had received burn injuries during incident and died—Deposed by Autopsy Surgeon that deceased had 13 c.m. long cut injury on his neck and 9.5 cm. long injury in occipital region which was sufficient to cause death—Trial Court convicted accused u/s 302, 201 and 120B IPC—Held, prosecution case based on direct eye-witness account of Mohd. Najim—However eye-witness Mohd. Najim

did not depose in court—Incriminating circumstances largely based on recovery from place which was public and accessible to all—The recovery of ustra not much consequence—Prosecution made no attempt to link recovery with accused—Prosecution made no attempt to prove motive—Prosecution failed to prove offences against appellant—Accused acquitted—Appeal allowed.

Surjit Kumar @ Shakir Ali @ Ganja v. *State (Govt. of NCT of Delhi)* *599*

— Sections 120-B, 420, 467, 468, 471—Prevention of Corruption Act, 1988—Sections 13 (2) and Section 13 (1) (d)—Bail—Case of prosecution that petitioners and other accused entered into conspiracy to eliminate all forms of competition and to ensure that the company Swiss Timing Ltd. (STL) was awarded contract for Time Scoring Result (TSR) system—Held, bail is the rule and committal to jail an exception—Refusal of bail is restriction on personal liberty of individual guaranteed under Article 21 of the Constitution—Requirements that have to be balanced are the seriousness of accusations, whether witnesses are likely to be influenced by accused and whether accused likely to flee from justice if granted bail—Prima facie case for offence u/s 467 IPC made out against petitioner—Although accusations against petitioners serious however, evidence to prove accusations is primarily documentary besides few material witnesses—If seriousness of offence on the basis of punishment provided, is the only criteria, courts would not be balancing the constitutional rights but rather recalibrating the scales of justice—Allegation made against petitioner Suresh Kalmadi of threatening witnesses and tampering evidence when witnesses were working under petitioner—Apparent that witnesses harassed and threatened only till they were working under petitioner and thereafter no influence on witnesses—Evidence on record that in past

witnesses were intimidated does not prima facie show that there is any likelihood of threat to prosecution witnesses—No merit in contention of CBI counsel that mere presence of petitioners at large would intimidate witnesses—Petitioner Suresh Kalmadi in custody for over 8 month and petitioner V.K. Verma for 10 months—No allegation that petitioners are likely to flee from justice and will not be available for trial—Allegations against petitioners of having committed economic offences which resulted in loss to State exchequer by adopting policy of single vendor and ensuring contract awarded only to STL—Whether case is of exercise of discretion for ensuring best quality or a case of culpability will be decided during the course of trial—No allegation of money trail to petitioners—No evidence of petitioners threatening witnesses or interfering with evidence during investigation or trial—No allegation that any other FIR registered against petitioners—Bail applications allowed.

Suresh Kalmadi v. *CBI* *630*

— Section—396, 397—Vienna Convention Consular Relations—1963—Article 36(1)(b)—Appellants preferred appeals against their conviction under Section 396 read with Section 397 IPC and pointed out various lacunas in prosecution case—They also urged that they were Bangladesh nationals and during investigations when they refused to participate in TIP, they were not assisted by Consular Officers of their country as provided by Vienna Convention on Consular Relations, which India had ratified, therefore, it was fatal irregularity in trial of appellants—Held—There is no automatic acceptance of an international treaty, even post ratification, as domestic law in India—It only becomes binding as law once Parliament has indicated its acceptance of the ratified treaty through enabling legislation—Since no legislation existed the said treaty was not binding—However, the appellants were given legal

representation; therefore object of article 36(1)(b) of treaty was satisfied.

Jamal Mirza v. *State* *711*

— Sections 4, 107 and 120B—Prevention of Corruption Act, 1988—Section 4, 11 & 12—Non acceptance of closure report—Jurisdiction—Case of prosecution that petitioner Sanjay Tripathi posted as Deputy Commissioner Income Tax, Mumbai had made assessment of Income Tax for AY 2001-02 of M/s Videocon Industries Ltd. vide order dated 30.03.2004—Sanjay Tripathi moved residence to Bengaluru on promotion and thereafter to Vasant Kunj, New Delhi—On both occasions, his household goods were transported by M/s. Prakash Packers and Movers, Mumbai for which petitioner Prakash Kitta Shetty of Videocon contacted M/s Prakash Packers and Movers—Bills for Rs. 46,9,47 and Rs. 52,822 were raised on M/s. Videocon Industries Ltd.—Petitioner Suresh Madhav Hegde of Videocon issued cheques for said amounts—Case of prosecution that accused Sanjay Tripathi, Suresh Madhav Hegde and Prakash Kitta Shetty of M/s. Videocon Industries by entering into conspiracy committed offence u/s 12—Sanjay Tripathi while functioning as Public Servant obtained wrongful peculiarly advantage from M/s. Videocon Industries Ltd. during 2007-08 having official dealing and thus conducted mis-conduct—Contention of petitioner that in absence of sanction no cognizance of offence u/s 11 and 12 could be taken—No case for abetment u/s 107 made out as neither any overt act nor instigation on part of petitioner—Also contended that Special Judge had no territorial jurisdiction to take cognizance of offence—No part of offence committed in Delhi—Cheques issued at Mumbai—Contention of CBI that offence of conspiracy is single transaction which terminated at Delhi with the household goods of Sanjay Tripathi having being delivered at Delhi Court—Petitioner Prakash Kitta

Shetty spoke to M/s Prakash Movers and Packers and arranged transportation while petitioner Suresh Madhav Hegde signed the cheques—Held, cognizance of offence u/s 12 PC Act and 120B IPC r/w. 12 PC Act will have to be taken by court within whose jurisdiction offence committed—In view of Section 4(1) of PC Act and Section 4(2) of IPC the Court competent to inquire and try offence u/s 12 PC Act would be court where offence of abetment took place—Transportation of goods from Bengaluru to Delhi not an offence but payment for said transportation by petitioners Suresh Hegde and Prakash Kitta Shetty on behalf of Videocon Industries Ltd. at Mumbai an offence—Petitioners not charged for substantive offence of conspiracy but with Section 120B r/w Section 12 PC Act—Only Court which has jurisdiction to try offence u/s 12 r/w 120B and Section 12 is competent court in Mumbai—High Court has no power to direct transfer but it has jurisdiction to direct Special Judge to return closure report for being presented before a court of competent jurisdiction at Mumbai—Order of special judge taking cognizance for offences u/s 120B IPC r/w 12 PC Act and Section 12 PC Act set aside—Special Judge directed to return closure report to CBI to be presented to court of competent jurisdiction at Mumbai—Impugned order set aside—Petition allowed.

Sanjay Tripathi v. *CBI* *734*

— Section, 302—Appellant challenged his conviction under Section 302 IPC urging testimony of eye witness relied upon by Trial Court unbelievable which was also not corroborated by other evidence—On behalf of State it was submitted, appellant earlier convicted for having murdered two constables and he was sentenced to undergo life imprisonment—Consequently, while serving sentence he was released on parole for three weeks but he failed to surrender and went

on to commit murder in said case—These facts not denied by appellant—Held:-Prosecution version in relying on the testimony of a witness who claims to have witnessed an incident, or crime, has to be critically examined—Thus, assessment of testimony for purpose of weighing its credibility is not confined to satisfying that the witness was merely consistent in his testimony; it extends to a critical examination of the entire probability of the facts deposed to, as well as conduct of the witness himself—If any of these reveal suspicious or improbable circumstances, court mat be justified in rejecting his testimony altogether.

Manoj Shukla @ Prem v. *State (Govt. of NCT of Delhi)*..... *782*

— Section 302—Appellant convicted under Section 302—He challenged his conviction—On behalf of State it was urged, appellant did not deny his previous conviction or fact he had over stayed his parole, therefore his conduct is also important to deny him the relief—Held:- Mere absconding by itself does not necessarily lead to a firm conclusion of guilt—Act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case.

Manoj Shukla @ Prem v. *State (Govt. of NCT of Delhi)*..... *782*

— Sections 326 and 304 Part-1—As per prosecution, deceased was smack addict whose place was frequently visited by other addicts—PW2, the brother of deceased with his wife PW3 lived in first floor of the premises in which the deceased lived in ground floor—On the night of incident PW2 was woken up by his wife PW3 on her hearing some commotion and she asked him to see what was happening—On going

down PW2 witnessed the deceased and appellant quarrelling—He tried to intervene however, appellant had a knife in his hand with which he attacked the deceased and inflicted a knife injury on his left thigh and then fled the spot—PW2 chased him but could not nab him—PW2 informed PW14 who was on patrolling duty and they both took deceased to hospital where he was declared brought dead—Trial Court convicted appellant under Section 304 Part-I and sentenced him to life imprisonment—On facts held that conviction rightly recorded u/s 304 Part-I IPC—Contention of appellant that case under Section 326 could not be accepted as the injury caused was intended and in the ordinary course of nature would have caused death which it did—Having regard to nature of injury which was a solitary knife blow on a non-vital part of body, sentence altered to RI for 7 years—Appeal partly allowed.

Madan Lal @ Manohar @ Motta v. *State* *58*

— Section 307, 406, 498A—Code of Criminal Procedure, 1973—Section—227—Petitioner charged for having committed offences punishable under Section 307, 406, 498A—By way of Criminal Revision, he Challenged impugned order urging, only slight suspicion was against petitioner for committing offence punishable under Section 307 IPC so he should not have been charged under said section—Held :- If at the initial stage there is a strong suspicion which leads the Court to think that there is a ground for presumption that the accused had committed the offence, then it is not open to the Court to say that there is no sufficient ground for proceeding against accused—However, in present case, no strong proof to frame charge under Section 307 IPC against petitioner.

Amit Dahiya v. *State* *73*

— Section—419, 420, 467, 468, 471, 120B—Code of Criminal Procedure, 1973—Section—362—Petitioner taken into custody on charges punishable under section 419, 420, 467, 468, 471, 120B IPC—He moved three bail applications which were dismissed—His fourth bail application moved after around 2-1/2 yeas of his being in custody, was allowed on ground of being in prolonged custody, trial would take long time and he would not claim any right, title or interest in immovable property qua which offence was committed—After gap of about 4 months, co accused also moved bail application, and trial court issued suo moto notice for cancellation of bail granted to petitioner on said application of co accused—However, Ld. Sessions Judge after appreciating records withdrew said notice—But, subsequently again issued suo moto notice to petitioner for cancellation of bail and cancelled his bail—Aggrieved petitioner filed Criminal Revision Petition challenging impugned order—Held:- Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail already granted.

Ved Prakash Saini v. *State NCT of Delhi* *153*

— Sections 363, 366, 376, 109—Appellant Ram Singh, convicted for offence punishable under Section 376 and appellant Bhagwan Dass under Section 376/109 IPC—Both appellants challenged their conviction urging, prosecutrix was consenting party which fact was upheld by the Trial Court, but it considered her consent immaterial on basis of her School Leaving Certificate mentioning her age below 16 years, whereas, ossification test opined her age to be 16 to 18 years—School leaving Certificate not reliable in absence of contemporaneous document supporting it, so medical evidence should have prevailed—Also, sentence awarded of 7 years on higher side—In appeal, conviction upheld, as School

Leaving Certificate found to be reliable and no reason found to rely on ossification test which gave rough estimate of age—Held:- for special reasons to be recorded Court can award a sentence less than minimum prescribed period of 7 years—Prosecutrix was just below 16 years but was in love with one of the appellants and had gone of her own will, being special reasons to reduce sentence of appellants below 7 years.

Ram Singh @ Karan v. *State N.C.T of Delhi* *143*

THE INDIAN SUCCESSION ACT, 1925—Section 375 which requires such security to be furnished is impugned only on the ground that it is rigorous and is coming in the way of the petitioners from enjoying the money bequeathed to them and is thus ultra vires the Constitution of India—The provision for taking security bond with surety is intended to ensure safety of the debts received by the grantee of the Succession Certificate or Letters of Administration. The provision requires the grantee of Succession Certificate and/or Letters of Administration to furnish security to protect the right of heir inter se so that the person who is ultimately found to be entitled to the whole or part of the debts is indemnified—The law thus requires him under Section 375 supra to furnish security to ensure that no loss is caused to the rightful heirs. The petitioners in the petition have been unable to plead as to how such provision protecting the interest of the heirs is bad—The right to property under the Constitution is always subject to reasonable restrictions and we find the aforesaid provision to be a reasonable one—Not only so, a bare perusal of Section 375 further shows that the furnishing of security itself is in the discretion of the Court. It is always open to the grantee to seek exemption from furnishing of such security—Held that the challenge to the *vires* of Section 375 of the Indian Succession Act, 1925 predicated on the same

being mandatory is misconceived and in ignorance of law.

Rajesh Kumar Sharma & Anr. v. *Estate of Late Sh. Raj Pal Sharma & Anr.* *461*

JUDICIAL REVIEW—In the course of exercising its power under judicial review, the Court is required to examine the decision making process of an authority and not the decision itself—As held in the Supreme Court in the case of *A.P.S.R.T.C. Vs G. Sirnivas Reddy,* reported as AIR (2006) SC 1465, the power of judicial review under Article 226 lays emphasis on the decision making process, rather than the decision itself and only such an action is open to judicial review, where an order or action of the State or an authority is illegal, unreasonable, arbitrary or prompted by malafides or extraneous consideration—In the present case, even if it is assumed that the decision arrived at by the Court could have been different from the one arrived at by the Committee, as for example the quantum of fine imposed in the impugned order, could have been less than or more than that imposed by the Committee, would in itself not be a ground for interference as the Court ought not to step into the shoes of the Committee and then arrive at a different conclusion—For all the aforesaid reasons, the present petition is dismissed being devoid of merits.

Management Education & Research Institute v. *Director Higher Education & Ors.* *693*

LIMITATION ACT, 1963—Articles 74, 75 and 79—Code of Criminal Procedure, 1973—Section 156(3)—Summons—Period of limitation—Suit for damages and permanent injunction—Appellant/plaintiff in business of freight transporter—Engaged by respondent/defendant for providing logistic services—Difficulties in execution of the transaction—Allegation of breach of obligation on each side—Respondent/

defendant filed suit for injunction and also criminal complaint with ACMM—Matter investigated u/s. 156(3)—preliminary report filed by the police no cognizable offence made out—Opportunity granted for filing a protest petition—No protest petition filed—No summon issued to the appellant/plaintiff—Report accepted and complaint dismissed on 24.03.2007—Suit filed on 09.10.2007—Held:- suit filed beyond the prescribed period of limitation—Declined to condone the delay in re-filing the suit—Suit dismissed vide order dated 02.02.2010—Aggrieved by the order appellant/plaintiff filed the present regular first appeal—Held—Action not founded on malicious prosecution, at best based on defamatory material contained in the complaint—Relevant Article is Article 75—period of limitation one year from the date of filing a complaint—Complaint filed on 26.03.2006—Expired on 25.03.2007—suit instituted on 09.10.2007 which is beyond the period of limitation—appeal dismissed.

Schenker India Pvt. Ltd. v. *Sirpur Paper Mills Ltd.* *476*

— Article 113—Regular First Appeal filed against the impugned judgment of the trial Court dated 18.10.2003 dismissing the suit filed by the appellant/plaintiff for recovery of Rs. 3,04,597.60/-—Held: The period of three years arises in the facts of the present case not from the date of the grant of the loan, but in fact from the date when default was committed inasmuch as the loan was repayable over a period of many years and in installments. In such a case, limitation will commence from the date of the default and not from the date of grant of loan. Suits for recovery of amounts in these cases are governed by Article 113 and not by Article 19 of the Limitation Act, 1963.

IFCI Venture Capital funds Limited v. *Santosh Khosla & Ors.* *646*

MALICIOUS PROSECUTION—Appeal impugns Judgement and decree and dated 30.01.2010 dismissing suit of the appellant claiming damages for malicious prosecution—FIR lodged against appellant under Section 363/366/376/511/506IPC by Respondent No. 3 alleging that his daughter was kidnapped by the Appellant—After the trial, appellant was acquitted by the judgement dated 31.10.2001—Thereafter Appellant filed suit for damages, which was dismissed. Held: The respondent not only leveled false charges against the appellant but also prosecuted the entire case vigorously with sole intention of getting the appellant convicted. Respondents also filed applications for cancellation of bail alleging the appellant to be a habitual criminal and a permanent resident of Kashmir without any rational basis. Respondents have deposed false facts one after the other throughout the proceedings. The criminal proceedings were initiated based upon false facts and sustained and contested by repeatedly asserting false and baseless allegations lowering image and reputation of appellants in the eyes of his neighbours, friend and relation. Damages awarded to the tune of Rs. 2,50,000.

Rizwan Shah v. *Shweta Joshi & Ors.* *205*

— Petitioner impugned the judgment dated 06.12.2010 passed by the appellate Authority for Industrial & Financial Reconstruction (in short, AAIFR). which confirmed the order passed by the Board for industrial & Financial Reconstruction (in short, BIFR) dated 18.04.2007 which infact was a clarification and/or modification of its earlier order dated 14.09.2006. Whether the direction of the BIFR, which has been overturned by the AAIFR, to the effect that 5% of the sale proceeds, which were adjusted by the first respondent i.e., State Bank of India (hereinafter referred to as SBI) are required to be shared amongst all other secured creditors? Contention of petitioner is that the respondent had itself

contended before the AAIFR even in the proceedings which culminated in the order dated 14.07.2001 that the amount deposited had to be shared between the SBI and itself (i.e. IFCI)—Held: That the concessions on law, by counsel cannot bind a litigant.

IFCI Limited v. *State Bank of India & Ors.* *318*

MOTOR VEHICLE ACT, 1988—Compensation for death—The Appellant Reliance General Insurance Company Limited impugns the judgment dated 02.06.2010 passed by the Motor Accident Claims Tribunal, (the Tribunal) whereby a compensation of Rs.44,52,100/- was awarded on account of the death of Ram Nayak Mishra, who was working as an Air Conditioning Engineer in Northern Railway and was aged about 59 years at the time of the accident—The sole contention raised on behalf of the Appellant is that the actual income of the deceased is to be taken into consideration to compute the loss of dependency. A large component in the salary was for overtime which was not regular income and therefore, could not have been taken into account.—The basic pay of the deceased was Rs.14,260/-. He would be entitled to 30% of the pay towards House Rent Allowance (HRA) also, if he would not have opted for the govt. accommodation. It is well settled that all perquisites are to be taken into consideration for the purpose of computing the loss of dependency—Although, it appears that the deceased was almost regularly getting overtime allowance ranging between Rs. 10,000/- to 35,000/- per month. Since the deceased was to retire just after 10-11 months, a sum of Rs. 10,000/- only as overtime allowance, shall be taken for computing the loss of dependency—After adding the national sum of Rs.75,000/- under conventional heads as granted by the Tribunal, the overall compensation comes to Rs.21,26,460/- The compensation is thus reduced from Rs. 44,52,100/- to Rs.

21,26,460/- The excess amount of Rs. 23,25,640/- along with the up-to date interest earned, if any, during the pendency of the Appeal, shall be refunded to the Appellant Insurance Company through its counsel. The statutory amount of Rs. 25.000/- shall also be returned.

Reliance General Insurance Co. Ltd. v. *Leela Wati & Ors.* *626*

— Order 12 Rule 8—Claims Tribunal awarded compensation—Appea l for reduction of compensation filed by Insurer before High Court—Plea taken, in absence of any evidence as to future prospects, same should not have been added—Driver did not possess any driving license at time of accident—A notice was served upon owner and driver to produce driving license—Non production of license would show that driver did not possess any driving license—Appellant should not have been saddled with liability to pay compensation—Held—In absence of any evidence as to deceased's permanent employment, Tribunal faulted in considering future prospects while computing loss of dependency—It is true that a notice was claimed to have been served upon driver and owner—However, no evidence with regard to same was produced—It is well settled that onus to prove breach of policy condition is on insurer—Simply stating that a notice under Order 12 Rule 8 of CPC was sent is not sufficient to discharge onus that driver did not possess any driving license to drive vehicle—Insurer cannot avoid liability to pay compensation.

National Insurance Co. Ltd. v. *Rajbala & Ors.* *793*

— Motor Accident Claims Tribunal (MACT) awarded a compensation of Rs. 1 lac as personal accident insurance cover to respondents who are LRs of deceased—Order challenged before High Court in Appeal—Held—Finding that

accident was caused on account of deceased's own negligence is not disputed as respondents have not filed any appeal or cross objection against judgment—It is clearly mentioned in India Motor Traffic under GR 36 that this personal accident cover is available to owner of insured vehicle holding effective driving license—Anybody driving vehicle with or without permission of owner cannot be taken as owner—Driver—Policy of insurance company is contractual—Impugned order can not be sustained.

Oriental Insurance Co. Ltd. v. *Kavita Singal & Ors.* *397*

— Appeal impugned order dated 05.10.2010 of the Motor Accidents Claims Tribunal (MACT) where compensation was awarded to family of deceased—Appellant claims that there was contributory negligence and that the award was exorbitant—The Tribunal had found the driver to be negligent and further that the bus had gone to extreme wrong side and hit the victim head on. Held—There was no contributory negligence involved in this case as every head on collision does not constitute the same and the facts in this case clearly indicate the mistake of appellant's driver—The amount awarded is not exorbitant as the correct income and dependency amounts have been taken and compensation accordingly, calculated.

Uttar Pradesh State Road Transport Corporation v. *Ramwati & Ors.* *191*

— Section 168—Respondent lost his right arm while travelling in bus of appellant due to accident with a truck—Appeal filed for reduction of compensation granted by Tribunal—Plea taken, driver and owner of truck were equally responsible and without them being impleaded, compensation could not

have been awarded against appellant—Since Respondent kept his arm outside window, he was equally at fault and compensation awarded be reduced on account of respondents's contributory negligence—First Respondent had not purchased any artificial limb till arguments in appeal were heard which would show that first Respondent really did not need artificial prosthesis—Cross objections filed by respondent—Plea taken, compensation awarded is too low and meager and cannot be said to be just and proper—Held—Driver of bus was not produced by appellant corporation to prove manner of accident—Thus, it could not be said that there was no negligence on part of bus driver or truck driver was at fault—Assuming driver of bus and truck were equally responsible, this would be a case of composite negligence—In such case it is for victim to elect as to against which of two tortfeasers he would proceed to claim compensation—There was no negligence on First Respondent's part in placing his elbow/arm on window sill and even if his elbow was protruding by a few inches, it was duty of Appellant's driver to drive bus in such a manner that there is safe distance between two vehicles—Principle governing grant of compensation in injury and death cases is to place claimant in almost same financial position as they were in before accident—First Respondent was entitled to be given addition of Rs. 50% of income towards future prospects as ITRs placed on record show that First Respondent's income gradually increased from AY 1994-95 to AY 1996-97—Compensation for physiotherapy allowed and compensation for artificial limbs doubled—Appeal of appellant dismissed and cross objections of First Respondent allowed.

Uttaranchal Transport Corporation v. *Navneet Jerath* *284*

— Section 166—Code of Civil Procedure, 1908—Order 41 Rule

24—Claim petition dismissed on ground that appellants failed to establish that accident was caused on account of rash and negligent driving of driver of offending vehicle—Order challenged before High Court—Plea taken, accident was caused on account of rash and negligent driving of driver of offending vehicle—Testimony of eye witness could not have been rejected in absence of any rebuttal by examining driver of vehicle—High Court being court of First Appeal is empowered to decide quantum of compensation instead of remanding case to Tribunal for its decision on issue—Per contra, plea taken Tribunal's finding that negligence on part of driver of offending vehicle not established cannot be faulted because it was not possible for a person to see accident from a distance of 3000 yards—Held—Driver of offending vehicle admitted involvement of truck and its being driven by him at time of accident—Yet driver and owner did not prefer to file any written statement—Driver did not prefer to controvert allegations of negligence deposed by eye witness—Negligence has to be proved by claimants on touchstone of preponderance of probability and not beyond shadow of all reasonable doubts—Tribunal ought to have relied on testimony of eye witness to reach conclusion that accident was caused on account of rash and negligent driving of driver of truck—Even if no finding on quantum of compensation is given by Tribunal, High Court as Court of First Appeal can appreciate evidence and compute compensation—Compensation granted in favour of appellants.

Santosh Bindal & Ors. v. *National Insurance Co. Ltd. & Ors.* *342*

— Section 163(A)—Motor Accident Claims Tribunal (MACT) awarded a compensation of Rs. 1 lac as personal accident insurance cover to respondents who are LRs of deceased—Order challenged before High Court in Appeal—Held—Finding

that accident was caused on account of deceased's own negligence is not disputed as respondents have not filed any appeal or cross objection against judgment—It is clearly mentioned in India Motor Traffic under GR 36 that this personal accident cover is available to owner of insured vehicle holding effective driving license—Anybody driving vehicle with or without permission of owner cannot be taken as owner—Driver—Policy of insurance company is contractual—Impugned order can not be sustained.

Oriental Insurance Co. Ltd. v. *Kavita Singal & Ors.* *397*

— Prevention of Corruption Act, 1988—Sections 7 & 9—Petitioner charge sheeted for offences punishable under Section 7 & 9 of Act on allegations that he accepted illegal gratification from journalist of tehelka.com posing as arms dealers—During course of investigation, statement of Respondent no.2 was recorded under Section 164 Cr.P.C. and he was also granted anticipatory bail—Before filing of charge sheet, CBI moved application seeking pardon for Respondent no.2 to make him witness/approver—Application allowed—Aggrieved petitioner challenged order granting pardon which was upheld in SLP—Then petitioner filed application for taking Respondent no.2 into custody, in terms of Section 306 (4)(b) as he was made approver—Application dismissed—Petitioner challenged order and urged Respondent no.2 was granted anticipatory bail contemplating his release on bail in event of arrest—Thus, he was never arrested before grant of pardon and as per provisions of Section 306(4)(b) unless he is already on bail, he is required to be detained in custody until termination of trial—Since he was not arrested so he was never granted bail—Held:- Though it is mandatory to keep the approver in custody unless on bail, however, Court is empowered in the interest of justice to avoid abuse

of process of law and for the right of life and liberty of an approver, to grant bail if not granted earlier—Pardon does not get vitiated on this count.

Bangaru Laxman v. *State Thr. CBI & Anr.* *102*

NEGOTIABLE INSTRUMENTS ACT, 1881—Sections 138, 143, 144, 145, & 147—Cross examination of complainant by accused—Complaint filed by respondent u/s 138 alleging that petitioner/accused one of the directors of M/s. Sukhdata Chits Pvt. Ltd. had issued cheque of Rs.50,000/- in his favour which was dishonoured with remarks "funds insufficient"—Petitioners told to honour cheque but refused—Despite legal notice dated 28.01.2010, petitioner did not make payment—Complaint filed—Application filed by petitioner u/s 145 (2) NI Act for cross-examination of respondent—Vide impugned order dated 07.02.2011, MM permitted cross-examination of complainant confined to para 4 and 6 of the application, holding that rest of the paras of the application were legal or within personal knowledge of petitioners u/s 106 Evidence Act and hence do not require any cross-examination—Order challenged in revision before ASJ—Order of MM upheld by ASJ—Held, limiting the right of petitioner, to cross-examine only with regard to para 4 and 6 of the complainant's application may cause prejudice to the petitioners-Objective of 138 NI Act is to enhance acceptability of cheques in settlement of liabilities—Considering legislative intent of summary trial and expeditious disposal of cases, particularly 139 of NI Act and Section 118 of Evidence Act providing presumption in favour of complainant that issue was cheque was towards debt or liability and Section 145 providing that evidence could be led by the complainant by way of affidavit, accused does not have unlimited and unbridled right of subjecting complainant to usual and routine type of examination—Phraseology "as to the facts contained therein" in Section 145 (2) cannot be

read to mean that complainant can be subjected to cross-examination of everything that he has stated on affidavit—However unjust to say that in all cases cross-examination would only be confined to defences of accused—Accused would be entitled to cross-examine complainant as done in summary trial but at the same time, not be precluded from putting certain questions that would be relevant and essential for just decision—Impugned order modified to the extent that cross-examination of the complainant would not remain limited to contents of Para 4 and 6 of application of complainant but shall also extend to facts in addition to their defences, as may be deemed essential by MM which are relevant in the facts and circumstances of the case keeping in view the object and scheme of the Act and particularly, provisions of Section 139, 143 of the Act and Section 106 of Evidence Act—Petition accordingly disposed of.

Sukhdata Chits Pvt. Ltd. & Ors. v. *Rajender Prasad Gupta* *581*

PREVENTION OF CORRUPTION ACT, 1988—Sections 13 (2) and Section 13 (1) (d)—Bail—Case of prosecution that petitioners and other accused entered into conspiracy to eliminate all forms of competition and to ensure that the company Swiss Timing Ltd. (STL) was awarded contract for Time Scoring Result (TSR) system—Held, bail is the rule and committal to jail an exception—Refusal of bail is restriction on personal liberty of individual guaranteed under Article 21 of the Constitution—Requirements that have to be balanced are the seriousness of accusations, whether witnesses are likely to be influenced by accused and whether accused likely to flee from justice if granted bail—Prima facie case for offence u/s 467 IPC made out against petitioner—Although accusations against petitioners serious however, evidence to prove accusations is primarily documentary besides few

material witnesses—If seriousness of offence on the basis of punishment provided, is the only criteria, courts would not be balancing the constitutional rights but rather recalibrating the scales of justice—Allegation made against petitioner Suresh Kalmadi of threatening witnesses and tampering evidence when witnesses were working under petitioner—Apparent that witnesses harassed and threatened only till they were working under petitioner and thereafter no influence on witnesses—Evidence on record that in past witnesses were intimidated does not prima facie show that there is any likelihood of threat to prosecution witnesses—No merit in contention of CBI counsel that mere presence of petitioners at large would intimidate witnesses—Petitioner Suresh Kalmadi in custody for over 8 month and petitioner V.K. Verma for 10 months—No allegation that petitioners are likely to flee from justice and will not be available for trial—Allegations against petitioners of having committed economic offences which resulted in loss to State exchequer by adopting policy of single vendor and ensuring contract awarded only to STL—Whether case is of exercise of discretion for ensuring best quality or a case of culpability will be decided during the course of trial—No allegation of money trail to petitioners—No evidence of petitioners threatening witnesses or interfering with evidence during investigation or trial—No allegation that any other FIR registered against petitioners—Bail applications allowed.

Suresh Kalmadi v. *CBI* *630*

RES JUDICATA—Details of the writ petition, being W.P. (C) No. 6742/2000 being taken for disposal of all the writ petitions challenge to legality and validity of communication dated 10.04.1999 issued by respondent No.2 demanding Additional Premium of Rs. 48,37,415/- and Revised Ground Rent @

Rs. 2,42,057/- per annum by applying land rates at four times of the actual notified rates in alleged violation of its own guidelines dated 11.01.1995—Petitioner also seeks to challenge the order dated 31.07.2000 by which respondent Nos. 1 and 2 have sought to determine the lease and the two notices dated 04.10.2000 issued by respondent No.4 under Sections 4 and 7 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971—The controversy revolves around the terms communicated by respondent Nos. 1 and 2 in respect of change of user of properties of the petitioners from the residential to commercial—The petitioner's family became owner of plot No.24 Barakhamba Road, New Delhi—Building plans for construction of a Multi-storeyed commercial building submitted to Respondent No.3 were approved—Petitioners entered into Collaboration Agreement with respondent no.5 for construction of the multi storeyed commercial building. As per the agreement, Respondent no.5 was liable to pay commercialization charges to Respondents 1 and 2—Respondent 1 and 2 issued show cause notice for passing order of re-entry for construction of Multi Storeyed Building allegedly without their permission—Petitioner filed C.W. No. 909/1973 challenging the said notice dated 11.07.1973—Fresh policy guidelines issued by of respondents 1 and 2 received by petitioners—Petitioners agreed to abide by the said policy and requested for fresh terms as per policy issued—Fresh terms communicated by respondents 1 and 2 for permission for change of user of land, in purported compliance of the new policy—The fresh demand of Respondents 1 and 2 was allegedly not in accordance with the new policy. Hence petitioner wrote to respondents 1 and 2 accordingly—This Court passed a common judgment in about 22 writ petitions on similar matters as that of the petitioner, where detailed directions were given for calculation of Additional Premium and Revised Ground Rent—Respondents 1 and 2 issued fresh

terms to the petitioners in purported compliance of judgment of this Court dated 19.05.1998. The terms communicated were erroneous in the view of the petitioner—SLP filed by other parties against the judgment of High Court dated 19.05.1998 disposed off. The said parties were permitted to move the High Court for clarification and/or for further directions—Order passed by respondents No.1 and 2 purportedly re-entering the premises and determining the lease—Two notices sent by Respondent No.4 under Section 4 and 7 respectively of The public Premises (Eviction of Unauthorized Occupants) Act, 1971 and the same are under challenge—Held—It is a second round of litigation because the issue involved has already been determined by two Division Benches of this Court who had quashed the revised demand of rates at four times of the actual notified rates—The Division Bench in its judgment date 19.05.1998 clearly held that the additional premium/conversion charges for the conversion of user of land will be determined with reference to the land rates (as notified by the Government (Ministry of Urban Development) from time to time applicable on the "crucial date" as per FAR assigned to the plot prevailing on the crucial date—Policy dated 11.01.1995 is the policy which gave the formula for calculation of additional premium/conversion charges which has already been accepted by the Division Bench in its judgment dated 19.05.1998—Calculation issued by the respondent No. 2 vide letter dated 10.04.1999 claiming additional premium/conversion charges of Rs. 48,37,415/- is erroneous and without application of mind—Land rates have been wrongly presumed to be based on FAR 100 and the same were wrongly multiplied with 4—This is so, because the FAR assigned to the plot was already 400 and there was no scope for further multiplying by 4—Annexure P-17 shows the land rate @ 600 Sq. Yds. in 1969 but did not specify the FAR—There was no change in 1970—No contrary evidence

in this regard has been produced by the respondent No.2 in order to show that the land rates in 1970 were prescribed for FAR 100—Therefore, the letter dated 10.04.1999 raising additional premium in view thereof is quashed—Notification/ circular dated 18.01.1996 issued by the respondent No.2 is also quashed—The present writ petition is allowed and communication dated 10.04.1999 and the communication dated 31.07.2000 and the two communications dated 04.10.2000 are quashed—The respondent Nos. 1 and 2 are at liberty to raise their fresh demand for change of the user of the property No.24, Barakhamba Road, New Delhi in accordance with principles laid down by the Division Bench judgment dated 19.05.1998 and the finding arrived herein.

Ashoka Estate Pvt. Ltd. & Ors. v. *Union of India & Ors.* *651*

RIGHT TO INFORMATION ACT, 2005—Appeal impugns the order of the Learned Single judge date 4th May 2011, dismissing the Writ Petition of the appellant. These intra appeals, though against separate orders and different respondents, are taken up together since all entail the same question of exemptions available to the appellant UPSC under the Right to Information Act, 2005.

Union Public Service Commission v. *N Sugathan* *93*

— LPA 797/2011: That the said writ petition was preferred impugning the order dated 14th January 2011 of the Central Information Commission (CIC) directing the UPSC to disclose the respondent the list of shortlisted candidates for the post of Senior Instructor (Fishery Biology) along with their experience and educational qualifications—Appellant contended that such information is the personal detail of the selected candidate and there is distinction between maintaining transparency and maintaining confidentiality; that the applicants

in the selection process submit their information to the UPSC in confidence and UPSC cannot be directed to divulge the same—Held that an applicant for a public post participates in a competetive process where his eligibility/suitability for the public post is weighed/compared vis-à-vis other applicants. The appointing/recommending authorities as the UPSC, in the matter of such selection, are required and expected to act objectively and to select the best Appeal dismissed.

Union Public Service Commission v. *N Sugathan* *93*

— LPA preferred against the order dated 19th April, 2011 of the learned Single Judge dismissing W.P (C) No. 2442/2011 preferred by the appellant UPSC impugning the order dated 12th January, 2011 of the CIC directing the appellant UPSC to provide to the respondent/information seeker photocopies of the experience certificates of the candidates who applied for the post of Senior Scientific officer (Biology) in Forensic Science Laboratory of the Government of National Capital Territory of Delhi and who were interviewed on 10th & 11th September, 2009—Held that those who are knocked out before the interview even and did not have a chance to compete any further, are definitely entitled to know that they have not been knocked out arbitrarily to deprive them from even competing any further, and hence the appeal was also dismissed.

Union Public Service Commission v. *N Sugathan* *93*

— LPA 810/2011: The present appeal is different to the extent that the information sought in this case relates to all the applicants for the post and not merely to those who had gone past the stage at which the respondent/information seeker had been eliminated.

Union Public Service Commission v. *N Sugathan* *93*

— Decision: The Court was unable to fathom the right, if any, of the respondent/information seeker to information qua those who are similarly eliminated as him. Such information relating to persons who though may have been the applicants to a public post but were eliminated in the selection process at the same stage as the information seeker, cannot be said to be necessary in public interest or for the sake of transparency or otherwise.

Union Public Service Commission v. *N Sugathan* *93*

SERVICE LAW—Aggrieved petitioner challenged order passed by Central Administrative Tribunal directing petitioner to grant Assured Career Progression (ACP) benefits along with arrears and re-fixation of retiral benefits dues to Respondent no.1—Petitioner urged, Respondent no.1 did not achieve requisite benchmark grading in ACR, so not entitled to benefits—On the other hand, Respondent no.1 claimed that relevant ACRs were not communicated to him which ought not to be considered for granting him benefits—Held:- Denial of a service benefit otherwise due to an employee, on the basis of un-communicated ACR, would be violative of the principles of natural justice.

Union of India Through Secretary & Ors. v. *Dhum Singh & Ors.* *778*

— Disciplinary action—Petitioners working as drivers with DTC charged with having entered the room of the Depot Manager, Naraina unauthorizedly, having abused the Depot Manager and having assaulted the Traffic Superintendent who was present in the room having fled by breaking the sheets of boundary of Naraina Depot after meeting out threats—Version of petitioners was that at the time of alleged incident, they were in Rohtak and were even challaned by traffic police for

traffic violations, which shows that nothing as alleged by DTC occurred—Inquiry Officer found the charges proved and the Disciplinary Authority imposed punishment, and departmental appeals were dismissed, followed by dismissal of OAs filed before the Central Administrative Tribunal—In the meanwhile, local police registered FIR and filed chargesheet against petitioners regarding the Naraina Depot incident, in which after trial the learned Magistrate convicted the petitioners for offence under Sec. 323/506/34 IPC and released them on probation, but in appeal, the learned Additional Sessions Judge acquitted the petitioners holding that in view of challan at Rohtak, presence of Petitioners at Naraina was doubtful—Tribunal while dismissing OAs held that acquittal does not preclude departmental action and rules of evidence in the two proceedings are different—Challenged—Held, in the absence of any record to show that challan at Rohtak was issued after verifying identity of violators and there being no plea that there was any reason for DTC to fudge the incident against the petitioners, in the exercise of powers of judicial review, High Court would not interfere with the concurrent findings of Inquiry Officer, Disciplinary Authority, Appellate Authority and Tribunal, particularly where there is no merit in ground of challenge.

Hardeep Singh v. *Delhi Transport Corporation* *148*

— Facts: Respondent belonged to the erstwhile Posts and Telegraph Building Works (Group "A") Service, which he joined in the year 1977 as Assistant Executive Engineer (Civil). The new telecom policy introduced in 1997 created a company called Bharat Sanchar Nigam Limited (BSNL). The intention of the Union Government was to transfer the entire telecom service to the newly formed BSNL by retaining the functions of policy formulation, licencing, wireless spectrum

management, administrative control of PSUs etc. with the Union Government. A circular dated 24.03.2005 issued by the DoT indicated the *scheme* for calling for options of absorption of Group "A" officers of P&T Building Works (Group "A") Services in MTNL/BSNL. The respondent exercised the option of being absorbed in BSNL on 06.06.2005. At that point of time, disciplinary proceedings were pending against Respondent. Before his option could be accepted, he sent a letter for withdrawal of the offer on 02.08.2006. However, that was rejected by an order dated 11.08.2006 by the DoT. The Respondent preferred the Original Application before the Central Administrative Tribunal (Tribunal). The Tribunal decided the question in favour of the respondent by holding that the offer made by the respondent could be withdrawn by him inasmuch as the offer had not yet been accepted by the petitioner. Held: The entire issue was held to be contractual and based upon the employees exercising their option to be retained in the parent department or to be absorbed in either MTNL or BSNL. It was further held that the scheme was essentially an invitation to an offer and the option exercised by the employee an offer to an invitation and remained an offer till its acceptance. It is only on the acceptance of the offer that a binding contract would result. In the present case, the respondent had withdrawn the option (offer) prior to its acceptance. There is nothing in law which prevented him from doing so. This is so because the offer had not been accepted and it had not resulted into a binding contract.

TRADE MARKS ACT, 1999—Section 29, Section 49 The plaintiff company is engaged in the business of packaging, moving and providing logistic services and has been using the trade marks AGARWAL PACKERS & MOVERS & DRS

Group (Logo). The Trade mark AGARWAL PACKERS & MOVERS is registered in the name of the plaintiff-company in a number of classes, including class 39 for providing transporters and goods carriers, packers and storage of goods and travelling arrangement services and in a class 17 for packaging storage, etc. The plaintiff also holds copyright in the artistic work of AGARWAL PACKERS & MOVERS (LOGO). DRS Group (Logo) is also a registered trademark of the plaintiff in class 39.—Though the suit pertains to number of trademarks owned by the plaintiff-company, arguments by the parties were advanced only with respect to use of trademarks Agarwal Packers & Movers bearing registration No. 1275683 and DRS GROUP (Label) bearing registration No. 1480427 which were subject matter of the interim order dated 03rd June, 2011—Admittedly, defendant No. 1—Company does not own the trademarks in question which stand registered in the name of the plaintiff-company. Since neither the procedure prescribed in Section 49 has admittedly been followed nor defendant No.1. company has been registered under Section 49 (2) of the Act, it cannot be said that defendant No.1 is a registered user of trademarks in question—Since defendant No. 1 is neither the proprietor nor the registered user of the trademarks Agarwal Packers & Movers and DRS GROUP logo, it has absolutely no right to use them and any such use by defendant No. 1 would amount to infringement of these trademarks, which are owned by the plaintiff-company—Emanating from equity jurisdiction, injunction is a discretionary relief—The Court is not bound to grant injunction merely because it is lawful to go so. Even if the plaintiff is able to make out violation of an alleged right, the Court may still refuse to protect him, if it is satisfied that looking into his conduct, it will not be equitable to exercise the discretion in his favour—The conduct of a party seeking injunction is an important factor to be taken into consideration

by the Court while exercising its discretion in a matter. The plaintiff in an injunction suit must come to the Court with clean hands and do nothing which is not expected from an honest, upright, deserving litigant and is required to disclose all material facts which may, one way or the other, affect the decision. A person deliberately concealing material facts from Court is not entitled to any discretionary relief—The suit filed at Secundrabad cannot be said to be such a material fact as would have affected the decision of the Court even on ex parte injunction and non disclosure of this suit therefore, does not disentitle the plaintiff to the discretionary relief of injunction—Infringement of the trademarks of the plaintiff-company by Agarwal Packers & Movers Private Limited dose not entitle defendant No. 1 also to infringe those marks.

DRS Logistics (P) Ltd. v. *DRS Dilip Roadlines (Pvt) Ltd. Ors.* *1*

TRANSFER OF PROPERTY ACT, 1882—Section 106—Appellant/defendant a tenant from 1979 at a monthly rent of Rs.1161.60—Rent increased from time to time under section 6A and 8—Rent Rs.2489.30 w.e.f 23.04.2004—legal notice dated 07.05.2007 enhancing rent to Rs. 3618.23 inclusive of maintenance charges Rs.880/- w.e.f. 23.04.2007—tenancy terminated by legal notice dated 07.09.2007—failure to vacate the premises—Suit for possession and mesne profits—Plea taken, notice dated 07.05.2007 defective as sought to increase the rent retrospectively—Notice dated 07.05.2007 not served—Held, even if language defective it will operate to increase the rent by 10% after 30 days of service of notice—Notice was served—Suit decreed—Aggrieved by the judgment the appellant/defendant preferred the regular first appal—Held—Notices were sent at seven addresses by registered AD post and UPC—The addresses were correct—Notice deemed to have been served—Notice has a necessary legal

effect of increasing rent 30 days after receipt of notice—Order 20 Rule 12 does not mandate that the court shall first take evidence only an aspect of illegality of possession and decree the suit for possession and only thereafter will go for trial with respect of mesne profits—Appeal dismissed.

Sewa International Fashions & Ors. v. *Meenakshi Anand* *607*