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Tribunal to hold its further sittings at Kuala Lumpur, the jurisdictional seat of arbitration—Opposed by the Defendant/ Videocon—Arbitral Tribunal decided that further sittings be held at London from 30th June, 2006 to 2nd July, 2006—Aggrieved, the Plaintiff on 30.05.2006 filed OMP No. 255 of 2006 under Section 9 of the Arbitration and Conciliation Act, 1996, in Delhi High Court seeking a declaration that the seat arbitration is Kuala Lumpur—Defendant raised objection to the maintainability of the petition on the ground of jurisdiction—Single Judge of this Court decided in favour of the Plaintiff, rejecting the objection of the Defendant and proceeded to fix dates for hearing on the merits of OMP No. 255 of 2006—Defendant filed a Special Leave Petition subsequently converted to a Civil Appeal—On 05.08.2009, while the Special Leave Petition before the Supreme Court of India was pending, the High Court of Malaysia dismissed the Plaintiffs challenge to the Partial Award on the Ground that the seat of arbitration had been shifted to London—The Plaintiff filed a Memorandum of Appeal—On 09.10.2009, the Defendant brought the decision of the Malaysian Court on the record of the Special Leave Petition pending before the Supreme Court—On 13.10.2009, while the matter was pending before the Supreme Court, the Defendant filed a Claim petition before the High Court of Justice, Queens Bench Division, Commercial Court, London—Defendant did not disclose the above filing to the Supreme Court or to the Plaintiff—On 10th August, 2010, the Plaintiff moved the Supreme Court by filing IA No. 4/2010 in Civil Appeal No. 4269/2011 pleading, inter alia, that the Supreme Court was seized of the matter including the question as to whether the seat of arbitration continued to be at Kuala Lumpur or the same had shifted to London—Simultaneously, on 12th August, 2010, an application was filed by the Plaintiff before the London Court stating that the juridical seat was not London and the issue of juridical seat was being contested in the Supreme Court of India—In the light of these facts, it was prayed that the London Court did not have the jurisdiction to hear the claim of juridical seat—After considering the matter,

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having it settled/decided by the Supreme Court of India is in breach of PSC and barred by res judicata/issue estoppel—London Court which does not have jurisdiction to go into the issue of "juridical seat" cannot assume jurisdiction—Indian Courts have personal, subject matter and territorial jurisdiction—Thus determination on the seat issue, to decide applicability of Part I of the Act, was within competence of the Supreme Court—Plaintiff contend also defendant had suppressed material facts regarding Supreme Court proceedings, London proceedings and proceedings relating to the present suit—Defendant contended that to grant the said anti-suit injunction the court must be satisfied that defendant is amenable to the personal jurisdiction of the court; that ends of justice will be defeated and injustice will be perpetuated, if injunction is declined and the principle of comity must be borne in mind—Forum non-conveniens—Court has to decide the jurisdiction of a court in regard to exclusive or non-exclusive jurisdiction invoked on the basis of jurisdiction clause is done on a true interpretation of the contract on the facts and circumstances of case—Court of natural Jurisdiction will not grant anti-suit injunction against a defendant where parties have agreed to submit to the exclusive jurisdiction of a Court, a forum of their choice for continuance of proceedings—Principle of Comity of Nations precludes grant of anti-suit injunctions barring the rarest of rare cases—Such Injunctions cannot be granted where a party has already challenged a foreign Courts jurisdiction until such party has failed in such challenge—Held:- A look at the judgment of the Supreme Court would suffice to show that the issue of seat of arbitration stood adjudicated by the judgment of the Supreme Court and the Supreme Court intended the said adjudication to be final and binding between the Parties said issue was addressed before the Supreme Court by both the parties and decided upon by the Supreme Court as the first question raised before it—Re-agitation of the question of seat of arbitration authoritatively pronounced upon by the Supreme Court would constitute abuse of the process of law and undoubtedly render

the foreign proceedings vexatious and oppressive due to the attendant consequences—In PSC between the parties, the Indian Law has been given primacy and it has been specifically laid down in Article 33.2—Contract clearly lays down that contravention of the laws of India is wholly impermissible—Res judicata which encompasses within its fold the principle of issue estoppel is an intrinsic part of the laws of India and its public policy—Conversely, the underlying object behind the doctrine of res judicata and issue estoppel is the public policy of India—Due regard to the laws of India and its public policy must, therefore, be held to be of paramount importance an anti-suit injunction should be granted only if there is an impending risk of conflicting judgments and if the proceedings in the Court of foreign jurisdiction would perpetuate injustice—While granting anti-suit injunction, it must tread cautiously having regard to all the facts and circumstances of the case, and be also mindful of the fact that an anti-suit injunction operates against the party concerned and not against the Court of foreign jurisdiction—Court cannot turn a blind eye to the vexation and oppression which would be caused to the plaintiff by compelling it to re-litigate on an issue upon which the Supreme Court has given its final and conclusive determination—To compel it to do so would constitute the worst imaginable case of abuse of the process of the Court, besides giving a complete go-by to the principle of res judicata and issue estoppel which govern the public policy of India—An injunction is granted as an ancillary to the main relief and flows out of a cause of action which has accrued to the plaintiff and even quia timet injunctions are granted by Courts on the plaintiff's establishing to the satisfaction of the Court that some threatened action by the defendant will constitute an actionable civil wrong, in contrast in an anti-suit injunction action the plaintiff does not have to establish either accrual of a cause of action or apprehension of an actionable wrong—An anti-suit injunction is unique in its conception and there is no denying that the equitable power to grant an anti-suit injunction in restraint of litigation in foreign soil exists only to

serve equity and shut out unconscionability—The grant or non-grant of such an injunction wholly depends upon whether the assumption of jurisdiction by a foreign court in the facts and circumstances of a particular case, taken in their entirety and viewed holistically, would be oppressive or vexatious or an abuse of the process or would amount to the loss of juridical or other advantage, in the context of all other factors, to one or the other party or an injustice would be perpetuated thereby—Present case prima facie appears to this Court to be one which could justify the passing of such an injunction order—Prima facie the initiation of proceedings by the defendant at London during the pendency of the Special Leave Petition before the Supreme Court of India was unconscionable, vexatious and oppressive and an abuse of the process of Law—It would be unduly harsh on the plaintiff to put the plaintiff through the inconvenience and uncertainty of litigating more than once on the same issue at a prohibitively high cost in a foreign land—The balance of convenience also tilts in favour of the plaintiff, as a necessary outcome of multiplicity of proceedings could be potentially conflicting decisions—Preservation of the integrity of the proceedings before the Hon'ble Supreme Court of India, Which culminated in the final judgment and order dated 11.05.2011, must necessarily be protected—Resultantly, an order of temporary injunction passed restraining the defendant from pursuing Claim No. 2009, Folio 1382 filed in the High Court of Justice, Queen's Bench Division, Commercial Court, London against the plaintiff—IA No. 21069/2011 is allowed accordingly.

Union of India v. *Videocon Industries Ltd.*..... *168*

CENTRAL EXCISE TARIFF ACT, 1985—Petitioner, manufacturer at Banglore of poultry equipment like poultry cages, welded wire mesh for poultry industry claimed exemption from payment of Excise duty under heading 84.36 of the Act—Assistant Collector of Central Excise, Banglore observed goods, manufactured by petitioners do not form part and do not go into making of machines of rearing and laying

units or batteries and merited classification under heading 7314—While said issue was pending consideration, Trade Notice dated 19.11.1990 was issued clarifying, heading 84.36 covers only 'Poultry Keeping Machinery' but not equipment which does not have any mechanical functions—Said Trade Notification was challenged by petitioner urging, while Excise Authorities at Bangalore were treating goods of petitioner under heading 7314 of but Excise Authorities at Ahmedabad and Maharashtra were treating said goods as exempt under heading 84.36 of the Act—Petitioner was thus, being discriminated—Held:- Machinery includes all appliances and instruments whereby energy or force is transmitted and transformed from one point to another—Wire mesh manufactured by petitioner even if sold to a poultry farmer for assembling of cages for poultry or battery of such cages cannot qualify as machinery under heading 84.36 and would be an article of iron and steel wire within meaning of 7314.

Azra Poultry Equipments v. *Union of India & Others* *393*

CODE OF CIVIL PROCEDURE, 1908—Indian Contract Act, 1872**—**Section 182, 186, 187 and 188—Suit for recovery of Rs. 4,99,500/- with interest—Supply of 417 Golden Rocker Sprayer and 100 knapsack sprayers—Respondent/plaintiff raised bill for Rs. 8,48,053/-—Appellant/defendant paid Rs. 4 lacs only leaving balance of Rs. 4,48,053/-—Letters written by respondent/plaintiff asking for payment—Payment not made—Suit filed—Appellant/defendant took the plea that 195 rocker sprayers and 45 knapsack sprayers taken back by the representative of respondent/plaintiff—Respondent/plaintiff denied the person who has taken back the sprayers to be its representative—Held—The representative was not the agent of respondent/plaintiff for receiving back the goods—Suit decreed—Aggrieved by the judgment appellant/defendant filed the regular first appeal—Held—The correspondence refers the representative as 'Sales Executive', 'our representative, he received payments—Working as commission agent, was an

agent of the respondent/plaintiff—His authority was not specifically restricted in any manner—Had general authority as is clear from the course of dealing between the parties—Respondent/plaintiff is estopped from denying the existence of his actual authority—Goods taken back by him—Appeal allowed—Suit dismissed.

The Kerala Agro Industries Corporation Ltd. & Anr. v. *Beta Engineers* *1*

— Order 2 Rule 2—Transfer of Property Act, 1882—Section 53A—Indian Contract Act, 1882—Section 202—Limitation Act, 1963—Section 27—Suit for possession and mesne profits—Respondents/plaintiffs claim to be owner of property having got the same under a Will from their mother—Mother purchased the same through registered power of attorney, receipt, agreement to sell dated 17.04.1986 from Sh. Birender Kumar Jain—Sh. Birender Kumar Jain purchased the same vide registered Sale Deed dated 11.07.1966 from Smt. Raj Kumari Bhatnagar who purchased it from Delhi Housing Company vide registered sale deed dated 20.08.1959—Respondents/plaintiffs employed a chowkidar to look after the property—Committed breach of trust and forged documents—Executed document, power of attorney etc. in favour of appellants/defendants and gave possession—Suit for injunction filed by the mother of respondent/plaintiffs against the appellants/defendants—During pendency of suit for injunctions, filed another suit for possession and mesne profits—Made statement through advocate not to dispossess the appellants/defendants without due process of law—Suit withdrawn with liberty to claim relief sought in the suit for possession and mesne profits already filed—Appellants/defendants pleaded themselves to be owners having purchased the same from Sh. Shafiq Raja vide agreement to sell, general power of attorney etc. dated 09.03.1994—Suit barred by Order 2 Rule 2 CPC—Held—Suit not barred by Order 2 Rule 2—Appellants/defendants have not proved the complete chain of title documents—Suit decreed—Aggrieved appellants/defendants filed the regular first appeal—

Held—Earlier suit withdrawn with liberty to seek the relief claimed in that suit in the second Suit—Result in consolidation of two suits—The relief claimed in earlier suit got merged in the second Suit, not hit be Order 2 Rule 2—Appellants/ defendants cannot be the owner unless the complete chain of title documents is proved—Complete chain of documents not proved—Respondents/plaintiffs have proved the complete chain of title documents—Appeal dismissed.

Vimla Gautam & Ors. v. *Mohini Jain & Anr.* *41*

— Order XXII Rule 10—Application for substitution in place of plaintiff filed by the petitioners, dismissed—Another application filed by three applicants—Contended that earlier purchasers sold their interest and right in the disputed property in their favour—Required to be impleaded in place of the plaintiff—This application dated 05.04.2004 had been dismissed on 13.12.2004 by the Civil Judge—First appellate Court reaffirmed the order of the trial Court and dismissed the application vide the impugned order dated 14.08.2006 holding that the suit had abated on the death of the plaintiff and the present application not having been filed during the pendency of suit, is not maintainable. Held—Even the first applicants never impleaded in place of the plaintiff—Their application dated 24.04.1996 was filed but not pursued—Substitution of the second category of persons did not arise as they were admittedly claiming their rights only through first applicants who themselves had not been allowed to be substituted in place of the original plaintiff—Present petitioners had no right or interest in the suit property—They could in no manner be termed as 'necessary' or 'proper' parties—Provisions of Order XXII Rule 10 of the Code would apply only when the suit was pending—Present suit had been disposed of as having been abated on 27.01.2003 and as such the application filed by the present petitioners on 05.04.2004 which was admittedly much after the date of abatement; the question of applicability of order XXII Rule 10 of the Code did not apply—No application under Order XXII Rule 9 of the Code seeking

setting aside of the abatement order dated 27.01.2003 was also ever filed—Present application filed under Order XXII Rule 10 (even presuming it to be an application under Order XXII Rule 9 of the Code) on 05.04.2004 is also much beyond the prescribed period of limitation—Impugned order suffers from no illegality, dismissed.

Suresh Kumar Agarwal & Ors. v. *Veer Bala Aggarwal* *424*

— Sec.89—Mediation—On 07.06.08 settlement arrived at before the mediator and terms of settlement signed by parties and their counsel and matter referred back to the referral court—On 11.08.08 both sides through their counsel appeared before the Court and the Court recorded a positive finding that the parties had settled their disputes—Till 29.08.08 there was no dispute as regards settlement—On 29.08.08 the court allowed petitioner's application for reconsideration of mediation settlement and referred the parties back to mediation—But on 04.09.08, the Judge-In-Charge, Mediation Cell remanded the matter back to court for disposal on merits, observing that no useful purpose would be served by mediation efforts—Challenged—Held, there being no dispute about the settlement till 29.08.08, there was a mandate of law upon the Court to pass a settlement decree and Court could not have relegated the parties to regular trial.

Naresh Chand Jain & Anr. v. *KM Tayal* *133*

— Order XXXIX Rule 2 Arbitration and Conciliation Act, 1996—Section 9—Suit for declaration and perpetual injunction instituted by Plaintiff to restrain Defendant from pursuing the claim in the High Court of Justice, Queen's Bench Division, Commercial Court, London in relation to the issue and matter already finally determined by the Hon'ble Supreme Court of India—Union of India, the Plaintiff, as the owner of natural resources including petroleum in the territorial waters of India, entered into a Production Sharing Contract (PSC) on October 28, 1994 at New Delhi—PSC executed between the UOI on

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Union of India v. *Videocon Industries Ltd.*..... *168*

— Suit relates to land, being subject matter of litigation in various suits for long—Plaintiff, a registered society, came into existence for conversion of erstwhile Hospital of Mental Diseases to a an institute to look after all aspects of mental health of citizens—A gazette notification was published in the official gazette on 30th December, 1993 issued by the Lieutenant Governor of Delhi transferring the management of the existing Hospital for Mental Diseases, Shahdara, Delhi from the Govt. of NCT of Delhi to the plaintiff.

Institute of Human Behaviour & Allied Sciences v. *Govt. of NCT of Delhi & Ors.*..... *247*

— Parties to the suit—Suit filed by Institute of Human Behaviour & Allied Sciences (IHBAS) against the Government of NCT of Delhi—Delhi Development Authority and Land & Development Department, Office of the Ministry of Works & Housing as defendant nos. 1, 2 and 3 respectively other defendants in respect of land being Khasra nos. 317/17 and 318/17 min admeasuring 16.98 acres in Village Tahrpur, which has been the subject matter of various litigation and claims by Het Ram (defendant no.4 herein); deceased Kewal Ram

@ Kewal (represented by legal heirs defendant nos. 5 (i) to (iii); Ganga Sahai ad Inderraj. Complaint was made by the Medical Superintendent, Hospital for Mental Diseases, Shahdara against Sh. Het Ram, Sh. Kewal; Sh. Ganga Ram Sahai and Sh. Inder Raj. Consequently notice dated 16th September, 1972 under section 4 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971—Estate Officer passed a detailed order of eviction dated 19th November, 1973 arriving at a conclusion that there was no valid lease in favour of the notices including Het Ram the defendant no. 4 as well as Kewal Ram; and therefore they had no right to occupy the disputed land and their possession was unauthorized. The order of eviction was jointly assailed by the four notices Het Ram; deceased Kewal; Inder Raj and Ganga Sahai by way of an appeal bearing PPA No. 88/1973 before the learned Add. District Judge. This appeal was rejected by a detailed judgment dated 28th March, 1974 passed by Justice G.R. Luthra, granting time up to 30th April, 1974 to the appellants to vacate the land and to deliver possession. Het Ram, Kewal, Inder Raj and Ganga Sahai carried a joint challenge against the order of the Estate Officer on the plea of tenancy and the judgment of the learned ADJ to Hon'ble High Court by way of Civil Writ No. 550/1972, which was dismissed. LPA was dismissed vide order dated 10th April, 1980. Petition under Order 21 Rule 32(5) of the CPC was filed by Shri Het Ram on 15th September, 1982 seeking execution of the aforesaid judgment. FAO. No. 391/2000: Order dated 16th February, 2004 was passed with the agreement of both parties that the trial Court should expedite disposal of the pending suit proceedings within a period of six months.

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Plaintiff prayed for interim orders against the defendants from causing any further wrongful interference in the peaceful possession of the suit property and also for restraining them

from creating third party interest by sale, loss or damage, trespassing, demolishing, additions, alterations, construction and eviction on the suit property. Also prayer made for restraining defendant nos. 1 to 3 from executing any deed or documents creating right, title or interest in the suit property in favour of defendant no. 4 and legal heirs of defendant no.5 or any other third party.

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Contention of the Plaintiff—That the favourable orders were procured by defendants 4 and 5 (i.e. Het Ram and Kewal Ram) by committing fraud on the Court and utilising the shield there of to occupy public land—Plaintiff also argued that it was not party to previous litigations initiated by the defendant no. 4 and 5, and was not bound by any adjudication therein. It was also contended that defendant 4 and 5 set up plea of tenancy in the initial cases against the government—Also the aforesaid defendants concealed this plea and judgments of Courts thereof—Re-agitated the matter again on plea of adverse possession—Present defendants despite the knowledge of the true owner of the property did not impead it—They set up false claim of cultivator possession.

Institute of Human Behaviour & Allied Sciences v. *Govt. of NCT of Delhi & Ors.* *247*

Contention of the Defendants—That the possession of the suit property was derived from forefathers of the defendants and hence acquired title by adverse possession—Also argued that any objection to the previous judgements were barred by limitation as plaintiff was not a statutory authority and window of 30 years vide Art. 65 of Limitation Act is inapplicable—Also the plaintiff had indulged in forum shopping by virtue of several remedies invoked by it.

Institute of Human Behaviour & Allied Sciences v. *Govt. of NCT of Delhi & Ors.* *247*

It is well settled that a judgment in a civil suit is inter partes and is not a judgment in rem. Given the claim of Het Ram and Kewal Ram against the defendants in Suit No. 293/1998, the claim of ownership by adverse possession can bind only the defendants in the said suit. The judgment dated 8th April, 1999 thus has to bind only the Union of India and the Land and Development Office who were the defendants in the suit (CS 298/1998). The judgment cannot bind IHBAS which was not a party to those proceedings. Het Ram-defendant nos. 4 also states this legal position in their written submissions dated 21st April, 2010 filed in the present case. The facts placed before this court also do not render it possible for this Court to hold these proceedings that Het Ram and Kewal Ram (or his successors) were in settled, exclusive, continuous, open and hostile possession of the suit land or any portion thereof or had ever asserted title of the property to support a finding that they had acquired title by adverse possession. Plaintiff has made out a prima facie case for grant of ad interim injuction. Balance of convenience is in favour of the plaintiff. Grave and irreparable loss and damage shall enure not only to the plaintiff but to the wider public at large which would be utilising the services available in the mental hospital which are certainly in short supply in the suit. Balance of convenience and interests of justice are also in favour of the plaintiff and against the defendants. Interim injunction granted. Since the land claimed by Het Ram in Suit No. 47/2000 is the subject matter of the present suit wherein Het Ram is also a party—The issues in the previous suits are directly and substantially in issue in the first suit. It also appears that the parties would be relying on the same evidence in support of their contentions in both the suits and relying on the case of *Chitivalasa Jute Mills vs. Jaypee Rewa Cement,* consolidated both the suits.

Institute of Human Behaviour & Allied Sciences v. *Govt. of NCT of Delhi & Ors.*..... *247*

CODE OF CRIMINAL PROCEDURE, 1973—Sections 482 & 156 (3)—Delhi Police Act, 1978—Section 140—Petitioners

police officers—Nishit Aggarwal/complainant made complaint in police station that he was owner of premises purchased from Laxmi Devi and that Chand Rani, Siani Devi and Bhim Singh had been threatening him and had put lock over his lock—Complaint made by Chand Rani alleging execution of sale deed in favour of Nishit to be fraudulent and that she was owner—When no action taken on complaint of Nishit, he made complaint to Commissioner of Police—Inquiry conducted by Additional DCP who submitted vide report that Laxmi Devi had sold property through registered sale deed to Nishit and that there was inaction on the part of local police in not registering complaint of Nishit—Accordingly on statement of Nishit FIR u/s 448/506/34 IPC lodged—On 22.01.09, petitioners visited premises and gave possession of premises to Nishit—Writ Petition filed by Chand Rani for quashing of FIR dismissed—Civil Suit filed by Chand Rani against Nishit dismissed—Criminal Writ Petition filed by Chand Rani against Nishit dismissed—Not being satisfied, Chand Rani filed criminal complaint before MM against Nishit and his wife u/s 200 Cr.P.C. read with Section 190 Cr.P.C.—In this complaint MM passed impugned order u/s 156 (3) Cr.P.C. directing SHO to register a case—Held, complainant/Nishit prima facie bonafide purchaser of property—Chand Rani filed suit before ADJ which was dismissed and she has not been able to prove any right, title or interest in premises—All authorities, including Commissioner of Police endorsed vigilance report that it was because of inaction of local police that no action taken against tress passers Chand Rani, Bhim Singh and others—Since Nishit had been dispossessed from premises legally owned by him, by Chand Rani and others, the act of the petitioners (Om Prakash and others) in getting the same restored to them, could not be said to be exceeding their jurisdiction or powers, but in compliance of the order of Commissioner of Police—In complaint u/s 200 Cr.P.C. Chand Rani did not disclose about filing of Criminal Writ before High Court—In Court the litigant is expected to disclose all relevant facts against his plea—Courts of law

depend on parties who put correct facts as there is no other means to ascertain true facts—There is an obligation on the complainant to disclose all correct facts since summoning of accused is based on evidence which has not been subjected to cross-examination—Intentional concealment of material facts in given facts and circumstances would entail quashing of criminal complaint—No reason given by MM while directing registration of FIR—Also, not stated against whom and under what provisions of law FIR was to be registered—Complaint against police officer time barred u/s 140 Delhi Police Act—Allegations taken at the face value, do not constitute any offence against the petitioners—Impugned order set aside—Petition allowed.

Om prakash & Ors. v. *State & Anr.* *21*

— Section 304—As per prosecution case, accused was habitual drunkard—On day of incident, accused harassing deceased who tried to pacify him—Accused was adamant and deceased slapped him after which accused strauqulated deceased—Incident witnessed by wife of deceased, PW5—Trial Court convicted accused u/s 302—Main contention of accused that he was denied benefit of legal counsel before trial Court—Held, accused initially provided legal aid by trial Court when accused produced from J/C—However subsequently his counsel was absent—Trial Court queried about whether accused wanted lawyer and he apparently refused—Thereafter trial Court proceeded to record testimony of prosecution witnesses and appointed Amicus Curiae subequently—Trial Court convicted accused u/s 302—Held, legal aid for poor resulted in poor legal aid—No material witnesses including IO cross-examined—Amicus only later moved application to recall PW5, however, even that not followed up—Absence of effective representation by accused resulted in denial of fair trial and infringed right of accused under Article 21 of the Constitution—Impugned conviction set aside—Matter remitted to trial court for conducting proceedings from stage when legal counsel of accused absented himself—Accused permitted

to cross-examine all prosecution witnesses unless he expressly gave up right through an affidavit or appropriate application—In view of peculiar facts accused released on bail—Trial Court requested to conclude trial expeditiously preferably within four months.

Sudhakar Tiwari v. *State* *34*

— Sections 397, 399 & 401—Audi Alteram Partem—Respondent filed revision petition against order of ACMM—Revision Petition disposed off without issuing notice to respondent or hearing him—Held ASJ while dealing with revision should have issued notice and heard petitioner. Impugned order set aside.

Chander Kant Pandit v. Dapinder Pal Singh *130*

— Section 482—Petition for quashing FIR for offence under Section 452/387/323/34 IPC on the grounds of compromise opposed by the State on the grounds that offences under Section 452 and 387 IPC are not compoundable—Held, till the decisions of the cited cases referred to the larger bench of the Supreme Court are altered or set aside, the said cited decisions operate as binding precedent and in view of statement of the complainant that he is no more interested to pursue the case, trial would be wasteful exercise by the trial Court, as such FIR liable to be quashed.

Irfan & Ors. v. *State & Anr.* *420*

— Section—366, 433 A—Petitioner convicted for offence punishable under Section 302 IPC and awarded death sentence by learned Additional Sessions Judge—High Court answered reference for confirmation of death sentence in negative and awarded life sentence to petitioner—Special Leave Petition filed by petitioner dismissed by Supreme Court—On 12.07.2000, Government of NCT brought out notification framing guidelines for premature release of convicts under section 433 A Cr. P.C. by Sentencing Reviewing Board (SRB)—Petitioner filed writ petition before Delhi High Court seeking reference of his name to SRB for grant of premature release—His

petition was disposed of with direction to treat his writ as representation and to be disposed of within a period of four weeks in terms of Sentence Reviewing Board Guidelines—Superintendent, Central Jail wrote letter submitting, petitioner not eligible for premature release as convicts whose death sentence was commuted to life imprisonment would be eligible for premature release after completing 20 years of imprisonment with remission—Petitioner had completed actual imprisonment of 14 years, 7 Months and 11 days but with remission his total imprisonment came to be 16 years, 9 months and 16 days, and thus, he was not considered eligible—On the other hand, it was urged on behalf of petitioner that he was not awarded death sentence, as learned Additional Sessions Judge had only pronounced death sentence which was subject to confirmation by the High Court—Since High Court did not confirm said sentence it could not be said that petitioner was awarded death sentence—Held:- A death sentence cannot be awarded by the Sessions Judge and the same is awarded only on confirmation in a reference by the High Court under Sections 366 Cr. P.C.—In absence of confirmation by High Court no death sentence was awarded on the Petitioner.

Sikander Mohd. Sahfi v. *State NCT of Delhi & Ors.* *159*

CONSTITUTION OF INDIA, 1950—Article 226—Petition for directions to respondent No.2/College to issue a migration certificate in her favour to enable her to migrate from respondent No. 2/College to Vivekanand College, Vivek Vihar, Delhi by getting admission in the B.Com (Pass) Course in the second year (Academic Session 2011-12)—Directions have also been sought to be issued to respondent No.1/University to verify from all colleges affiliated to it as to whether migration certificates are being issued to students in a timely manner—Brief facts—Petitioner, a resident of Ghaziabad U.P., completed her schooling in the year 2009-10 and thereafter in July 2010, applied to respondent No.2/ College situated near

Najafgarh, Delhi seeking admission in the B.Com (Pass) Course, which was duly granted to her—Petitioner continued her studies in the respondent No. 2/College and was declared as having passed the first year in July 2011—In the second session (i.e. the second academic year) of the aforesaid approached Vivekanand College, Delhi University with a request for grant of permission to migrate from respondent No.2/College to the said college—Upon receiving consent from the proposed transferee college, the petitioner submitted a representation dated 29.08.2011 to respondent No.1/ University stating *inter alia* that though she had obtained a no objection from the Principal of Vivekanand College for her migration to the same course in the second year, respondent No.2/College had failed to issue a migration certificate to her—It is stated that, in the meantime, Vivekanand College issued a circular dated 21.09.2011, confirming the migration of the petitioner from respondent No.2/College to the course of B.Com. (Pass) in the second year—Despite the issuance of the said circular, as respondent No. 2/College refused to issued a migration certificate to the petitioner, she had to approach this Court by filing the present petition. Petitioner contended that respondent No.2/College has been arbitrarily withholding her migration certificate and it has adopted a pick and chose policy for issuing migration certificates—Held:- Division Bench in *Aman Ichhpuniani* has held that to migrate from one college to another is not a vested right—The welfare of the student and the institution have both to be kept in view and weighed—If there be conflict between the two—A student has a right to choose an educational Institution of his choice while seeking an admission, but such right cannot be exercised with the same vigour and vitality while seeking migration—Petitioner had been shifting her stand from time to time with regard to the reasons given by her for seeking migration—Representation filed by the Petitioner reveals that while initially, the petitioner took a plea of "distance from college to home" as a ground for seeking migration from respondent No.2/ College to Vivekanand College, Vivek Vihar, subsequently, she

took the plea of financial hardship of her father as a ground for seeking migration—The Petition is accordingly dismissed.

Apurva v. *University of Delhi & Anr.* *67*

CONTEMPT OF COURTS ACT, 1971—Sec.19—Hon'ble Single Judge refused to issue notice and dismissed the Contempt Application—Appeal—Appellants contended that the Appeal is not under Sec. 19 but under the Letter Patent of High Court—Held, since under Sec.19, Contempt of Courts Act, appeal is maintainable against only an order of punishment and not order of dismissal of contempt application, and the Act does not provide for an intra Court appeal, Provisions of Letter Patent cannot be invoked to negate the statute to maintain such appeal—Further held, since an order refusing to exercise contempt jurisdiction does not determine any right, it is not a judgment, so not appealable under Letters Patent.

Dolly Kapoor & Anr. v. *Sher Singh Yadav & Ors.*.. *151*

DELHI MUNICIPAL CORPORATION ACT, 1957—Sec. 15 & 17—Election Petition—Respondent No.1 filed election petition challenging the election of appellant on the ground of corrupt practices including the appellant's act of appointing a permanent employee of MCD as polling agent—Trial Court on the basis of evidence dismissed the petition—Challenged by way of writ petition—Hon'ble Single Judge, by impugned judgment, reversed the findings of trial court and allowed the petition—Letters Patent Appeal—After analysis of evidence on record, findings of Hon'ble Single Judge set aside and petition dismissed—Held, standard of proof required to establish a charge of corrupt practice alleged in an election petition is same as that of criminal charge; in election disputes it is unsafe to accept oral evidence on its face value unless backed by incontrovertible documentary evidence; and while exercising writ jurisdiction, as against appeal, unless some perversity could be shown, the judgment of trial court should not be disturbed.

Balbir Tyagi v. *A. Dhanwanti Chandela & Anr.* *113*

DELHI POLICE ACT, 1978—Section 140—Petitioners police officers—Nishit Aggarwal/complainant made complaint in police station that he was owner of premises purchased from Laxmi Devi and that Chand Rani, Siani Devi and Bhim Singh had been threatening him and had put lock over his lock—Complaint made by Chand Rani alleging execution of sale deed in favour of Nishit to be fraudulent and that she was owner—When no action taken on complaint of Nishit, he made complaint to Commissioner of Police—Inquiry conducted by Additional DCP who submitted vide report that Laxmi Devi had sold property through registered sale deed to Nishit and that there was inaction on the part of local police in not registering complaint of Nishit—Accordingly on statement of Nishit FIR u/s 448/506/34 IPC lodged—On 22.01.09, petitioners visited premises and gave possession of premises to Nishit—Writ Petition filed by Chand Rani for quashing of FIR dismissed—Civil Suit filed by Chand Rani against Nishit dismissed—Criminal Writ Petition filed by Chand Rani against Nishit dismissed—Not being satisfied, Chand Rani filed criminal complaint before MM against Nishit and his wife u/s 200 Cr.P.C. read with Section 190 Cr.P.C.—In this complaint MM passed impugned order u/s 156 (3) Cr.P.C. directing SHO to register a case—Held, complainant/Nishit prima facie bonafide purchaser of property—Chand Rani filed suit before ADJ which was dismissed and she has not been able to prove any right, title or interest in premises—All authorities, including Commissioner of Police endorsed vigilance report that it was because of inaction of local police that no action taken against tress passers Chand Rani, Bhim Singh and others—Since Nishit had been dispossessed from premises legally owned by him, by Chand Rani and others, the act of the petitioners (Om Prakash and others) in getting the same restored to them, could not be said to be exceeding their jurisdiction or powers, but in compliance of the order of Commissioner of Police—In complaint u/s 200 Cr.P.C. Chand Rani did not disclose about filing of Criminal Writ before High Court—In Court the litigant is expected to

Supply of 417 Golden Rocker Sprayer and 100 knapsack sprayers—Respondent/plaintiff raised bill for Rs. 8,48,053/-—Appellant/defendant paid Rs. 4 lacs only leaving balance of Rs. 4,48,053/-—Letters written by respondent/plaintiff asking for payment—Payment not made—Suit filed—Appellant/defendant took the plea that 195 rocker sprayers and 45 knapsack sprayers taken back by the representative of respondent/plaintiff—Respondent/plaintiff denied the person who has taken back the sprayers to be its representative—Held—The representative was not the agent of respondent/plaintiff for receiving back the goods—Suit decreed—Aggrieved by the judgment appellant/defendant filed the regular first appeal—Held—The correspondence refers the representative as 'Sales Executive', 'our representative, he received payments—Working as commission agent, was an agent of the respondent/plaintiff—His authority was not specifically restricted in any manner—Had general authority as is clear from the course of dealing between the parties—Respondent/plaintiff is estopped from denying the existence of his actual authority—Goods taken back by him—Appeal allowed—Suit dismissed.

The Kerala Agro Industries Corporation Ltd. & Anr. v. *Beta Engineers* *1*

— Section 202—Limitation Act, 1963—Section 27—Suit for possession and mesne profits—Respondents/plaintiffs claim to be owner of property having got the same under a Will from their mother—Mother purchased the same through registered power of attorney, receipt, agreement to sell dated 17.04.1986 from Sh. Birender Kumar Jain—Sh. Birender Kumar Jain purchased the same vide registered Sale Deed dated 11.07.1966 from Smt. Raj Kumari Bhatnagar who purchased it from Delhi Housing Company vide registered sale deed dated 20.08.1959—Respondents/plaintiffs employed a chowkidar to look after the property—Committed breach of trust and forged documents—Executed document, power of attorney etc. in favour of appellants/defendants and gave

possession—Suit for injunction filed by the mother of respondent/plaintiffs against the appellants/defendants—During pendency of suit for injunctions, filed another suit for possession and mesne profits—Made statement through advocate not to dispossess the appellants/defendants without due process of law—Suit withdrawn with liberty to claim relief sought in the suit for possession and mesne profits already filed—Appellants/defendants pleaded themselves to be owners having purchased the same from Sh. Shafiq Raja vide agreement to sell, general power of attorney etc. dated 09.03.1994—Suit barred by Order 2 Rule 2 CPC—Held—Suit not barred by Order 2 Rule 2—Appellants/defendants have not proved the complete chain of title documents—Suit decreed—Aggrieved appellants/defendants filed the regular first appeal—Held—Earlier suit withdrawn with liberty to seek the relief claimed in that suit in the second Suit—Result in consolidation of two suits—The relief claimed in earlier suit got merged in the second Suit, not hit be Order 2 Rule 2—Appellants/defendants cannot be the owner unless the complete chain of title documents is proved—Complete chain of documents not proved—Respondents/plaintiffs have proved the complete chain of title documents—Appeal dismissed.

Vimla Gautam & Ors. v. *Mohini Jain & Anr.* *41*

INDIAN PENAL CODE, 1860—Section 376—Petitioner was arrested under Section 376 IPC—He raised plea of being juvenile as per School Leaving Certificate and Birth Certificate issued by MCD—His school records were got verified but his MCD certificate was not found available in MCD records—Thus, petitioner moved application under Section 7A of Act conducting ossification test to determine his juvenility—As per ossification test report his estimated age was between 19 to 20 years and on the basis of said report, learned trial Court held petitioner was not juvenile—Aggrieved by order, petitioner preferred revision urging learned Trial Court ought to have relied upon verified school certificate and should not have got conducted ossification test—Held:- Trial Court while holding

Sh. Bhagwan Singh in the year 1987 proclaimed himself to be the owner of the suit property on the basis of a Will.

Gulab Chaudhary v. *Govinder Singh Dahiya & Anr.* *134*

Imposition of costs—Relying on the case of *Ramrameshwari Devi and Others v. Nirmala Devi and Others* (2011) 8 SCC 249 wherein the Supreme Court has held that unless actual costs are imposed a dishonest litigant will take unnecessary benefit of the false litigation, cost of Rs. 25.000 was imposed on the Appellant.

Gulab Chaudhary v. *Govinder Singh Dahiya & Anr.* *134*

MOTOR VEHICLE ACT, 1988—Section 163-A—The Appellants are the parents of the deceased Sunny who died in a motor accident which occurred on 01.08.2008 impugned a judgment in MACT No. 611/2008 decided on 13.12.2010—In the Claim Petition filed before the Tribunal, it was averred that on 01.08.2008 at about 5.30 A.M. a two wheeler number DL-7S-BA-4864 met with an accident while it was being driven by Respondent No. 1 (Adarsh Kumar) and the deceased Sunny was riding as a pillion rider—The Tribunal by the impugned judgment found that the deceased himself was driving the two wheeler and Respondent No. 1 Adarsh Kumar (owner of the two wheeler) was one of the two pillion riders on the said two wheeler—Obviously, the Insurance Company indemnifies the owner on the basis of the contract of insurance where a third party is involved. Where an insurance contract provides for own damages or personal accident, the owner would be entitled to compensation in respect of the damage to the vehicle irrespective of any fault as also of the insurance amount upto the coverage in the contract in respect to the injuries received by him in an accident involving his own vehicle. Where the owner himself is a tortfeasor, he cannot claim compensation from his own insurer for a third party policy—In this case, the accident took place on account of

the neglect or default of deceased Sunny himself. His legal representatives, therefore, would not be entitled to the grant of compensation from the owner under Section 163-A of the Act also.

Usha Sharma & Anr. v. *Adarsh Kumar & Anr.* *57*

SPECIFIC RELIEF ACT, 1963—Section 12, Section 20—Agreement to sell—Place of land—Possession to be finally considered on making up of balance valuation and paying the same to respondents—Reason for uncertainty because rights of respondent over partial area of land was by general power of attorney—Hence, no title by regular sale deed—On one side of land remained no boundary wall but a partly dried pond—Valuation thus after possession gained—Respondents argued that discretionary relief not to be granted as appellant already had the complete area under the agreement to sale. Held:- No crystallisation of area or price and hence, appellant cannot be held liable to pay balance price and breach has arise—Further held:- Doctrine of clean hands inapplicable—No evidence that appellant ever had the amount of land averred—Dishonour of cheque calls for breach of contract and has no bearing on doctrine of clean hands. Denial of discretionary relief cannot be raised by respondents who are guilty of breach—Once clear that agreement to sale has been acted upon, Specific relief has to be granted—Specific performance of area in possession of appellant granted—Competent person appointed to measure exact area of land in possession of appellant as to determine balance price—Balance multiplied by forty as rough appreciation of land price in Delhi in last 33 years.

Mohinder Nath Sharma (Decd.) Thr. LR's v. Ram Kumar & Ors. *429*

INDIAN TRADE UNION ACT, 1926—Writ Petition under Article 226 of the Constitution of India for issue a Writ of Mandamus requiring the Respondent to recognize the registered trade unions in the Railways Production Units as Railway Trade Unions—Brief Facts—Respondent, a duly registered trade

union of workers of Railway Coach Factory (RCF), Kapurthala—RCF workers are treated at par with the Railway Production Units (RPUs)—In respect of Zonal Railways, the Ministry of Railway (Central) has the policy for recognition of unions based on secret ballot, this system is not available in RPUs—As per Rules for the Recognition of Service Associations of Railway Servants the Government agreed to accord official recognition to Associations of its Industrial employees, which includes the railway servant—In all Central Government Ministries and Departments including the Railways, Joint Consultative Machinery (JCM) has been set up in 1966—JCM provided that it would " supplement and not replace the facilities provided to employees to make only representations, or the associations of employees to make representation of matters concerning their respective constituent service grade etc"—In this JCM, the representatives of the recognized Unions participate on behalf of the employees in Zonal Officers—In RPUs, no system of recognition of trade unions—Only Staff Councils are allowed to represent the cause of the workers and trade unions are not permitted—Writ Petition filed—Ld. Single Judge allowed the Petition—Hence the LPA—Appellant contended that the system of Staff Council was introduced in 1954 and subsequently approved by the Cabinet, Govt. of India in the year 1967—Pursuant to the system, the appellant shows one post of Zonal Secretary belonging to each recognized association at the production units—Since its inception, the Staff Council has worked properly and efficiently—At no point of time has there been any allegation that on account of mechanism of Staff Council, genuine grievances of workmen employed in the production units have not been redressed to the entire satisfaction of the employees and in the public interest—Staff Council is comprised of members directly elected by workers themselves, to represent the grievances and interest through regular meetings with the local management at local level—Also, hold meeting with the Board once a year where policy as well as the issues of common

concern for the employees are taken up, discussed threadbare and ways and means are devised to sort them out amicably and peacefully—Held:- No doubt, recognition of Union is not a right—It is the prerogative of the employer to recognize a Union or not—In the Trade Union Act also, no provision for recognition—It is also well established law that when the Government introduced the system of recognition, it was well within the rights of the Government to impose conditions for recognition—Such conditions are not to be treated as unreasonable restriction within the meaning of Article 19(4) of the Constitution—The question, however, as rightly delineated by the learned Single Judge is that when the rules of recognition are provided for zonal railways, whether excluding the RPUs from the purview thereof would amount to discrimination and would be impermissible under Article 14 of the Constitution—In order to justify such an exclusion of RPUs, the Government is required to demonstrate that there is a reasonable classification between RPUs on the one hand and Zonal Railways on the other hand and this classification is based in intelligible differentia having nexus with the objective sought to be achieved—Appellant has not been able to provide any satisfactory answer for this classification which appears to be irrational and arbitrary—Claim of the appellant that Staff Councils have worked properly, efficiently, satisfactorily or in public interest and have addressed genuine grievance of the workers is refuted by the respondent union—It is pointed out that such Staff Councils which existed in Zonal Railways as well were abolished long ago but continue to remain in Railway Production Units—This is so even when it enjoys the same status as the Railway Workshops where Staff Council system has been abolished—No valid reason is forthcoming as to why such Staff Council are abolished in the Railway Zonal Office but continue to remain in RPUs—Respondent union as well as its IAIRF have consistently been protesting against the dissatisfactory and improper working of the Staff Council for decades and have raised such issues from time to time—Even the Staff Council at the RCF Kapurthala itself recorded

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THE KERALA AGRO INDUSTRIES CORPORATION LTD. & ANR. ....APPELLANTS

VERSUS

BETA ENGINEERS ....RESPONDENT

(VALMIKI J. MEHTA, J.)

RFA NO. : 418/2003 DATE OF DECISION: 09.01.2012

Code of Civil Procedure, 1908—Indian Contract Act, 1872—Section 182, 186, 187 and 188—Suit for recovery of Rs. 4,99,500/- with interest—Supply of 417 Golden Rocker Sprayer and 100 knapsack sprayers—Respondent/plaintiff raised bill for Rs. 8,48,053/-—Appellant/defendant paid Rs. 4 lacs only leaving balance of Rs. 4,48,053/-—Letters written by respondent/plaintiff asking for payment—Payment not made—Suit filed—Appellant/defendant took the plea that 195 rocker sprayers and 45 knapsack sprayers taken back by the representative of respondent/plaintiff—Respondent/plaintiff denied the person who has taken back the sprayers to be its representative—Held—The representative was not the agent of respondent/plaintiff for receiving back the goods—Suit decreed—Aggrieved by the judgment appellant/defendant filed the regular first appeal—Held—The correspondence refers the representative as 'Sales Executive', 'our representative, he received payments—Working as commission agent, was an agent of the respondent/plaintiff—His authority was not specifically restricted in any manner—Had general authority as is clear from the course of dealing between the parties—Respondent/plaintiff is estopped from denying the existence of his actual authority—Goods taken back by him—Appeal allowed—Suit dismissed.

A reading of the aforesaid provisions shows that the relationship of principal and agent can be express or implied or partly express or partly implied. The relationship of principal and agent therefore can also arise on account of the principal and agent conducting themselves as such. Once a person is taken as an agent unless therefore there are words restricting the authority of the agent, ordinarily an agent would be entitled to represent the principal within the ordinary scope of business conducted by the agent on behalf of the principal. At this stage it is necessary to refer to some of the relevant observations of the Supreme Court on the aspect of relationship of principal and agent as contained in the judgment reported as **Chairman, Life Insurance Corpn. and Ors. Vs. Rajiv Kumar Bhasker** (2005) 6 SCC 188. The summary of different paragraphs of this judgment pertaining to relationship of principal and agent are contained in head note D of this judgment which reads as under:

> "The relationship of principal and agent can only be established by the consent of the principal and the agent. **The consent need not necessarily be to the relationship of principal and agent itself.** The "principal" and "agent" will be held to have consented if they have agreed to a state of facts on which the law imposes the consequences which result from agency, **even if they do not recognize it themselves and even if they have professed to disclaim it. Nor is the use of or omission of the word "agent" conclusive.** The consent must, however, have been given by each of them, either expressly or by implication from their words and conduct. Agency is a legal concept which is employed by the Court when it becomes necessary to explain and resolve the problems created by certain fact situations. When the existence of an agency relationship would help to decide an individual problem,

and the facts permit a court to conclude that such relationship existed at a material time, then whether or not any express or implied consent to the creation of an agency may have been given by one party to another, the Court is entitled to conclude that such relationship was in existence at the time, and for the purpose in question.

Ostensible or apparent authority comes about where the principal, by words or conduct, has represented that the agent has the requisite actual authority, and the party dealing with the agent has entered into a contract with him in reliance on that representation. The principal in these circumstances is stopped from denying that actua authority existed. In the commonly encountered case, the ostensible authority is general in character, arising when the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question. **Ostensible general authority may also arise where the agent has had a course of dealing with a particular contractor and the principal has acquiesced in this course of dealing and honoured transactions arising out of it.**

xxxx xxxx xxxx xxxx" (underlining added)

A reading of the ratio laid down by the Supreme Court in the case of **Rajiv Kumar Bhasker** (supra) shows that even if principal and agent deny that they are having the relationship of principal and agent, they will have to be taken as principal and agent if they are held to have consented and acted as per a state of facts which imposes the consequences of relationship of principal and agent, and it is not necessary that the agent is described as an 'agent.. The Supreme Court clearly observes that when the facts of a case permit to conclude that there existed a relationship of principal and

agent between two persons, then whether or not any express or implied consent to the creation of an agency may have been given by one party to another, a Court is still entitled to conclude that relationship of an agency was in existence between a principal and an agent. A principal by ostensible words of conduct can represent that agent has the requisite actual authority and the person dealing with the agent can place reliance on such a representation, and whereupon the principal is estopped from denying that actual authority vests in an agent, to act as an agent. The ostensible general authority can also arise from a course of dealing. **(Para 8)**

Important Issue Involved: (A) The relationship of principal and agent can be express or implied or partly express or partly implied. The relationship of principal and agent therefore can also arise on account of theirs conducting themselves as such. Once a person is taken as an agent unless therefore, there are words restricting the authority of the agent ordinarily an agent would be entitled to represent the principal within the ordinary scope of business conducted by the agent on behalf of the principal.

(B) Even if the principal and agent deny that they are having such relationship, they will have to be taken as principal and agent it they are held to have consented and acted as per a state of facts which imposes the consequences of relationship of principal and agent and it is not necessary that the agent is described as an 'agent'.

(C) when the facts of a case permit to conclude that there existed a relationship of principal and agent between two persons, then whether or not any express or implied consent to the creation of an agency may have been given by one party to another, court is still entitled to conclude that relationship of agency was in existence between them.

(D) A principal by ostensible words of conduct can represent that agent has the requisite actual authority and the person dealing with the agent can place reliance on such a representation, and whereupon the principal is estopped from denying that actual authority vests in an agent, as an agent. The ostensible general authority can also arise from a course of dealing.

[V.K. Gu]

APPEARANCES:

FOR THE APPELLANTS : Mr. C.N. Sreekumar, Advocate with Ms. Resmitha R. Chauhan, Advocate.

FOR THE RESPONDENT : Mr. B.S. Arora, Advocate.

CASES REFERRED TO:

1. *Chairman, Life Insurance Corpn. and Ors.* vs. *Rajiv Kumar Bhasker* (2005) 6 SCC 188.
2. *State of Orissa* vs. *United India Insurance Co. Ltd.,* AIR 1997 SC 2671.
3. *Kamal Singh Dugar* vs. *Corporated Engineers (India) Pvt. Ltd.,* AIR 1963 Calcutta 464.
4. *Mohd. Ekram & Ors.* vs. *Union of India,* AIR 1959 Patna 337.

RESULT: Appeal accepted.

VALMIKI J. MEHTA, J.

1. This Regular First Appeal filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment of the trial Court dated 30.1.2003 decreeing the suit of the respondent/plaintiff for recovery of ' 4,99,500/- with pendente lite and future interest @ 24% per annum.

2. The facts of the case are that the respondent/plaintiff filed the subject suit for recovery of monies against the appellants/defendants for having supplied a total of 417 numbers of Golden Rocker Sprayers and 100 numbers of knapsack sprayers. The respondent/plaintiff is a manufacturer and supplier of Agriculture, Anit-Malaria and other pest

control sprayers and spare parts. Originally, the order which the respondent/plaintiff claimed was placed upon it on 3.12.1999, was for 300 golden rocker sprayers 100 numbers of knapsack sprayers, however, subsequently the quantity of Golden Rocker Sprayers was increased to 400 numbers vide telegram dated 27.12.1999 which was said to have been sent by the appellants/defendants and thereafter to 417 numbers. The respondent/plaintiff claimed that a total amount of Rs. 8,48,053/- became due from the appellants/defendants and for which the bill bearing No.1558 dated 28.12.1999 was sent to the appellants/defendants. The appellants/defendants paid a sum of Rs. 4 lacs, leaving a balance of Rs. 4, 48,053/- and for recovery of which the subject suit was filed.

3. The appellant No.1/defendant, M/s. Kerala Agro Industries, Corporation Ltd., a Kerala State Government undertaking, contested the suit and the basic point of defence was that out of the total sprayers supplied, the representative of the respondent/plaintiff one Mr. M.A. Jose had taken back 195 numbers of rocker sprayers and 45 numbers of knapsack sprayers and therefore unless credit is given for these sprayers having taken back, no payment could be made. In fact, considering that out of the total bill of Rs. 8,48,053/-, a sum of Rs. 4 lacs was already paid, it was urged before this Court that a very negligent amount if at all would remain due to the respondent/plaintiff once the value for 195 numbers of Golden Rocker Sprayers and 45 numbers of knapsack sprayers is reduced from the claim of the respondent/plaintiff.

4. The main issue which was argued before the trial Court was with respect to whether Mr. M.A. Jose was the agent of the respondent/plaintiff and whether he had received back 195 numbers of Golden Rocker Sprayers and 45 numbers of knapsack sprayers from the appellants/defendants. The relevant issue, in this regard, which was framed by the trial Court was modified as issue No.3 which reads as under:-

"MODIFIED ISSUE NO.3

"Whether Sh. M.A. Jose was authorized by the plaintiff to collect sprayers back from the defendant on behalf of the plaintiff and the said goods were returned by the defendant to him as alleged in the Written Statement? If so, to what effect. OPD"

5. The trial Court has held that Mr. M.A. Jose was not the agent of the respondent/plaintiff for receiving back of the goods. It is also held

that Mr. M.A. Jose acted in excess of authority in receiving back the goods and therefore the respondent/plaintiff was not liable. The relevant observations, made by the trial Court, in this regard read as under:-

> " Perusal of the telegram Ex.P.4 shows that if has been sent by Mr. S.C. Bose i.e. DW.1 Divisional Engineer of the defendant company. The said telegram is not sent by Mr. Jose as is being claimed by the defendants. So it is proved that the goods in question were sent by the plaintiff to the defendants in pursuance of the order Ex.P.3 followed by enhanced order vide telegram Ex.P.4 dated 27.12.1998. As already mentioned above receipts of goods as mentioned as mentioned in the Bill Ex.DW.1/p.1 is not disputed by the defendants in any manner whatsoever. However, the plea of the defendants is that they had placed an order for supply of 300 Rocker Sprayers and 100 Knapsack Sprayers 9 litre capacity, but the plaintiff sent excess supply. Their plea is that the excess goods were received from the plaintiff vide the said bill with an understanding between the defendants and Mr. Jose, Local Representative of the plaintiff that Mr. Jose would take back part goods and so that goods were returned to Mr. Jose for and on behalf of the plaintiff company. It is not disputed that the plaintiff had sent the goods in question to the defendants vide Bill Ex.DW.1/P.1. As mentioned in the quotation Ex.P.2 the orders taken directly or through the Representative of the plaintiff were subject to confirmation by the plaintiff. The plaintiff vide their letter Ex.D.1/PX had sought confirmation from the defendants regarding order for enhanced number of goods. The said letter is duly admitted by the defendants during admission/denial of documents vide endorsement dated 09.7.2002. The defendants vide telegram Ex.P.4 which is dated 27.12.99 asked the plaintiff to send the enhanced number of goods as mentioned in the telegram. As already mentioned above, the said telegram is duly proved to have been sent by the defendants to the plaintiff. It is further shows that the confirmation for supply of enchanced number of goods sought by the plaintiff vide their letter Ex.D1-PX was sent by the defendants to the plaintiff vide telegram Ex.P.4. That means the concluded contract came into existence between the parties vide telegram Ex.P.4. This further shows that the terms and conditions as mentioned

in the quotations Ex.P.2 has been duly accepted by the defendants . As per the terms and conditions contained therein the goods once sold were not to be taken back by the plaintiff. There is no clause in that contract under which the defendants could return part of goods to Mr. M.A. Jose, a Representative of the plaintiff. **There is nothing on record by the defendants to prove that the plaintiff vide any written communications or by their conduct representations made the defendants to believe that Mr. M.A. Jose was authorized to enter into any agreement with the defendant for an on their behalf and to take back any part of goods from the defendants for and on behalf of the plaintiff.** The terms and conditions contained in Ex.P.2. go to show that even the orders received through the Representative, were subject to confirmation by the plaintiff and so there is no question of Mr. M.A. Jose being authorized to take part of goods supplied by the plaintiff to the defendants vide Bill Ex.DW.1/P.1 in pursuance of a concluded contract between the plaintiff and the defendants.

Besides, the plaintiff has placed on record the communications dated 29.12.1999, 21.1.2000 and 01.03.2000. Letter dated 29.12.1999 another letter dated 21.1.2000 and the Fax message dated 01.3.2000 have been admitted by the defendants during admission/denial of documents. They did not dispute the contents of the said documents at any point of time, and therefore, can be read in evidence against the defendants. Vide letter dated 29.12.1999, the plaintiff had requested the defendants to release the payment for the goods supplied by them to the defendants. Similarly, vide letter dated 21.1.2000, the plaintiff while referring to invoice No.1558 Ex.DW.1/P.1 again asked for payment from the defendants for the goods supplied. Similarly, letter dated 01.3.2000 has been admitted by the defendants during admission/ denial of the documents. Its contains where also not disputed by the defendants and, therefore, the document and its contents are deemed to have been proved by the defendants. Vide this letter also, the plaintiff has reiterated their demands for the goods supplied vide invoice/bill No.1558 which is Ex.DW.1/P.1. As borne out from the invoice/bill Ex.DW.1/P.1 copy of which has also been admitted by the defendants and Mark Ex.P.6 shows

that the goods were received by the defendants from the plaintiff. However, the defendants did not send reply to any of the communications dated 29.12.1999, 21.1.2000 and 01.3.2000 disputing their liability of the entire amount of the bill i.e. Rs.8,48,053/- on the plea that they had returned back part of goods to Mr. M.A. Jose under an expressed or implied authority by the plaintiff to him. The defendants brought the fact regarding return of part of goods to Mr. M.A. Jose for the first time vide their reply Ex.P.10/D.A. in reply to the letter dated 06.6.2000 (Ex.P.9) sent by the plaintiff. Vide letter dated 06.6.2000 (Ex.P.9) the plaintiff had informed the defendants about the non-payment of the full amount of Rs.8,48,053/- against bill No.1558 dated 28.12.1999. Admittedly, the said letter was received by the defendant and was replied by the defendants vide letter dated 22.6.2000 which is Ex.P.10/D.A. It was vide this reply dated 22.6.2000 that the defendant informed the plaintiff for the first time that Mr. M.A. Jose Representative of the plaintiff had collected back 215 Rocker Sprayers and 64 Knapsack Sprayers from them till 14.2.2000. Non information on the part of the defendant in that regard despite receipt of admitted letter dated 21.1.2000 and 01.3.2000 (since admitted by the defendants) which were received by the defendants subsequent to alleged taking back of aforesaid quantity of Rocker Sprayers and Knapsack Sprayers by Mr. M.A. Jose is not explained. The defendants did not inform the plaintiff for the reasons best known to them. This further goes to show that had the defendants given back part of goods to Mr. M.A. Jose at the instructions or under the authority of plaintiff, the defendants would have certainly informed the plaintiff in that regard. Their silence in that regard for a period of almost six months leads to irresistible inference that they did not do so as they knew very well that they had given back a part of goods admittedly received against bill No. 1558 dated 28.12.1999, as per the understanding between the defendants and Mr. Jose and not at the instructions of the plaintiff either expressed or implied authority of the plaintiff for that purpose.

Besides, in reply Ex.P.10/D.A dated 22.6.2000 by the defendant to the plaintiff's demand of balance payment of Rs.4,48,053/- against the aforesaid bill No. 1558 dated 28.12.1999 out of the

total bill amount of Rs.8,48,053/-. The defendant did not allege that 215 Rocker Sprayers and 65 Knapsack Sprayers out of those received against the aforesaid bills were returned to Mr. Jose entire under any written authority by the plaintiff in his favour or that the plaintiff had at any point of time acted so as to make the defendants believe that the plaintiff has authorized Mr. Jose to collect back the said goods from the defendants. These facts go to show that the plea of the defendant that Mr. M.A. Jose had been given back 215 Rocker Sprayers and 65 Knapsack Sprayers out of the goods admittedly received against the bill No. 1558 dated 28.12.1999 under any expressed or implied authority by the plaintiff in favour of MR. Jose, in an afterthought. This plea of the defendants also cannot be believed in view of accepted terms and conditions of the concluded contract between the plaintiff and the defendants according to which goods once sold, could not be returned back by the defendants. The above evidence goes to show that the defendant has failed to prove that Mr. M.A. Jose was authorized to receive back 215 Rocker Sprayers and 65 Knapsack Sprayers out of the said articles received vide Bill No. 1558 dated 28.12.1999, for and on behalf of the plaintiff. Issue is accordingly decided against the defendants and in favour of the plaintiff.

xxxx xxxx xxxx xxxx

The proposition of law laid down by the Hon'ble Calcutta High Court, by Hon'ble Patna High Court and by Hon'ble Apex Court in the above noted three cases is squarely applicable to the facts of this case. In the light of the findings on Issue No.3 above, it is held that by operation of Section 237 of the Contract Act, the plaintiff is not bound by the aforesaid acts of Mr. M.A. Jose as the defendant has failed to prove that the plaintiff has by his words or conduct induced the defendants to believe that the alleged acts of Mr. M.A. Jose were within the scope of his authority given by the plaintiff. Therefore, the return of 215 Rocker Sprayers and 65 Knapsack Sprayers by the defendants to Mr. Jose assuming the same were received back by Mr. M.A. Jose is no answer to the plaintiff's claim in the suit. Hence, the plaintiff is entitled to recover a principle sum of Rs.4,48,053/- along with the interest of Rs.51,447/- (total Rs.4,99,500/-) till

the date of institution of the suit. Issue is accordingly decided in favour of the plaintiff and against the defendants." (underlining added)

6. A reading of the aforesaid paras of the impugned judgment shows that the trial Court arrived at a conclusion that Mr. M.A. Jose was not the authorized agent and he acted in excess of the authority, consequently the respondent/plaintiff is not bound by the action of Mr. M.A. Jose in receiving back 195 numbers of rocker sprayers and 45 numbers of knapsack sprayers. This conclusion was arrived at firstly on the ground that there was no term and condition in quotation, Ex.P2 dated 29.4.1999 that Mr. M.A. Jose could receive back any goods which were sold by the respondent/plaintiff to the appellants/defendants. Another reason for arriving at the conclusion that Mr. M.A. Jose was not the agent was that because as per the trial Court, there was nothing on record to prove that the respondent/plaintiff by any written communication or by its conduct/representation made the appellants/defendants believe that Mr. M.A. Jose was authorized to take back the goods. Yet another reason for holding that the case of the appellants/defendants is not correct because it was held by the trial Court that respondent/plaintiff wrote letters dated 29.12.1999, 21.1.2000 and 1.3.2000 asking for payment, and to which letters no disputes were raised that payment was not liable to be made on account of goods having been returned to the respondent/plaintiff through Mr. M.A. Jose.

7. I am afraid that the impugned judgment has wholly mis-construed the relevant documents which have been filed and exhibited in the trial Court. In fact, the trial Court has committed clear cut illegality in avoiding to make reference to the various relevant portions of the documents/correspondence existing on record. Once we look at the relevant portions of the documents and correspondence on record, it becomes clear that Mr. M.A. Jose was in fact the agent of the respondent/plaintiff and therefore the appellant/defendant was fully justified in taking Mr. M.A. Jose as the agent of the respondent/plaintiff, who could receive back the goods. Before I refer to the documents/correspondence on record, it is relevant first to refer to Sections 182, 186, 187 and 188 of the Contract Act, 1872 and which Sections read as under:-

"182. **'Agent' and 'principal' defined.** – An 'agent' is a person employed to do any act for another, or to represent another in

dealings with third person. The person for whom such act is done, or who is so represented, is called the 'principal'.

186. **Agent's authority may be expressed or implied** – The authority of an agent may be expressed or implied.

187. **Definitions of express and implied authority** – An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

188. **Extent of agent's authority** – An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to such act. An agent having an authority to carry on a business, has authority to do every lawful thing necessary for the purpose, or usually done in the course, of conducting such business."

8. A reading of the aforesaid provisions shows that the relationship of principal and agent can be express or implied or partly express or partly implied. The relationship of principal and agent therefore can also arise on account of the principal and agent conducting themselves as such. Once a person is taken as an agent unless therefore there are words restricting the authority of the agent, ordinarily an agent would be entitled to represent the principal within the ordinary scope of business conducted by the agent on behalf of the principal. At this stage it is necessary to refer to some of the relevant observations of the Supreme Court on the aspect of relationship of principal and agent as contained in the judgment reported as **Chairman, Life Insurance Corpn. and Ors. Vs. Rajiv Kumar Bhasker** (2005) 6 SCC 188. The summary of different paragraphs of this judgment pertaining to relationship of principal and agent are contained in head note D of this judgment which reads as under:

"The relationship of principal and agent can only be established by the consent of the principal and the agent. **The consent need not necessarily be to the relationship of principal and agent itself.** The "principal" and "agent" will be held to have consented if they have agreed to a state of facts on which the law imposes

the consequences which result from agency, **even if they do not recognize it themselves and even if they have professed to disclaim it. Nor is the use of or omission of the word "agent" conclusive.** The consent must, however, have been given by each of them, either expressly or by implication from their words and conduct. Agency is a legal concept which is employed by the Court when it becomes necessary to explain and resolve the problems created by certain fact situations. When the existence of an agency relationship would help to decide an individual problem, and the facts permit a court to conclude that such relationship existed at a material time, then whether or not any express or implied consent to the creation of an agency may have been given by one party to another, the Court is entitled to conclude that such relationship was in existence at the time, and for the purpose in question.

Ostensible or apparent authority comes about where the principal, by words or conduct, has represented that the agent has the requisite actual authority, and the party dealing with the agent has entered into a contract with him in reliance on that representation. The principal in these circumstances is stopped from denying that actua authority existed. In the commonly encountered case, the ostensible authority is general in character, arising when the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question. **Ostensible general authority may also arise where the agent has had a course of dealing with a particular contractor and the principal has acquiesced in this course of dealing and honoured transactions arising out of it.**

xxxx xxxx xxxx xxxx" (underlining added)

A reading of the ratio laid down by the Supreme Court in the case of **Rajiv Kumar Bhasker** (supra) shows that even if principal and agent deny that they are having the relationship of principal and agent, they will have to be taken as principal and agent if they are held to have consented and acted as per a state of facts which imposes the consequences of relationship of principal and agent, and it is not necessary that the agent

is described as an 'agent'. The Supreme Court clearly observes that when the facts of a case permit to conclude that there existed a relationship of principal and agent between two persons, then whether or not any express or implied consent to the creation of an agency may have been given by one party to another, a Court is still entitled to conclude that relationship of an agency was in existence between a principal and an agent. A principal by ostensible words of conduct can represent that agent has the requisite actual authority and the person dealing with the agent can place reliance on such a representation, and whereupon the principal is estopped from denying that actual authority vests in an agent, to act as an agent. The ostensible general authority can also arise from a course of dealing.

9. In view of the aforesaid legal position, let us see the facts which have emerged on record. It is also relevant to note before referring to the actual documents/correspondence on record that the relationship between the parties for supplying of sprayers did not arise for the first time under the subject order dated 3.12.1999, but existed from over a year earlier inasmuch as other orders were also placed upon the respondent/plaintiff by the appellants/defendants, and with respect to which payments were made and there are no disputes with respect to the earlier supplies. With this preface, let us see the documents/correspondence on record as to whether the same bring out a course of dealing giving ostensible general authority to an agent whereby the principal can be said to have represented that the agent is duly authorized to act on behalf of the principal/respondent-plaintiff.

10. The first letter necessary to be referred in this regard is the letter dated 18.11.1998 (Ex.DW1/PZ) sent by the respondent/plaintiff to the appellants/defendants. This letter is marked by the respondent/plaintiff to Mr. M.A. Jose specifically referring him as a *Sales Executive*. Then there is the letter dated 15.12.1999 (Ex.D1/PX), making reference to the subject order dated 3.12.1999 which specifically refers to Mr. M.A. Jose as "our representative Mr. Jose". At this stage, it must be kept in mind that the Supreme Court in **Rajiv Kumar Bhasker's** case (supra) has held that an agent need not be called by the term 'agent', and thus 'representative' surely is an agent. Copy of this letter dated 15.12.1999 is in fact marked to Mr. Jose. It was Mr. M.A. Jose who received payments on behalf of the respondent/plaintiff and one such payment is

evidenced by the receipt dated 15.3.2000, Ex.P8/DA, and which was a receipt showing that Mr. M.A.Jose had received a demand draft of Rs. 1,73,077/-. There is in fact also a letter written by Mr. M.A.Jose on the letter-head of the respondent/plaintiff and which is dated 12.1.2000 (Ex.DW1/5) asking for handing over back 35 numbers of Rocker sprayers. That the requisite numbers of Rocker sprayers and Knapsack sprayers as stated by the appellants/defendants have been given back to Mr. M. A. Jose is established beyond doubt by means of the delivery challans duly receipted by Mr. M. A. Jose and which are dated 12.1.2000 (Ex.DW1/6), 2.2.2000 (Ex.DW1/8), 14.2.2000 (Ex.DW1/10) and 15.3.2000 (Ex.DW1/12). The respondent/plaintiff in fact in its plaint also admits that Sh. M. A. Jose was working for the respondent/plaintiff on commission i.e. as a commission agent for the respondent/plaintiff. The appellants/defendants have also pleaded, and which pleadings have been proved by the deposition of its witness, Sh. G. Subhash Chandra Bose, DW1, that the appellants/defendants have always been consistently dealing with the respondent/plaintiff only through Mr. M. A. Jose and such course of dealings included placing of orders upon the respondent/plaintiff through Mr. M.A.Jose, an aspect admitted by the respondent/plaintiff in the letter dated 15.12.1999, Ex.P5/DA. This witness DW1 has also deposed with respect to goods in question being received by the appellants/ defendants through Mr.M.A.Jose and also making of payment to Mr. M. A. Jose.

11. In my opinion, in the face of the aforesaid documentary evidence being the plaint where the respondent/plaintiff admits that Mr. M.A.Jose was working on commission with the respondent/plaintiff, i.e. as a commission agent, the specific admission in the letter dated 15.12.1999, Ex.P5/DA that Mr. M.A.Jose was their representative by stating "our representative Mr. Jose" and copy of this letter is marked to Mr. Jose, the fact that Mr. Jose received payment on behalf of the respondent/ plaintiff vide Ex.P8/DA dated 15.3.2000, in my opinion, leaves no manner of doubt that Mr. Jose was in fact an agent acting for and on behalf of the respondent/plaintiff. Surely, if "a representative", a term mentioned in the letter dated 15.12.1999, Ex.P5/DA and by which the subject order was placed, is not an agent then what else is a representative. A representative is indeed a very wide term and such representative can, therefore, unless the scope of authority is specifically curtailed, without doubt, would have led the appellants/defendants to believe that the

appellants/defendants could even return the goods to the said agent, Mr. M. A. Jose. Any doubt as to the complete authority of the agent, Mr. M. A. Jose to act for and on behalf of the respondent/plaintiff is clear from the course of dealing including of Mr. M. A. Jose having received the payment as evidenced by Ex.P8/DA dated 15.3.2000. Though, the respondent/plaintiff has conveniently chosen to deny the document being the letter dated 12.1.2000, Ex.DW1/5, and which is a letter on the letter-head of the respondent/plaintiff by which Mr. M.A.Jose took back 35 numbers of Rocker sprayers, in my opinion, such a convenient denial cannot take away the validity and effect of this letter dated 12.1.2000. Whatever doubt remains becomes clear from the document being the letter dated 1.7.2000, Ex.DW1/13, and at the back of which, are contained the minutes of the meeting when the brother of the partner of the respondent/plaintiff, one Sh. Hari Prakash visited the office of the appellants/defendants. These minutes of meeting clearly show that it is Mr. M. A. Jose who took Mr. Hari Prakash to the office of the appellants/ defendants and the appellants/defendants have never dealt with anyone else except Mr. Jose. The presence of Mr. Jose when this meeting took place on 3.7.2000 becomes clear from the endorsement in Hindi written by Sh. Hari Prakash on Ex.DW1/12 which states that he has heard both the parties, i.e. the appellants./defendants. representative on one hand and Mr. M. A. Jose on the other.

12. In my opinion, what appears from the facts of the present case is that either a fraud is sought to be perpetrated on the appellants/ defendants by the respondent/plaintiff along with its representative, Mr. M.A.Jose, or more probably the respondent/plaintiff has fallen out with this agent, Mr. M.A.Jose who had received back 195 numbers of Rocker sprayers and 45 numbers of Knapsack sprayers from the appellants/ defendants. In fact, in my opinion, it can be said that there is a fraud being played upon the appellants/defendants by the respondent/plaintiff along with Mr. M.A.Jose because in the cross-examination of the witness of the respondent/plaintiff , Sh.Anil Kumar, PW1, this witness in categorical terms admitted on 1.11.2002 that the respondent/plaintiff has taken no action whatever against Mr. M.A.Jose for taking back the goods without instructions. Surely, once it came to light that Mr. M.A.Jose had received sprayers of a huge amount of over Rs. 4,00,000/-, then surely, if there is the taking of these sprayers without authority of the respondent/plaintiff, then, the respondent/plaintiff surely would have sent

at least notices and complaints to Mr. M. A. Jose mentioning of his illegal conduct and fraud being played, and possibly even file a case (civil or criminal) for fraud, however admittedly no such thing was done by the respondent/plaintiff and entitling the drawing of conclusion of a possible collusion for the purpose of committing fraud by the respondent/plaintiff along with Mr. M. A. Jose on the appellants/defendants. Even if there is no issue of fraud, possibly, it appears that there could have been certain dues of the respondent/plaintiff to Mr. M. A. Jose, and therefore in spite of Mr. M. A. Jose allegedly having illegally taken back sprayers of huge value of over Rs. 4,00,000/-, however, no action whatsoever was taken against Mr. M. A. Jose possibly because of certain dues which could have existed of the respondent/plaintiff towards Mr. M. A. Jose.

13. Learned counsel for the respondent/plaintiff laid great stress on the fact that in Ex.P2 dated 29.4.1999 it is specifically mentioned that goods once sold shall not be taken back under any circumstances, and therefore, Mr. M.A.Jose had no right to receive back the goods. I really fail to understand his argument because once goods are sold, surely it could have been specifically agreed between the respondent/plaintiff and the appellants/defendants for return of certain goods, and if a principal can agree to an alteration of the term of the supply, surely an agent could also have done so. In addition, I may also mention that the order dated 3.12.1999, and reflected through the respondent's/plaintiff's letter dated 15.12.1999, Ex.P5/DA, does not talk of contractual relationship with respect to this earlier terms and conditions contained in Ex.P2 dated 29.4.1999 and which have specifically not been incorporated in the contract dated 3.12.1999/15.12.1999.

14. Learned counsel for the respondent/plaintiff also placed reliance upon three judgments reports as **Mohd. Ekram & Ors. vs. Union of India,** AIR 1959 Patna 337; **Kamal Singh Dugar vs. Corporated Engineers (India) Pvt. Ltd.,** AIR 1963 Calcutta 464 and **State of Orissa vs. United India Insurance Co. Ltd.,** AIR 1997 SC 2671 in support of the proposition that when the agent acts beyond the scope of his authority including by committing a fraud, the principal will not be liable. In my opinion, all these judgments are based on the assumption that Mr.M.A.Jose acted beyond the scope of his authority, however, before these judgments can apply, it was necessary to prove that the authority/agency of Mr. M.A.Jose was specifically restricted to not receiving back the goods, and which was duly brought to the notice of

the appellant/defendant, however, I have already referred to in detail above respondent/plaintiff itself referring to Mr. M.A.Jose as their representative or commission agent, and which terms are wide terms to show complete agency without any restriction of authority. That there was no restriction of authority becomes clear also from the course of dealing between the parties through Mr. M.A.Jose, and as per which course of dealing, Mr. M.A.Jose not only supplied these sprayers to the appellants/defendants, but in fact received payments with respect to the same. The judgments which are therefore cited on behalf respondent/laintiff have no application to the facts of the case. In the **Mohd. Ekra & Ors.**(supra) case relied upon, the admitted position was that the railways re-booked the consignment without expressed authority, i.e. the agent was found to have acted beyond authority, and so is the position in the other cases of **Kamal Singh Dugar** (supra) and **State of Orissa** (supra). The judgments therefore cited on behalf of the respondent/plaintiff have no application to the facts of the present case.

15. In my opinion, the trial Court has drawn a wrong conclusion by holding that payments were due because the appellants/defendants failed to reply to the letters dated 29.12.1999, 21.1.2000 and 1.3.2000 stating that sprayers were returned to Mr. M.A. Jose, and which is faulty inasmuch as it is rightly pointed out by the learned counsel for the appellants, that during this period the aforesaid letters were written, the appellant/defendant was in fact returning the goods to Sh. M.A. Jose vide Ex.DW1/6 dated 12.1.2000, DW1/8 dated 2.2.2000 and DW1/10 dated 14.2.2000 and DW1/12 dated 15.3.2000, and therefore, only after the goods were returned, would there have arisen the occasion of stating that the total amount of sprayers returned were of a particular number and only whereafter would the liability have been crystallized for payment under the particular number of sprayers supplied. At the very first opportunity once the fraud came to light, the appellants/defendants wrote the letter dated 1.7.2000 detailing the fraud being played. It is this letter which also contains the minutes of meeting between the representative of the appellants/defendants, Sh. Hari Kishan- brother of partner of respondent/plaintiff and Mr. M.A. Jose. This letter dated 1.7.2000 pithily brings out the fraud being played upon the appellants/defendants and therefore this letter is reproduced as under:-

"KTR/S/58F/949

M/s. Beta Engineers,
1534, Mamurpur,
Narela, Delhi – 110 040

REGIONAL
OFFICE,
NEELESWARAM.
P.O. KOTTARAKARA
– 691 506.
PHONE : 454740
DATE: 1-7-2000.

Sirs,

Sub : Supply of Sprayers – Settlement of pending bills.

Ref: Your Lr. No.BE/06/2000/291 dt. 29-6-2000.

This is to acknowledge the receipt of your letter under reference. We may inform you the following:

1. We have been doing the business of your products in good faith through your representative, Mr. M.A. Jose. He used to collect all payments in your favour and also collect the orders from this office on your behalf. Even the last payment Rs.4,00,000/- (Rupees Four lakhs only) also has been collected by Mr. Jose.

2. Our supply order KTR/S/58F/1977 dt. 3-12-99 was also collected by Mr. Jose on the understanding that the consignment could be sent through direct truck only if an order of 400 pieces is given. It was also agreed that he will manage to dispose off the excess quantities, if any, on his own arrangement.

3. You have also confirmed that you have received the confirmation to supply 400 Rocker Sprayers, 100 Knapsack Sprayers and other items through your representatives, Mr. Jose, vide your Lr. No.BE/12/99/1119 dt. 15-12-99.

4. We regret to inform you that the telegram dt. 27-12-99 (as seen from the photocopy enclosed with your above letter), is not seen sent either by the undersigned or from this office. You may kindly trace the origin of the telegram which might also have been sent by your representative, Mr. Jose.

5. It is a matter of great concern to us that even though all the transactions on your behalf were being done through your

authorized representative, Mr. M.A. Jose, you have now disowned him through your letter under reference.

6. However, on receipt of your above letter by 2 PM on 1/7/2000, I have booked a trunk call to 0482 252307 to contact, Mr. Jose at his residence. Unfortunately I could not get Mr. Jose as he has gone to Kottayam to receive one of your managers who is expected to arrive at Kottayam through K.K. express as told by the father of Mr. Jose who attended the phone. I have also passed the message such that Mr. Jose or the Manager of the Beta Engineers may contact me back immediately on their arrival.

7. As explained above being the fact, we, The Kerala Agro Industries Corpn. Ltd. strongly feel that there is a small of fraud either on your part or on your representative's part. Under this circumstances, in order to settle this issue, we request that you may either depute one of your authorities along with Mr. Jose to this office to discuss the matter in detail and to find a solution, or send us the credit note as demanded vide our Lr. No.KTR/S/58F/883 dt. 22-6-2000.

Thanking you,

Yours faithfully,

FOR THE KERALA AGRO INDUSTRIES CORPN. LTD.

Sd/-
REGIONAL ENGINEER

Copy to: 1. Sri M.S. Jose,
Kunchirakkattu,
Kadaplamattam
Kortayam – 686 571.

2. The Engineer (Op.), H.O., for information."

In my opinion, therefore, not too much weight can be attached to the appellants/defendants not replying to the letters dated 29.12.1999, 21.1.2000 and 1.3.2000.

16. A civil case is decided on balance of probabilities. A civil Court puts all the evidence which have been led in a melting pot so as to determine the final picture which has to emerge. In my opinion, in view of the admitted documents/correspondence on record, there is no manner

of doubt that Mr. M.A.Jose was an agent acting for the respondent/plaintiff, and in view of the ratio of the judgment of the Supreme Court in the case of **Chairman, LIC** (supra), Mr. M.A. Jose clearly had ostensible general authority which was clear from the correspondence between the parties and also the course of dealing, and therefore, the respondent-plaintiff/principal was clearly bound to honour the actions of the agent, Mr. M. A. Jose of having received back the goods as held by the Supreme Court in the case of **Chairman, LIC** (supra). The respondent-plaintiff/principal is estopped in the facts of the case from denying that actual authority existed in Mr. M.A. Jose in taking back the goods.

17. In view of the above, appeal is accepted. Suit of the respondent/plaintiff shall stand dismissed. Parties are left to bear their own costs. Decree sheet be prepared.

18. The bank guarantee furnished by the appellants/defendants pursuant to the order dated 27.4.2005 shall stand discharged. The amount which has been deposited by the appellants/defendants in this Court, being the amount of Rs. 22,403/-, along with accrued interest be also released back to the appellants/defendants. Trial Court record be thereafter sent back.

ILR (2012) III DELHI 21
CRL. M.C

OM PRAKASH & ORS. ....PETITIONER

VERSUS

STATE & ANR. ....RESPONDENT

(M.L. MEHTA, J.)

CRL. M.C. NO. : 1152/2010 & CRL. M.A. NO. : 4088/2010 DATE OF DECISION: 10.01.2012

Code of Criminal Procedure, 1973—Sections 482 & 156 (3)—Delhi Police Act, 1978—Section 140—Petitioners police officers—Nishit Aggarwal/complainant made

complaint in police station that he was owner of premises purchased from Laxmi Devi and that Chand Rani, Siani Devi and Bhim Singh had been threatening him and had put lock over his lock—Complaint made by Chand Rani alleging execution of sale deed in favour of Nishit to be fraudulent and that she was owner—When no action taken on complaint of Nishit, he made complaint to Commissioner of Police—Inquiry conducted by Additional DCP who submitted vide report that Laxmi Devi had sold property through registered sale deed to Nishit and that there was inaction on the part of local police in not registering complaint of Nishit—Accordingly on statement of Nishit FIR u/s 448/506/34 IPC lodged—On 22.01.09, petitioners visited premises and gave possession of premises to Nishit—Writ Petition filed by Chand Rani for quashing of FIR dismissed—Civil Suit filed by Chand Rani against Nishit dismissed—Criminal Writ Petition filed by Chand Rani against Nishit dismissed—Not being satisfied, Chand Rani filed criminal complaint before MM against Nishit and his wife u/s 200 Cr.P.C. read with Section 190 Cr.P.C.—In this complaint MM passed impugned order u/s 156 (3) Cr.P.C. directing SHO to register a case—Held, complainant/Nishit prima facie bonafide purchaser of property—Chand Rani filed suit before ADJ which was dismissed and she has not been able to prove any right, title or interest in premises—All authorities, including Commissioner of Police endorsed vigilance report that it was because of inaction of local police that no action taken against tress passers Chand Rani, Bhim Singh and others—Since Nishit had been dispossessed from premises legally owned by him, by Chand Rani and others, the act of the petitioners (Om Prakash and others) in getting the same restored to them, could not be said to be exceeding their jurisdiction or powers, but in compliance of the order of Commissioner of Police—In complaint u/s 200 Cr.P.C. Chand Rani did not disclose

about filing of Criminal Writ before High Court—In Court the litigant is expected to disclose all relevant facts against his plea—Courts of law depend on parties who put correct facts as there is no other means to ascertain true facts—There is an obligation on the complainant to disclose all correct facts since summoning of accused is based on evidence which has not been subjected to cross-examination—Intentional concealment of material facts in given facts and circumstances would entail quashing of criminal complaint—No reason given by MM while directing registration of FIR—Also, not stated against whom and under what provisions of law FIR was to be registered—Complaint against police officer time barred u/s 140 Delhi Police Act—Allegations taken at the face value, do not constitute any offence against the petitioners—Impugned order set aside—Petition allowed.

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Ms. Rebecca M. John, Advocate with Mr. Vishal Gosain, Advocate with Mr. Kushdeep, Advocate

FOR THE RESPONDENT : Mr. Pawan Sharma, Standing Counsel with Mr. Harsh Prabhakar, Ms. Afshan Pracha, Advocate with SI Pankaj Saroha, P.S. Nangloi, Counsel for respondent No. 2.

CASES REFERRED TO:

1. *Subhkaran Luharuka & Anr.* vs. *State (Govt. of NCT of Delhi) & Anr.,* 2010 (3) JCC 1972.
2. *MCD* vs. *State of Delhi and Another,* 2005 SCC (Cri.) 1322.
3. *Balbir Singh* vs. *Government of NCT of Delhi & Ors.,* 125 (2005) DLT 543.

4. *Balvinder Singh Sidhi* vs. *Mahender Singh (Inspector),* 70 (1997) DLT 472.
5. *State of Haryana and others* vs. *Bhajan Lal and others,* 1992 Supp (1) Supreme Court Cases 335.

RESULT: Petition allowed.

M.L. MEHTA, J. (Oral)

1. This is a petition under section 482 Cr.P.C. against the order dated 25.01.2010 of learned MM whereby directions were given to the police under section 156(3) Cr.P.C. for registration of an FIR against the petitioners.

2. The case has peculiar facts. The petitioners are police officers. One Nisheet Aggarwal in his complaints made to the police of P.S. Nangloi on 02.07.2008 and 26.07.2008 had complained that he was owner of premises bearing No. 643 (New No. 1579), Khasra No. 229, Village Mundka having purchased the same from Smt. Laxmi Devi wife of Pratap Singh, whereas Chand Rani, Syani Devi and Bhim Singh had been threatening and harassing him for the same have put their lock over his lock on the premises. Similar complaints were made by him on 7th August 2008 and also on 10th August, 2008. In the mean time on 18.08.2008 and on 26.08.2008 complaints were made by Smt. Chand Rani to P.S. Nangloi alleging execution of sale deed in favour of Nisheet Aggarwal of the aforesaid property to be a fraudulent and bogus one and claiming herself to be the owner and in possession of the same.

3. Since no action was taken by the police on the complaint of Nisheet Aggarwal, he made a complaint to the Commissioner of Police. The inquiry was got conducted by the Addl. DCP (Vigilance), who vide his report dated 06.01.2009 while finding fault of inaction on the part of the local police reported that Smt. Laxmi Devi had sold the aforesaid property through the registered sale deed dated 19.06.2008 to the complainant Nisheet Aggarwal. The operative part of the inquiry report was as under:

> "Enquiry also revealed that the alleged persons prepared fake papers (Affidavit/GPA) of the property in question and submitted to the BSES and also in the court. Smt. Chand Rani having no title and she is not empowered to execute any GPA in the name

of his cousin brother, Bhim Singh showing herself as sole owner of the property whereas on the other side Smt. Laxmi Devi has executed the registered sale deed in the name of the complainant. The property executed by Smt. Laxmi Devi was very much in her possession as revealed from the local enquiry and also from the statement of Mr. Harish, the tenant. It also revealed that the possession of the property was given to the complainant on the spot and keys were handed over and the said property remained in the possession of the complainant for 1-1/2 month. The local enquiry further revealed that the alleged persons had demanded a big amount from the complainant to withdraw themselves from the scene. The alleged party had broken the locks of rented room which was already handed over to the complainant and put their lock and installed an electric meter by submitting fake papers.

The incident took place on 07.08.08 and the complainant, his wife made PCR calls, met SHO/Nangloi and also submitted complaints but no action into the matter has been taken on the pretext of civil suit filed by Smt. Chand Rani on 23.07.2008 in which no interim orders were passed by the Court On repeated complaints and PCR calls, no legal action was taken by the local police. The enquiry revealed that the alleged persons were indirectly allowed to put lock on the lock of the complainant. The alleged person firstly had broken the lock of one room and put his lock there. Secondly they captured/occupied other room also and put lock on it and on the main gate also. The same has been admitted by the local police personnel who had gone there to attend the PCR calls. The local police have taken a false excuse by saying the matter is sub-judice in the court. In fact they failed to take proper and timed action into the matter."

4. The enquiry of Additional DCP (Vigilance) was endorsed by Addl. Commissioner of Police (Vigilance) who recorded that allegation of inaction against the local police on the complaints of the complainant Nisheet Aggarwal stands substantiated and a case under the proper sections of IPC should have been registered and investigated. This was further endorsed by the Special Commissioner of Police (Vigilance) and also by the Commissioner of Police. The Commissioner of Police, however, also ordered that *"no dispossession should be allowed and action be taken against the trespassers, if any."*

5. Thereafter on the statement of the complainant Nisheet Aggarwal, FIR No. 15/2009, under section 448/506/34 IPC P.S. Nangloi was registered by the petitioners and the investigation was carried on by the petitioner No. 1. On 22.01.2009, the petitioners visited the premises and called the locksmith and got opened the premises and gave possession thereof to the complainant. Smt. Chand Rani and others challenged the registration of the FIR by way of W.P. (Crl.) No. 423/2009 wherein in addition to the prayer of quashing of FIR, prayers were also made for initiation of departmental enquiry against petitioner No. 1 and also for return of the household articles allegedly taken away by the police officers at the time of taking over the possession of the premises. However, the writ petition was confined to the prayer of quashing FIR No. 15/2009. The said writ was dismissed by this Court vide order dated 01.04.2009.

6. A civil suit bearing No. 685/2008, titled as **Smt. Chand Rani and Others Vs. Smt. Laxmi Devi** was also filed by the complainant Chand Rani which came to be dismissed by the Court of ADJ on 19.02.2009. The matter did not rest there. In August 2009 Chand Rani and Others filed a Civil Writ bearing No. 7601/2009 before this Court against the complainant Dr. Nisheet Aggarwal, his wife Neeru Aggarwal and also the Commissioner of Police and SHO P.S. Nangloi which was also dismissed by this Court on 18.03.2010. Not being satisfied, she filed a criminal complaint before the Court of MM on 05.09.2009 against Dr. Nisheet Aggarwal, his wife Neeru Aggarwal, Laxmi Devi, present petitioners and others under section 200 Cr. P.C. read with section 190 Cr.P.C. It was in this complaint that the learned MM passed the impugned order under section 156(3) Cr. P.C. directing SHO, P.S. Nangloi to register a case against the petitioners.

7. The impugned order has been assailed by the petitioners mainly on the grounds that (i) Metropolitan Magistrate ought not to have passed the order directing for registration of the case under section 156(3) Cr.P.C. without calling for the status report from the police or getting conducted preliminary enquiry as regards the allegations of the complainant. In this regard reliance was placed on **Subhkaran Luharuka & Anr. Vs. State (Govt. of NCT of Delhi) & Anr.,** 2010 (3) JCC 1972 in which the petitioners registered the FIR against the complainant and others, in discharge of their duties as directed by the C.P. and (3) the

complainant concealed and suppressed the material facts from the court of MM in obtaining the order under section 156(3) Cr. P.C. Reliance was placed on **MCD Vs. State of Delhi and Another,** 2005 SCC (Cri.) 1322.

8. The Standing Counsel for the State submitted that the complaint as made by Smt. Chand Devi before the Magistrate was not maintainable being barred by limitation under Section 140 of Delhi Police Act inasmuch as the incident took place on 7th August, 2008 and complaint was made on 05.09.2009. He placed reliance on the judgment of **Balbir Singh Vs. Government of NCT of Delhi & Ors.,** 125 (2005) DLT 543 and **Balvinder Singh Sidhi Vs. Mahender Singh (Inspector),** 70 (1997) DLT 472 of our own High Court to contend that the acts performed by the petitioners were directly and reasonably connected with their official duties or in any case in the purported exercise of their official duties and thus within the ambit of Section 140 of the D.P. Act.

9. On the other hand learned counsel for the respondent Smt. Chand Rani submitted that the Registration of the FIR which was ordered by the MM under Section 156(3) Cr. P.C. was initially stayed by this Court on 03.04.2010, but, subsequently vide order dated 9th August, 2011, the said stay was vacated with the observations made by the Court that the petitioners exceeded their jurisdiction in opening lock and handing over the possession of the disputed property to Dr. Nisheet Aggarwal. Learned counsel for the respondent justified the impugned order of registration of FIR against the petitioners contending that the petitioners had exceeded their jurisdiction in dispossessing the complainant Chand Rani in violation of the order of the Commissioner of Police made in the vigilance report. With regard to the plea of the petitioners on their having concealed material facts, it was submitted by learned counsel for the respondent Chand Rani that the fact of dismissal of Criminal Writ being neither relevant nor necessary, the non mention thereof in the complaint under section 200 Cr. P.C. did not amount to any concealment or suppression of any fact by the respondent. The learned counsel for the respondent also submitted that the power of this Court under section 482 Cr. P.C. was to be used sparingly and disputed questions of facts could not be gone into by this court at this stage.

10. Heard learned counsel of the parties and perused the record.

11. The facts as have been briefly noted above are not in dispute.

The law with regard to power of this Court in entertaining petitions under section 482 Cr. P.C. is well settled by various pronouncements of the Supreme Court and this court. Only a reference can be made to the judgment of **State of Haryana and others vs. Bhajan Lal and others,** 1992 Supp (1) Supreme Court Cases 335 wherein the Supreme Court enumerated category of cases where this Court could exercise power under section 482 Cr. P.C. and under Article 226 of the Constitution of India to prevent the abuse of the process of any court or otherwise to secure ends of justice and it was held as under:

> "1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.
>
> 2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.
>
> 3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
>
> 4. Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated Under Section 155(2) of the Code.
>
> 5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
>
> 6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for

the grievance of the aggrieved party.

7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

12. From the above facts it may be seen that the complainant Dr. Nisheet Aggarwal prima facie seems to be the bona fide purchaser of the property in question by virtue of registered sale deed from Smt. Laxmi Devi. Smt. Chand Rani had allegedly executed GPA in respect of the said premises in favour of her cousin Bhim Singh. They filed a civil suit in respect of the said premises which came to be dismissed by the Court of learned ADJ vide order dated 19.02.2009. The said judgment of the civil court has become final, having not been challenged by them, meaning thereby that they had not been able to prove any right, title or interest in the said premises. Since no action was being taken by the police on the complaints made by Dr. Nisheet Aggarwal, the matter was enquired into by the vigilance department of the police which, as noted above, recorded a finding of fact that it was because of inaction of the local police that no action was taken against the trespassers namely Smt. Chand Rani, Sh. Bhim Singh and others. All the authorities including the Commissioner of Police had endorsed the vigilance report. The Commissioner of Police while endorsing the report had also ordered that there shall be no dispossession and the action was to be taken against the trespassers, if any. It was in pursuance of this order that the petitioners on the statement of complainant Dr. Nisheet Aggarwal registered FIR No. 15/2009 on 21.01.2009 under section 448/506/34 IPC. The interpretation that was sought to be given to the order of Commissioner of Police by the learned counsel for the respondent Chand Rani was misplaced inasmuch as by reading this order in the context of the vigilance report, it would be seen that the Commissioner of Police directed that there shall not be dispossession and the action was to be taken against the trespassers. Since Dr Nisheet Aggarwal had been dispossessed from the premises legally owned by him by Chand Rani and others, the act of the petitioners in getting the same restored to him could not be said to be in exceeding their jurisdiction or powers. They had done all these in discharge of their duties and in compliance of the order of the Commissioner of Police.

13. The Criminal writ petition No. 423/2009 was filed by Chand Rani and Ors for quashing of the aforesaid FIR. Despite the fact that the reliefs sought regarding departmental enquiry and return of articles were given up by them and the petition confined to the relief of quashing of the FIR, it was dismissed by this court on 01.04.2009.

14. The Civil suit bearing No. 658/2008 filed by Chand Rani and others in respect of the said premises also came to be dismissed by the Court of ADJ on 19.02.2009. Now having lost the criminal writ as well as civil suit, Chand Rani and others filed Civil Writ 7601/2009 in August 2009 seeking somewhat similar reliefs in respect of the aforesaid premises which also came to be dismissed by this Court on 18.03.2010. It is noted that in the complaint made to the MM under section 200 Cr. P.C. on 05.09.2009, the complainant Chand Rani had mentioned about filing of civil writ No. 7601/2009, but, did not disclose about the filing and dismissal of her criminal writ by this Court on 01.04.2009. The plea raised by learned counsel for the respondent Chand Rani that this was not a material and relevant fact to be disclosed in a complaint, was untenable. The disclosure of the contents of the writ and the order that came to be passed would certainly have bearing on the mind of the MM while entertaining the complaint under section 200 Cr.P.C. It is settled proposition of law that litigant is expected to approach the Court by disclosing all relevant facts against his plea. Courts of law depend on the parties to put correct facts and there is no other means to ascertain true facts. It is the obligation of all those who come to seek justice particularly in the criminal complaints, since the procedure leading to the summoning of accused is based on the evidence which has not been subjected to the cross examination. Intentional concealment of material facts in the given facts and circumstances would entail quashing of the complaint. This Court while dismissing the writ on 11.04.2009 in para 3 observed as under:

"Respondent No. 3 (Nisheet Aggarwal) is the first informant of the FIR in question. He has alleged that on 26.07.2008, the petitioners (Chand Rani and others) had forcibly trespassed into his property which he had purchased for a consideration of Rs.17.00 lakh and the petitioners had put their own lock on it and had threatened the first informant, while petitioner No. 1 Bhim Singh pointed a revolver at him and had threatened to kill him if he raised a eye towards the property in question."

15. In the case of **MCD Vs. State of Delhi and Another,** 2005 SCC (Cri.) 1322 the Hon'ble Supreme Court in paragraph No. 21 held as under:

> "This apart, the respondent did not also disclose the fact in the criminal revision filed before the High Court that he has also been convicted in another Criminal Case No. 202 of 1997 by the Court of Metropolitan Magistrate, Patiala House, New Delhi. Thus, the contesting respondent has come to the High Court with unclean hands and withholds a vital document in order to gain advantage on the other side. In our opinion, he would be guilty of playing fraud on the Court as well as on the opposite party. A person whose case is based on falsehood can be summarily thrown out at any stage of the litigation. We have no hesitation to say that a person whose case is based on falsehood has no right to approach the Court and he can be summarily thrown out at any stage of the litigation. In the instant case, non-production of the order and even non-mentioning of the conviction and sentence in the criminal Case No. 202 of 1997 tantamounts to playing fraud on the Court. A litigant who approaches the Court is bound to produce all documents which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well on the opposite party. The second respondent, in our opinion, was not justified in suppressing the material fact that he was convicted by the Magistrate on an earlier occasion. Since the second respondent deliberately suppressed the crucial and important fact, we disapprove strongly and particularly, the conduct of the second respondent and by reason of such conduct, the second respondent disentitled himself from getting any relief or assistance from this Court."

16. In the case of **Subhkaran Luharuka & Anr.** (supra) this Court laid down certain guidelines for the Magistrates while dealing with applications under section 156(3)Cr. P.C. The said guidelines were summarized as under:

> "(i) Whenever a Magistrate is called upon to pass orders under Section 156(3) of the Code, at the outset, the Magistrate should ensure that before coming to the Court, the Complainant did

> approach the police officer in charge of the Police Station having jurisdiction over the area for recording the information available with him disclosing the commission of a cognizable offence by the person/persons arrayed as an accused in the Complainant. It should also be examined what action was taken by the SHO, or even by the senior officer of the Police, when approached by the Complainant under Section 154(3) of the Code.
>
> (ii) The Magistrate should then form his own opinion whether the facts mentioned in the complaint disclose commission of cognizable offences by the accused persons arrayed in the Complaint which can be tried in his jurisdiction. He should also satisfy himself about the need for investigation by the Police in the matter. A preliminary enquiry as this is permissible even by an SHO and if no such enquiry has been done by the SHO, then it is all the more necessary for the Magistrate to consider all these factors. For that purpose, the Magistrate must apply his mind and such application of mind should be reflected in the Order passed by him.
>
> Upon a preliminary satisfaction, unless there are exceptional circumstances to be recorded in writing', a status report by the police is to be called for before passing final orders.
>
> (iii) The Magistrate, when approached with a Complaint under Section 200 of the Code, should invariably proceed under Chapter XV by taking cognizance of the Complaint, recording evidence and then deciding the question of issuance of process to the accused. In that case also, the Magistrate is fully entitled to postpone the process if it is felt that there is a necessity to call for a police report under Section 202 of the Code.
>
> (iv) Of course, it is open to the Magistrate to proceed under Chapter XII of the Code when an application under Section 156(3) of the Code is also filed along with a Complaint under Section 200 of the Code if the Magistrate decides not to take cognizance of the Complaint. However, in that case, the Magistrate, before passing any order to proceed under Chapter XII, should not only satisfy himself about the pre-requisites as aforesaid, but, additionally, he should also be satisfied that it is necessary to direct Police investigation in the matter for collection

of evidence which is neither in the possession of the complainant nor can be produced by the witnesses on being summoned by the Court at the instance of complainant, and the matter is such which calls for investigation by a State agency. The Magistrate must pass an order giving cogent reasons as to why he intends to proceed under Chapter XII instead of Chapter XV of the Code.''

17. Though the guidelines in the case of **Subhakarana Luharkha** (Supra) came to be passed by this Court after the impugned order of the learned MM, but it is seen that the impugned order seems to have been passed by the learned MM in routine and casual manner. The learned MM ought to have given reasoned order while directing registration of FIR under section 156(3) Cr. P.C. Not only that, no reasons have been given, even it has also not been stated against whom and under what provision of law the FIR was to be registered.

18. Assuming for the sake of arguments that the acts of the petitioners as police officers were in excess of their jurisdiction or power, the complaint against them was apparently time barred. This was also the submission of learned Standing Counsel for the State. The incident took place on 7th August 2008 and the complaint was made by Smt. Chand Rani to the Magistrate on 05.09.2009. Section 140 of the Delhi Police Act which provides limitation for such an action against the police officers reads 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."

19. In view of my above discussion the allegations taken at their face value do not constitute any offence against the petitioners. Hence, I am of the view that subjecting the petitioners to undergo criminal trial was nothing but an abuse of the process of the Court and was apparently miscarriage of justice. For all these reasons, the petition is allowed and the impugned order is set aside.

ILR (2012) III DELHI 34
CRL. A.

SUDHAKAR TIWARI **....APPELLANT**

VERSUS

STATE **....RESPONDENT**

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

CRL. A. NO. : 875/2011 **DATE OF DECISION: 11.01.2012**

Indian Penal Code, 1860—Section 302—Criminal Procedure Code, 1973—Section 304—As per prosecution case, accused was habitual drunkard—

On day of incident, accused harassing deceased who tried to pacify him—Accused was adamant and deceased slapped him after which accused strauqulated deceased—Incident witnessed by wife of deceased, PW5—Trial Court convicted accused u/s 302—Main contention of accused that he was denied benefit of legal counsel before trial Court—Held, accused initially provided legal aid by trial Court when accused produced from J/C—However subsequently his counsel was absent—Trial Court queried about whether accused wanted lawyer and he apparently refused—Thereafter trial Court proceeded to record testimony of prosecution witnesses and appointed Amicus Curiae subequently—Trial Court convicted accused u/s 302—Held, legal aid for poor resulted in poor legal aid—No material witnesses including IO cross-examined—Amicus only later moved application to recall PW5, however, even that not followed up—Absence of effective representation by accused resulted in denial of fair trial and infringed right of accused under Article 21 of the Constitution—Impugned conviction set aside—Matter remitted to trial court for conducting proceedings from stage when legal counsel of accused absented himself—Accused permitted to cross-examine all prosecution witnesses unless he expressly gave up right through an affidavit or appropriate application—In view of peculiar facts accused released on bail—Trial Court requested to conclude trial expeditiously preferably within four months.

The imperative of providing free legal aid was explained by the Supreme Court, in **Khatri (II) v. State of Bihar,** (1981) 1 SCC 627 in the following terms:

> "There is so much lack of legal awareness that it has always been recognised as one of the principal items of the programme of the legal aid movement in this country to promote legal literacy. It would make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail of its purpose. The Magistrate or the Sessions Judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. Unfortunately, the Judicial Magistrates failed to discharge this obligation in the case of the blinded prisoners and they merely stated that no legal representation was asked for by the blinded prisoners and hence none was provided. We would, therefore, direct the Magistrates and Sessions Judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State. Unless he is not willing to take advantage of the free legal services provided by the State, he must be provided legal representation at the cost of the State. We would also direct the State of Bihar and require every other State in the country to make provision for grant of free legal services to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicable situation. The only qualification would be that the offence charged against the accused is such that, on conviction, it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation."

In **Sukh Das vs. State of Arunachal Pradesh** 1986 (2) SCC 401, the court emphasized that the accused does not have to apply for legal aid and that failure of the court to provide this facility would vitiate the trial. **(Para 8)**

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Anu Narula, Advocate.

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

CASES REFERRED TO:

1. *Sukh Das* vs. *State of Arunachal Pradesh* 1986 (2) SCC 401.
2. *Khatri (II)* vs. *State of Bihar,* (1981) 1 SCC 627.

RESULT: Matter remitted to Trial Court.

S. RAVINDRA BHAT (OPEN COURT)

1. The present appeal is filed against the judgment and order dated 10.01.2010 whereby the appellant was convicted for the offence punishable under Section 302 IPC and sentenced to undergo life imprisonment. The prosecution case was that on 27.5.2007 at about 9.00 PM, the accused murdered his brother Inder Tiwari by strangulating him in flat bearing No. 150, Pocket 10, DDA Flats, Nasirpur, New Delhi. The prosecution during the course of trial had relied on the testimony of 19 witnesses. The principal witnesses who deposed and whose testimony persuaded the Trial Court to record conviction were PWs 2 and 5, the latter i.e. PW-5 was the most material of witnesses as she claimed to have seen the incident. According to her, the appellant used to be a habitual drunkard and frequently consumed intoxicating substances. PW-5 deposed that on the day (of her husband's murder) the appellant had harassed her husband and he (her husband) had been trying to pacify him. The witness further deposed that incident occurred in the late evening at about 9.00 PM after the family had dinner when the deceased started to pacify the appellant who remained adamant. The deceased slapped the appellant, apparently both of them got "entangled" and despite PW-5's best efforts, she was unable to separate them. The appellant then allegedly strangulated the deceased.

2. This Court does not propose to consider the merits of the appeal in detail. One of the main submissions made on behalf of the appellant was that he was denied the benefit of legal counsel, which resulted in miscarriage of justice. Learned counsel in this regard relied upon the

order sheets in the trial court. She emphasised that after 24.04.2009, on which date appellant's counsel was present, there was no one to assist him on 29.05.2009. On that date the appellant was unrepresented despite that the trial court proceeded to record the testimony of several material witnesses. Similarly on the next date of hearing i.e. 22.08.2009, when the appellant was again unrepresented, further prosecution witnesses were examined. It was only on 12.10.2009 that the Court deemed it appropriate to appoint amicus to assist the appellant. The said amicus who argued the matter, did not discharge his duties properly. In this regard reliance was placed upon the testimonies of various witnesses including PW-10, PW-11, PW-12 (I.O.) and PW-13. Counsel submitted that none of these witnesses was even cross-examined. Apparently the application on behalf of the appellant to recall PW-5 for cross-examination was made. She could not be found; as was evident from the order of 26.06.2010, therefore there was no cross-examination.

3. It was argued that the denial of effective legal representation amounted to denial of a fair trial and therefore infringed Article 21 of the Constitution. Counsel submitted that apart from other facts which could not have been elicited from the witnesses, the appellant was also denied a proper counsel who could have pointed to the Court (even according to the testimony of the prosecution witnesses, notably PW-2) that he (the appellant) was a psychiatric patient and had suffered on account of some mental disorder. Had the appellant been given effective representation, this aspect could have been suitably highlighted.

4. The learned APP submitted that the order-sheet dated 29.05.2009 records that though the appellant's counsel was not present, he stated that there was no need for a lawyer. In these circumstances, the trial court could not be faulted for having proceeded to record the testimony of the witnesses having regard to the mandate under Section 309 Cr.P.C. The Counsel urged that so far as the plea of insanity or mental incapacity is concerned the same was not taken during the trial and cannot therefore be urged in the course of appeal.

5. This court has considered the records of the trial court. The appellant had been given legal aid, as he was unable to afford the services of a lawyer to defend himself. The last time the counsel so provided for him, appeared during the course of trial was on 24-04-2009. Subsequently on 29th May, 2009, though the Appellant was produced from judicial

custody, his counsel was absent, and the court queried about whether he wanted a lawyer. He apparently refused. Thereafter, the court proceeded to record the testimony of prosecution witnesses. On the next dates of hearing, the Court proceeded to record prosecution evidence, and only on 12-10-2009 it appointed an amicus.

6. The conduct of the Appellant's defence has led us to conclude that this was one instance where legal aid for the poor resulted in poor legal aid. None of the material witnesses, including the IO was cross examined. It was much later that the amicus deemed it appropriate to move an application to recall PW-5; however, even that was not followed up. The result perhaps was predictable; the Appellant was convicted.

7. Section 304 of the Code of Criminal Procedure reads as follows:

> "304 LEGAL AID TO ACCUSED AT STATE EXPENSE IN CERTAIN CASES.
>
> (1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State."

8. The imperative of providing free legal aid was explained by the Supreme Court, in **Khatri (II) v. State of Bihar,** (1981) 1 SCC 627 in the following terms:

> "There is so much lack of legal awareness that it has always been recognised as one of the principal items of the programme of the legal aid movement in this country to promote legal literacy. It would make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail of its purpose. The Magistrate or the Sessions Judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. Unfortunately, the Judicial Magistrates failed to discharge this obligation in the case of the blinded prisoners and they merely stated that no legal

> representation was asked for by the blinded prisoners and hence none was provided. We would, therefore, direct the Magistrates and Sessions Judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State. Unless he is not willing to take advantage of the free legal services provided by the State, he must be provided legal representation at the cost of the State. We would also direct the State of Bihar and require every other State in the country to make provision for grant of free legal services to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicable situation. The only qualification would be that the offence charged against the accused is such that, on conviction, it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation."

In **Sukh Das v State of Arunachal Pradesh** 1986 (2) SCC 401, the court emphasized that the accused does not have to apply for legal aid and that failure of the court to provide this facility would vitiate the trial.

9. Having regard to the entire conspectus of the circumstances in this case, we have no doubt that the absence of effective representation on behalf of the Appellant, after 24-04-2009 has resulted in denial of fair trial, and infringed his right under Article 21 of the Constitution. The impugned judgment therefore, requires to be set aside.

10. In view of the above discussion, the impugned judgment is set aside, and the matter is remitted for conducting proceedings from the stage after 24-04-2009. The Trial Court shall continue the proceeding from the stage and permit the Appellant to cross examine all the witnesses who were examined after that date, unless the Appellant expressly gives up his right to do so, through an affidavit or appropriate application. In view of these circumstances, and having regard to the peculiar facts, the Appellant is directed to be released on bail, subject to his furnishing personal bond, and surety for the sum of Rs. 15,000/-to the satisfaction of the Trial Court. The Trial Court is requested to conclude the proceedings, and the trial, as expeditiously as possible, and in any event within four months from today. The parties are directed to be present

before the Trial Court for directions in this regard, on 20th January, 2012. The Registry is directed to ensure that the Trial Court records are transmitted to it immediately to ensure compliance with the present judgment.

11. The Appeal is allowed in the above terms.

ILR (2012) III DELHI 41
RFA

VIMLA GAUTAM & ORS. ....APPELLANTS

VERSUS

MOHINI JAIN & ANR. ....RESPONDENTS

(VALMIKI J. MEHTA, J.)

RFA NO. : 101/2008 DATE OF DECISION: 16.01.2012

Code of Civil Procedure, 1908—Order 2 Rule 2—Transfer of Property Act, 1882—Section 53A—Indian Contract Act, 1882—Section 202—Limitation Act, 1963—Section 27—Suit for possession and mesne profits—Respondents/plaintiffs claim to be owner of property having got the same under a Will from their mother—Mother purchased the same through registered power of attorney, receipt, agreement to sell dated 17.04.1986 from Sh. Birender Kumar Jain—Sh. Birender Kumar Jain purchased the same vide registered Sale Deed dated 11.07.1966 from Smt. Raj Kumari Bhatnagar who purchased it from Delhi Housing Company vide registered sale deed dated 20.08.1959—Respondents/plaintiffs employed a chowkidar to look after the property—Committed breach of trust and forged documents—Executed document, power of attorney etc. in favour of appellants/defendants and gave

possession—Suit for injunction filed by the mother of respondent/plaintiffs against the appellants/defendants—During pendency of suit for injunctions, filed another suit for possession and mesne profits—Made statement through advocate not to dispossess the appellants/defendants without due process of law—Suit withdrawn with liberty to claim relief sought in the suit for possession and mesne profits already filed—Appellants/defendants pleaded themselves to be owners having purchased the same from Sh. Shafiq Raja vide agreement to sell, general power of attorney etc. dated 09.03.1994—Suit barred by Order 2 Rule 2 CPC—Held—Suit not barred by Order 2 Rule 2—Appellants/defendants have not proved the complete chain of title documents—Suit decreed—Aggrieved appellants/defendants filed the regular first appeal—Held—Earlier suit withdrawn with liberty to seek the relief claimed in that suit in the second Suit—Result in consolidation of two suits—The relief claimed in earlier suit got merged in the second Suit, not hit be Order 2 Rule 2—Appellants/defendants cannot be the owner unless the complete chain of title documents is proved—Complete chain of documents not proved—Respondents/plaintiffs have proved the complete chain of title documents—Appeal dismissed.

The object of Order 2 Rule 2 CPC is that there cannot be one proceeding after another with respect to the same cause of action and a plaintiff must claim all reliefs on the basis of one cause of action in the first suit which is filed. If however the earlier suit is disposed of and thereafter a subsequent suit is filed, the subsequent suit which claims reliefs which are based on the same cause of action which was the subject matter of the earlier suit, then, the said second suit would be barred by provision of Order 2 Rule 2 CPC. Therefore the spirit of Order 2 Rule 2 CPC is to prevent commencement of one legal proceeding after an earlier legal proceeding has come to an end, meaning thereby if a subsequent suit is filed during the pendency of

the earlier suit and the earlier suit is withdrawn with liberty to seek the relief claimed in the first suit in the second suit, and which liberty when granted, in substance, results in consolidation of two suits i.e. the earlier suit and the later suit. The effect therefore is that it is only one suit which is tried i.e. the later suit, as the relief claimed in the earlier suit gets merged in the second suit as the earlier suit is withdrawn with liberty to seek the relief in the subsequent suit. It is also relevant to note that the appellants against whom the suit was filed, and which suit was withdrawn as per the statement of the counsel for the respondents/plaintiffs not to dis-possess the appellants/defendants without due process of law, raised no objection when the earlier suit was being withdrawn with liberty to claim the relief claimed, in the second suit which was already filed. Considering all these aspects, I am of the opinion that the trial Court has rightly held that the present suit i.e. the subject suit was not barred by provision of Order 2 Rule 2 CPC. **(Para 6)**

I am aware of the recent judgment of the Supreme Court in the case of **Suraj Lamp Industries Pvt. Ltd. Vs. State of Haryana and Anr.** 183 (2011) DLT 1(SC) which holds that these type of documentation executed in favour of Indira Kumari Jain do not confer 'ownership' rights in the property, however, a close reading of the judgment shows that in paras 12, 13 & 16 it is mentioned that rights which are created in terms of Section 53A of the Transfer of Property Act, 1882 and rights which are created by Section 202 of the Contract Act, 1872 are protected. Therefore, of course, specific ownership rights are not created by means of documents being the agreement to sell, general power of attorney etc. as these are not 'sales' however on the basis of such documents rights to the extent created by Section 53A of Transfer of Property Act, 1882 and Section 202 of the Indian Contract Act, 1872 are preserved. Therefore, complete ownership rights may not vest with the mother of the respondents/plaintiffs-Smt. Indira Kumari Jain, however, rights under Section 53A of Transfer of Property Act, 1882 and Section 202 of Contract Act, 1872 would surely have

vested. Such rights after 12 years transform into ownership rights by law of prescription under Section 27 of the Limitation Act, 1963. Further, as already stated above, appellants have failed to produce the complete chain of title documents in their favour, besides the fact that even the witness from whom the appellants/defendants is said to have purchased the property did not step into the witness box, namely Sh. Shafiq Raja- a person who used to ply rickshaws.

(Para 9)

Important Issue Involved: (A) Specific ownership rights are not created by means of documents being the agreement to sell, general power of attorney etc. as these are not sales, however on the basis of such documents right to the extent created by Section 53A Transfer of Property Ac 1882 and Section 202 of the Indian Contract Act, 1872 are preserved, which after 12 years transform into ownership rights by law of prescription under Section 27 Limitation Act, 1963.

(B) Dishonesty in litigation ought to be dealt with by imposition of actual costs and actual costs be awarded.

[Vi Ku]

APPEARANCES:

FOR THE APPELLANTS : Mr. Sanjay Rathi, Advocate.

FOR THE RESPONDENT : Mr. N.S. Dalal, Advocate with Mr. Devesh Pratap Singh, Advocate.

CASES REFERRED TO:

1. *Suraj Lamp Industries Pvt. Ltd.* vs. *State of Haryana and Anr.* 183 (2011) DLT 1(SC).
2. *Ramrameshwari Devi and Others* vs. *Nirmala Devi and Others* (2011) 8 SCC 249.
3. *Salem Advocate Bar Association* vs. *Union of India* (2005)6 SCC 344.

4. *Swaran Singh* vs. *State of Punjab* MANU/SC/0320/2000 : (2000) 5 SCC 668.

5. *M.A. Faiz Khan* vs. *Municipal Corporation of Hyderabad* AIR 1998 Andhra Pradesh 414.

6. *Ammini Kutty and others* vs. *George Abraham reported as* AIR 1987 Kerala 248.

RESULT: Appeal dismissed.

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal (RFA) under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 27.10.2007 decreeing the suit of the respondents/plaintiffs for possession and mesne profits with respect to the suit property bearing No.F-274, Abadi of Janta Garden, Pandav Nagar, Patparganj, Delhi admeasuring 200 sq. yds.

2. The facts of the case are that the respondents/plaintiffs claimed to be owners of the suit property inasmuch as the suit property was said to belong to their mother-Smt. Indira Kumari Jain who died on 2.11.1996. Smt. Indira Kumari Jain is said to have executed a Will dated 9.4.1991 with respect to the suit property in favour of the respondents/plaintiffs-daughters. Smt. Indira Kumari Jain is said to have purchased rights in the suit property by means of usual documents being registered power of attorney dated 17.4.1986; Ex.PW1/3, a receipt for a sum of Rs. 15,000/-; Ex.PW1/4, an agreement to sell dated 17.4.1986; Ex.PW1/5 and an affidavit dated 17.4.1986; Ex.PW1/6. Sh. Birender Kumar Jain from whom Smt. Indira Kumari Jain, mother of the respondents/plaintiffs purchased the suit property is said to have purchased the property by means of a registered sale deed dated 11.7.1966; Ex.PW1/2 from one Smt. Raj Kumari Bhatnagar. Smt. Raj Kumari Bhatnagar had purchased the suit property from Delhi Housing Company vide registered sale deed dated 20.8.1959, Ex.PW1/1. The respondents/plaintiffs employed a Chowkidar, namely, Dildar Hussain alias Chunnu to look after the suit plot who was also residing in the suit plot alongwith his family members. This Chowkidar in breach of trust made some forged documents such as the power of attorney in collusion with the defendants and thereafter on 9.3.1994 under the power of attorney first executed certain documents and thereafter gave possession of the land to the defendants. An injunction

suit therefore came to be filed by Smt. Indira Kumari Jain seeking permanent injunction against the defendants and which suit was filed on or around 4.8.1994. In this suit, Smt. Indira Kumari Jain made a statement through her Advocate that defendants will not be dis-possessed without due process of law and therefore the suit for injunction was withdrawn on 8.4.1999 with liberty sought from the Court to claim the relief sought in the said suit, in the present suit for possession and mesne profits which was already filed on behalf of respondents/plaintiffs. The respondents/plaintiffs also prayed for mesne profits in the suit, and which relief of mesne profits has been granted alongwith the relief of possession by the impugned judgment and decree.

3. The appellants were the defendants in the suit and who contested the suit firstly on the ground that they were owners of the suit property by means of the documents executed in their favour by one Sh. Shafiq Raja. The documents which were sought to have been executed in favour of the defendants were agreement to sell dated 9.3.1994; Ex.DW2/1, general power of attorney dated 9.3.1994; Ex.DW2/2, receipt dated 9.3.1994 for a sum of Rs. 3,80,000/-; Ex.DW2/3 and an affidavit, Ex.DW2/4. The appellants/defendants also claimed that the subject suit was barred by provision of Order 2 Rule 2 CPC. As already stated that disbelieving the defence, suit was decreed.

4. Before this Court, learned counsel for the appellants/defendants has argued two basic points:-

(i) The suit was barred by provision of Order 2 Rule 2 CPC; and

(ii) The appellants/defendants were owners of the property by means of documentation dated 9.3.1994, Ex.DW2/1 to Ex.DW2/4, and therefore the suit was liable to fail.

5. So far as the issue with respect to the subject suit being barred by provision of Order 2 Rule 2 CPC, the same was an additional issue which was disposed of by the trial Court in paras 25 and 26 of the impugned judgment by holding that the suit was not barred under Order 2 Rule 2 CPC. The relevant observations, of the trial Court in this regard, read as under:-

"After giving due thoughts to the rival submissions of the counsels for the parties and perusing the entire relevant material

placed in the file including the authorities cited by them, I have come to the conclusion that the present suit is not hit by the provisions of Order 2 R 2 CPC as in the case in hand admittedly, the previous suit was instituted during the pendency of the first suit and the filing of the second suit is not barred under any provision of law. The present suit was filed in the Hon'ble High Court of Delhi during the pendency of the previous suit where no relief of Permanent Injunction, as claimed in the previous, was claimed. The matter came up before the Hon'ble High Court of Delhi on 22.03.1999 and it did not order for registration of the suit, rater, it called upon the plaintiff to file the copy of the plaint of the previous suit. The matter was adjourned to 12.04.1999. Before 12.04.1999, an application was filed for withdrawal of the suit with liberty to seek the relief claimed in the first suit in the subsequent suit. The plaintiffs were allowed to withdraw the suit with liberty to claim the relief in the suit filed before the Hon'ble High Court of Delhi. When the matter came up before the Hon'ble High Court of Delhi on 12.04.1999 it was informed to the court that the previous suit has been withdrawn with liberty to get the relief claimed in that suit in the present suit and it was only thereafter the direction for the registration of the plaint as suit was issued. The proposition raised by Ld. Counsel for defendant that the suit is deemed to have been instituted on the date when the plaint is presented is not correct as for the purpose of limitation Act a suit is deemed to have been instituted on that day when the plaint is presented otherwise the suit is deemed to be filed when the orders are passed for its registration. In this regard a reliance can be placed upon the judgment reported as AIR 1986 Bombay 353, where in para 4 it has been held that:-

> "The code itself therefore envisages two stages-first of the presentation of the plaint and the next of the admission of the plaint. The suit is not admitted to the register of the suits and a number given to it merely on the presentation of the suit. After the presentation the plaint is scrutinized. If there are any defects in the same, the plaintiff is required to remove them. The removal of defects is a matter of procedure. It is only after the defects are removed then it becomes eligible for an entry and a number in the register of suits. One of the defects can be the absence of leave of the court to institute the suit where it is necessary including leave under Cl.12 of the Letters Patent. So long therefore as the plaint is not admitted and entered in the register of suits all defects including that of the absence of leave under the said clause can be removed without returning the plaint. There is no question of returning the plaint which is not admitted. It simply remains under objection till it is admitted."

In **Ammini Kutty and others Vs. George Abraham** reported as AIR 1987 Kerala 248, it has been held in para 8 that, "it is well known that plaints are drafted by counsel; and so long as infallibility is not a universal virtue, a mistake committed by counsel should not be the undoing of the client in every case. Where the court is satisfied that a bona fide error is committed, that high stakes are involved, and that it would be unjust on the facts and circumstances of the case to allow the defendant to take advantage of such an error, it must have the power to do what is just."

> *Further in para 9 of the said judgment, it has been held that, "The last contention is that the Rule provides for grant of permission to withdraw a suit, only when a fresh suit is to be instituted, and not for grant of permission after the institution of such a second suit. The purpose and object of the Rule has already been considered; and if the court is competent to relieve a plaintiff of the adverse consequences of mistakes committed by him in instituting or proceeding with a suit, it is not really material whether the permission is granted before or after the institution of a fresh suit. Even if the institution of the second suit before obtaining of permission to withdraw the first is not proper, that can at best only be an irregularity, which should be considered as cured at least from the time permission is obtained."*

In AIR 1998 Andhra Pradesh 414 titled as **M.A. Faiz Khan Vs. Municipal Corporation of Hyderabad** it was held:-

"The procedural rigor cannot be allowed to come in the way

of substantive justice. Filing of the second suit without actually obtaining permission to withdraw the first suit should only be treated as a procedural irregularity, which is curable. The permission to withdraw the first suit is only to file fresh suit and when such permission is granted, the suit already instituted should not fail. The permission takes away the bar of res judicata. Hence the second suit should be held as maintainable."

In the light of above, I have come to the considered opinion that the suit of the plaintiff is not hit by the provisions of Order II R 2 of the Code of Civil Procedure, accordingly, issue stands decided against the defendants and in favour of plaintiffs."

6. The object of Order 2 Rule 2 CPC is that there cannot be one proceeding after another with respect to the same cause of action and a plaintiff must claim all reliefs on the basis of one cause of action in the first suit which is filed. If however the earlier suit is disposed of and thereafter a subsequent suit is filed, the subsequent suit which claims reliefs which are based on the same cause of action which was the subject matter of the earlier suit, then, the said second suit would be barred by provision of Order 2 Rule 2 CPC. Therefore the spirit of Order 2 Rule 2 CPC is to prevent commencement of one legal proceeding after an earlier legal proceeding has come to an end, meaning thereby if a subsequent suit is filed during the pendency of the earlier suit and the earlier suit is withdrawn with liberty to seek the relief claimed in the first suit in the second suit, and which liberty when granted, in substance, results in consolidation of two suits i.e. the earlier suit and the later suit. The effect therefore is that it is only one suit which is tried i.e. the later suit, as the relief claimed in the earlier suit gets merged in the second suit as the earlier suit is withdrawn with liberty to seek the relief in the subsequent suit. It is also relevant to note that the appellants against whom the suit was filed, and which suit was withdrawn as per the statement of the counsel for the respondents/plaintiffs not to dis-possess the appellants/defendants without due process of law, raised no objection when the earlier suit was being withdrawn with liberty to claim the relief claimed, in the second suit which was already filed. Considering all these aspects, I am of the opinion that the trial Court has rightly held that the present suit i.e. the subject suit was not barred by provision of Order 2 Rule 2 CPC.

7. So far as the issue of ownership is concerned, the present is a stark case as to how in metropolitan cities people in whom trust is reposed commit criminal breach of trust and misappropriate an immovable property. The appellants/defendants except proving the documents, Ex. DW2/1 to Ex.DW2/4, have not been able to prove the complete chain of title documents from the original owner M/s. Delhi Housing Company. Merely because a set of documents are executed in favour of the appellants/ defendants cannot make them the owners of the property, unless the complete chain of title documents has been filed and proved on record, and admittedly and as stated above, the complete chain of documents have not been proved on record by the appellants/defendants. The respondents/plaintiffs, on the other hand, have proved the complete chain of documents i.e. the original sale deed from Delhi Housing Company to Smt. Raj Kumari Bhatnagar as PW1/1, the registered sale deed by Smt. Raj Kumari Bhatnagar in favour of Sh. Birender Kumar Jain as Ex.PW1/ 2, and then the documentation in the year 1986 in favour of Smt. Indira Kumari Jain, mother of plaintiffs being documents Ex.PW1/3 to Ex.PW1/ 6. Sh. Birender Kumar Jain appeared as a witness, PW8 and deposed in favour of respondents/plaintiffs.

8. Learned counsel for the appellants/defendants sought to take advantage of the fact that the buyer from Smt. Raj Kumari Bhatnagar in the sale deed, Ex.PW1/2 is written as Sh. Virender Kumar Jain son of Lala Paras Das Jain, however the documentation by which the mother of the respondents/plaintiffs-Smt. Indira Kumari Jain purchased the property state the seller as Sh. Birender Kumar Jain, son of P.D. Goyal. In my opinion, this argument which is raised on behalf of the appellants besides being wholly misconceived is malafide and an endeavour to make a mountain out of a molehill. Firstly, in certain castes persons have a tendency within the same family to write their surnames either as Goyal or Gupta or Bansal, and which surnames are used even with respect to real brothers in Delhi. Secondly the sale deed is executed by Smt. Raj Kumari Bhatnagar in favour of Sh. Virender Kumar Jain and which Virender Kumar Jain (who is none other than Birender Kumar Jain) has stepped in the witness box as PW-8. Merely because the parentage of Sh. Birender Kumar Jain is written as Lala Paras Das Goyal in the documents executed by Birender Kumar Jain and the parentage of Birender Kumar Jain in the documents executed by Smt. Raj Kumari Bhatnagar is written as Sh. Paras Das Jain cannot take the appellants any further as

the appellants never took up such a stand in the trial Court and also did not put any question in the cross-examination of any of the witnesses of the respondents/plaintiffs that Sh. Birender Kumar Jain who executed the documentation on 17.4.1986 is not the person in whose favour the sale deed was executed by Sh. Raj Kumari Bhatnagar. I may note that the initial P. D. in P.D. Goyal can possibly be Paras Das and possibly for this reason this issue was never raised on behalf of the appellants/ defendants in the trial Court. The trial Court, after discussing exhaustively various documentary evidence as also the documentation of witnesses of both the parties with respect to ownership of the respondents/plaintiffs has held as under:-

"ISSUE NO.2:-

If issue no.1 is decided in the affirmative, whether the plaintiffs are entitled to a decree of possession in respect of suit land? OPP.

The onus to prove the issues have been placed upon the plaintiff. In this case, the plaintiffs have based their title not on any Sale deed but on execution of the usual documents such as Agreement to Sell, General Power of Attorney etc. In order to prove the title, the plaintiffs have proved on record the following documents:-

Ex.PW1/1: Certified copy of the Registered Sale Deed dated 20.08.1959 between Delhi Housing Company and Smt. Rajkumari Bhatnagar.

Ex.PW1/2: Certified copy of the Registered Sale Deed dated 11.07.1966 whereby Smt. Rajkumari Bhatnagar sold the said plot of land to Sh. Birender Kumar Jain.

Ex.PW1/3: Certified copy of a Registered Power of Attorney dated 17.04.1986 executed by Sh. Birender Kumar Jain in favour of Smt. Indira Kumari Jain, whereby all the rights in respect of the said plot of land were transferred by Sh. Birender Kumar Jain in favour of Smt. Indira Kumari Jain.

Ex.PW1/4: Certified copy of the receipt of a sum of Rs. 15,000/ - received by Sh. Birender Kumar Jain in advance from Smt. Indira Kumar in respect of the said plot of land.

Ex.PW1/5: Agreement to Sell dated 17.04.1986 executed by Sh. Birender Kumar Jain in favour of Smt. Indira Kumari Jain. Under Agreement to Sell the consideration has been mentioned as Rs. 15,000/-.

The whole consideration was paid to him vide receipt Ex.PW1/ 4. In clause I of the said Sale Deed, it is mentioned that "the actual physical vacant possession of the said property has been delivered to party no.2 by the party no.1 on the spot" Smt. Indira Kumari Jain, thus came into possession of the property in part performance of the Agreement to Sell dated 17.04.1986.

Ex.PW1/6: Affidavit signed by Sh. Birender Kumar Jain on 17.04.1986 wherein he has stated that the ownership rights wi h possession of the plot no.274 in Block-F, measuring 200 sq. yds. situated in the area of Vill. Gharonda Neem Ka Bangar alias Patparganj in the abadi of Pandav Nagar, Illaqa Shahdara, Delhi with one room with boundary wall has been sold to Smt. Indira Kumari Jain.

Accordingly to Ld. counsel for plaintiffs, from these documents it has been established that Sh. Birender Kumar Jain was the owner of the said property and that he had agreed to sell the said property to Smt. Indira Kumar Jain and had placed Smt. Indira Kumar Jain in possession of the said property in part performance of the Agreement to Sell. Sh. Birender Kumar Jain also appeared as a witness and testified that he had entered into the transaction with Smt. Indira Kumari Jain. It is not disputed that Smt. Indira Kumar Jain died during the pendency of the first suit after leaving behind a Will dated 09.04.1991. The said Will has been exhibited as Ex.PW1/7 by its attesting witness Sh. Vidya Bhushan. Even otherwise, the plaintiffs are the natural heirs of the deceased being her daughters.

On the other hand according to Ld. counsel for the defendants, in the absence of any registered documents like Sale Dee, the plaintiffs are not entitled for relief of declaration as claimed in the suit.

xxxx xxxx xxxx xxxx

Power of Attorney sales in Delhi is a common mode of sale

of immovable properties to get over the Legislative restriction of transfer of properties. In the case in hand no Sale Deed was executed, however, the property was transferred by execution of the General Power of Attorney, Special Power of Attorney, Agreement to Sell etc. The concept of Power of Attorney sales have been recognized as mode of transaction. An interest has been created in favour of the purchaser. In **117 (2005) DELHI LAW TIMES-506** it was held that, *"Even if the plaintiffs have not become the owners as provided by execution of the Sale Deed, they have interest in the property and the plaintiffs are entitled to the possession of the property being as they were placed in possession of the property U/s 53A of the Specific Relief Act."*

The issue no.1 should be answered in favour of the plaintiffs alleging that by virtue of the execution of the aforesaid documents, Smt. Indira Kumari Jain had interest in the property in dispute and that on her death the plaintiffs have acquired interest in the property and that the plaintiffs have possessory title over the property and are entitled to the possession of the property and as such both the issues i.e. issue no.1 & 2 are liable to be decided in favour of the plaintiffs and against the defendants and they stand decided accordingly."

9. I am aware of the recent judgment of the Supreme Court in the case of **Suraj Lamp Industries Pvt. Ltd. Vs. State of Haryana and Anr.** 183 (2011) DLT 1(SC) which holds that these type of documentation executed in favour of Indira Kumari Jain do not confer 'ownership' rights in the property, however, a close reading of the judgment shows that in paras 12, 13 & 16 it is mentioned that rights which are created in terms of Section 53A of the Transfer of Property Act, 1882 and rights which are created by Section 202 of the Contract Act, 1872 are protected. Therefore, of course, specific ownership rights are not created by means of documents being the agreement to sell, general power of attorney etc as these are not 'sales' however on the basis of such documents rights to the extent created by Section 53A of Transfer of Property Act, 1882 and Section 202 of the Indian Contract Act, 1872 are preserved. Therefore, complete ownership rights may not vest with the mother of the respondents/ plaintiffs-Smt. Indira Kumari Jain, however, rights under Section 53A of Transfer of Property Act, 1882 and Section 202 of Contract Act, 1872

would surely have vested. Such rights after 12 years transform into ownership rights by law of prescription under Section 27 of the Limitation Act, 1963. Further, as already stated above, appellants have failed to produce the complete chain of title documents in their favour, besides the fact that even the witness from whom the appellants/defendants is said to have purchased the property did not step into the witness box, namely Sh. Shafiq Raja- a person who used to ply rickshaws.

10. A civil case is decided on balance of probabilities. A civil court after complete evidence is led and which is put in a melting pot decides the final picture which has to emerge. The final picture which has emerged in this case in view of the complete chain of title documents in favour of Smt. Indira Kumari Jain (mother of the respondents/plaintiffs), taken alongwith the fact that the appellants/defendants failed to prove the chain of title deeds, shows that respondents/plaintiffs have duly discharged onus of proof of their ownership including of their mother-Smt. Indira Kumari Jain. One cannot permit such criminal breach of trust, as found in the present case, by persons who are put into possession of the property to take care of the property, but who misappropriate the property by creating forged and fabricated documents.

11. The Supreme Court in the recent judgment of **Ramrameshwari Devi and Others v. Nirmala Devi and Others** (2011) 8 SCC 249 has stated that it is high time that actual and realistic costs be imposed. The Supreme Court has said that dishonesty in litigation ought to be dealt with by imposition of actual costs. Earlier a Division Bench of three Judges in the case of **Salem Advocate Bar Association Vs. Union of India** (2005)6 SCC 344 has held in para 37 of the said judgment that it is high time that actual costs be awarded. Some of the relevant paras of the judgment in the case of **Ramrameshwari Devi** (supra) read as under:-

"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** MANU/SC/0320/2000 : (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)

I am also empowered to impose costs, which may be actual costs, in terms of ***Volume V*** of the ***Punjab High Court Rules and Orders (as applicable to Delhi) Chapter VI Part I Rule 15***. Considering the endeavour of the appellants in collusion with the Chowkidar of the property to mis-appropriate the property, I find that in the interest of justice and fair play actual costs be imposed.

I may also note at this stage that during the course of hearing I put it to the counsel for the appellants, as per the submission of the counsel for the respondents, that the appellants can take time to vacate the suit property, and they will be exempted from paying the mesne profits which have been granted under the impugned judgment and decree, since possession of the suit property has already been taken in execution of the impugned judgment and decree, but the counsel for the appellants states that he has instructions to invite a judgment.

12. Accordingly, this appeal is dismissed with costs of Rs. 50,000/- and which I consider to be reasonable actual costs in the facts and circumstances of the present case. The amount deposited in this Court by the appellants be released to the respondents in appropriate satisfaction of the impugned judgment and decree. Trial Court record be sent back.

ILR (2012) III DELHI 57
MAC. APP.

USHA SHARMA & ANR. ....APPELLANTS

VERSUS

ADARSH KUMAR & ANR. ....RESPONDENTS

(G.P. MITTAL, J.)

MAC. APP. NO. : 506/2011 DATE OF DECISION: 19.01.2012

Motor Vehicle Act, 1988—Section 163-A—The Appellants are the parents of the deceased Sunny who died in a motor accident which occurred on 01.08.2008 impugned a judgment in MACT No. 611/2008 decided on 13.12.2010—In the Claim Petition filed before the Tribunal, it was averred that on 01.08.2008 at about 5.30 A.M. a two wheeler number DL-7S-BA-4864 met with an accident while it was being driven by Respondent No. 1 (Adarsh Kumar) and the deceased Sunny was riding as a pillion rider—The Tribunal by the impugned judgment found that the deceased himself was driving the two wheeler and Respondent No. 1 Adarsh Kumar (owner of the two wheeler) was one of the two pillion riders on the said two wheeler—Obviously, the Insurance Company indemnifies the owner on the basis of the contract of insurance where a third party is involved. Where an insurance contract provides for own damages or personal accident, the owner would be entitled to compensation in respect of the damage to the vehicle irrespective of any fault as also of the insurance amount upto the coverage in the contract in respect to the injuries received by him in an accident involving his own vehicle. Where the owner himself is a tortfeasor, he cannot claim compensation from his own insurer for a third party policy—In this case, the accident took place on account

of the neglect or default of deceased Sunny himself. His legal representatives, therefore, would not be entitled to the grant of compensation from the owner under Section 163-A of the Act also.

In my view, the contentions raised on Appellant's behalf are devoid of any merit and are liable to be rejected. **(Para 7)**

Important Issue Involved: The Insurance Company indemnifies the owner on the basis of the contract of insurance where a third party is involved. Where an insurance contract provides for own damages or personal accident, the owner would be entitled to compensation in respect of the damage to the vehicle irrespective of any fault as also of the insurance amount upto the coverage in the contract in respect to the injuries received by him in an accident involving his own vehicle. Where the owner himself is a tortfeasor, he cannot claim compensation from his own insurer for a third party policy. It was in this context that in **Rajni Devi** (Supra) the Supreme Court held that a borrower of a vehicle steps into the shoes of an owner and is not entitled to compensation from his insurer.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANTS : Mr. O.P. Mannie, Advocate.

FOR THE RESPONDENTS : Ms. Shantha Devi Raman, Advocate For R-2.

CASES REFERRED TO:

1. *General Manager, Chandigarh Transport Undertaking-I, Chandigarh & Anr* vs. *Kanwaljit Kaur & Ors.,* decided on 09.05.2011.
2. *National Insurance Company Limited* vs. *Sinitha & Ors.,* 2011 (13) SCALE 84.
3. *Ningamma & Anr.* vs. *United India Insurance Company Limited,* (2009) 13 SCC 710.

4. *Oriental Insurance Company Ltd.* vs. *Rajni Devi and Ors.* (2008) 5 SCC 736.

RESULT: Dismissed.

G.P. MITTAL, J. (ORAL)

1. The Appellants who are the parents of the deceased Sunny who died in a motor accident which occurred on 01.08.2008 impugn a judgment in MACT No.611/2008 decided by the Motor Accident Claims Tribunal, (the Tribunal) on 13.12.2010.

2. In the Claim Petition filed before the Tribunal, it was averred that on 01.18.2008 at about 5:30 A.M. a two wheeler number DL-7S-BA-4864 met with an accident while it was being driven by Respondent No.1 (Adarsh Kumar) and the deceased Sunny was riding as a pillion rider.

3. The Tribunal by the impugned judgment found that the deceased himself was driving the two wheeler and Respondent No.1 Adarsh Kumar (owner of the two wheeler) was one of the two pillion riders on the said two wheeler.

4. The learned counsel for the Appellants does not dispute that the two wheeler was driven by the deceased himself and that the accident took place by skidding of the two wheeler. The Tribunal relied on the unchallenged testimony of R2W1 to reach the conclusion that the deceased was driving the two wheeler.

5. The learned counsel for the Appellant submits that the judgment in **Ningamma & Anr. v. United India Insurance Company Limited,** (2009) 13 SCC 710 was misapplied by the Tribunal while rejecting the Appellant's Petition under Section 163-A of the Motor Vehicles Act (the Act). In this case, the owner of the two wheeler was also sitting on the pillion seat and the vehicle was being driven by the deceased with his permission. The presence of the owner on the two wheeler scooter would mean that the deceased Sunny was a third party vis-a-vis the owner. Thus, the owner was liable to pay the compensation and the Insurance Company was under obligation to indemnify the owner.

6. In the alternative, it is urged that even if, it is assumed that the deceased stepped into the shoes of the owner, he would be entitled to be paid a compensation of Rs. 1,00,000/- payable to the driver-cum-owner under the Insurance Policy.

7. In my view, the contentions raised on Appellant's behalf are devoid of any merit and are liable to be rejected.

8. In **Ningamma & Anr.** (supra), the Supreme Court relied on **Oriental Insurance Company Limited v. Rajni Devi,** (2008) 5 SCC 736 where it was held that Section 163-A of the Act cannot be said to have any application in respect of the accident wherein the owner of the motor vehicle himself is involved.

9. Obviously, the Insurance Company indemnifies the owner on the basis of the contract of insurance where a third party is involved. Where an insurance contract provides for own damages or personal accident, the owner would be entitled to compensation in respect of the damage to the vehicle irrespective of any fault as also of the insurance amount upto the coverage in the contract in respect to the injuries received by him in an accident involving his own vehicle. Where the owner himself is a tortfeasor, he cannot claim compensation from his own insurer for a third party policy. It was in this context that in **Rajni Devi** (supra) the Supreme Court held that a borrower of a vehicle steps into the shoes of an owner and is not entitled to compensation from his insurer. Para 18 of the report in **Ningamma & Anr.** (supra) is extracted hereunder:-

> "18. In the case of **Oriental Insurance Company Ltd. v. Rajni Devi and Ors.** (2008) 5 SCC 736, wherein one of us, namely, Hon'ble Justice S.B. Sinha is a party, it has been categorically held that in a case where third party is involved, the liability of the insurance company would be unlimited. It was also held in the said decision that where, however, compensation is claimed for the death of the owner or another passenger of the vehicle, the contract of insurance being governed by the contract qua contract, the claim of the claimant against the insurance company would depend upon the terms thereof. It was held in the said decision that Section 163-A of the M.V.A. cannot be said to have any application in respect of an accident wherein the owner of the motor vehicle himself is involved. The decision further held that the question is no longer res integra. The liability under Section 163-A of the M.V.A. is on the owner of the vehicle. So a person cannot be both, a claimant as also a recipient, with respect to claim. Therefore, the heirs of the deceased could not have maintained a claim in terms of Section 163-A of the

M.V.A. In our considered opinion, the ratio of the aforesaid decision is clearly applicable to the facts of the present case. In the present case, the deceased was not the owner of the motorbike in question. He borrowed the said motorbike from its real owner. The deceased cannot be held to be employee of the owner of the motorbike although he was authorised to drive the said vehicle by its owner, and therefore, he would step into the shoes of the owner of the motorbike".

10. There is another aspect of the case. A Claim under Section 163-A of the Act can be claimed by a person without proving any "wrongful act", "neglect" or "default" of the driver of the vehicle who caused the accident. But at the same time, if the person claiming the compensation himself is responsible for that accident or in other words, where the accident occurred because of the wrongful act, neglect or default of the Claimant or the deceased, the owner of the vehicle would be entitled to escape the liability under Section 163-A of the Act.

11. The distinction between award of compensation on the basis of 'liability without fault' under Section 140 and payment of compensation under Section 163-A of the Act was drawn by the Supreme Court in **National Insurance Company Limited v. Sinitha & Ors.,** 2011 (13) SCALE 84. I extract Paras 13, 14, 15 and 16 of the report hereunder for ready reference:-

"13. In the second limb of the present consideration, it is necessary to carry out a comparison between Sections 140 and 163-A of the Act. For this, Section 163-A of the Act is being extracted hereunder:

Section 163-A. Special provisions as to payment of compensation on structured formula basis – (1) Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having the force of law, the owner of the motor vehicle or the authorized insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be.

Explanation - For the purposes of this Sub-section, "permanent disability" shall have the same meaning and extent as in the Workmen's Compensation Act, 1923 (8 of 1923).

(2) In any claim for compensation under sub-section (1), the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person.

(3) The Central Government may, keeping in view the cost of living by notification in the Official Gazette, from time to time amend the Second Schedule.

A perusal of Section 163(A) reveals that Sub-section (2) thereof is in pari materia with Sub-section (3) of Section 140. In other words, just as in Section 140 of the Act, so also under Section 163-A of the Act, it is not essential for a claimant seeking compensation, to "plead or establish", that the accident out of which the claim arises suffers from "wrongful act" or "neglect" or "default" of the offending vehicle. But then, there is no equivalent of Sub-section (4) of Section 140 in Section 163-A of the Act. Whereas, under Sub-section (4) of Section 140, there is a specific bar, whereby the concerned party (owner or insurance company) is precluded from defeating a claim raised under Section 140 of the Act, by "pleading and establishing", "wrongful act", "neglect" or "default", there is no such or similar prohibiting clause in Section 163-A of the Act. The additional negative bar, precluding the defense from defeating a claim for reasons of a "fault" ("wrongful act", "neglect" or "default"), as has been expressly incorporated in Section 140 of the Act (through Sub-section (4) thereof), having not been embodied in Section 163-A of the Act, has to have a bearing on the interpretation of Section 163-A of the Act. In our considered view the legislature designedly included the negative clause through sub-section (4) in Section 140, yet consciously did not include the same in the scheme of Section 163-A of the Act. The legislature must have refrained from providing such a negative clause in Section 163-A intentionally and purposefully. In fact, the presence of Sub-

section (4) in Section 140, and the absence of a similar provision in Section 163-A, in our view, leaves no room for any doubt, that the only object of the Legislature in doing so was, that the legislature desired to afford liberty to the defense to defeat a claim for compensation raised under Section 163-A of the Act, by pleading and establishing "wrongful act", "neglect" or "default". Thus, in our view, it is open to a concerned party (owner or insurer) to defeat a claim raised under Section 163A of the Act, by pleading and establishing anyone of the three "faults", namely, "wrongful act", "neglect" or "default". But for the above reason, we find no plausible logic in the wisdom of the legislature, for providing an additional negative bar precluding the defense from defeating a claim for compensation in Section 140 of the Act, and in avoiding to include a similar negative bar in Section 163A of the Act. The object for incorporating Sub-section (2) in Section 163A of the Act is, that the burden of pleading and establishing proof of "wrongful act", "neglect" or "default" would not rest on the shoulders of the claimant. The absence of a provision similar to Sub-section (4) of Section 140 of the Act from Section 163A of the Act, is for shifting the onus of proof on the grounds of "wrongful act", "neglect" or "default" onto the shoulders of the defense (owner or the insurance company). A claim which can be defeated on the basis of any of the aforesaid considerations, regulated under the "fault" liability principle. We have no hesitation therefore to conclude, that Section 163A of the Act is founded on the "fault" liability principle.

14. There is also another reason, which supports the aforesaid conclusion. Section 140 of the Act falls in Chapter X of the Motor Vehicles Act, 1988. Chapter X of the Motor Vehicles Act, 1988 is titled as "Liability Without Fault in Certain Cases". The title of the chapter in which Section 140 falls, leaves no room for any doubt, that the provisions under the chapter have a reference to liability "... without fault ...", i.e., are founded under the "no-fault" liability principle. It would, however, be pertinent to mention, that Section 163A of the Act, does not find place in Chapter X of the Act. Section 163A falls in Chapter XI which has the title "Insurance of Motor Vehicles Against Third Party Risks". The Motor Vehicles Act, 1988 came into force with

effect from 1.7.1989 (i.e., the date on which it was published in the Gazette of India Extraordinary Part II). Section 140 of the Act was included in the original enactment under chapter X. As against the aforesaid, Section 163A of the Act was inserted therein with effect from 14.11.1994 by way of an amendment. Had it been the intention of the legislature to provide for another provision (besides Section 140 of the Act), under the "no-fault" liability principle, it would have rationally added the same under Chapter X of the Act. Only because it was not meant to fall within the ambit of the title of Chapter X of the Act "Liability Without Fault in Certain Cases", it was purposefully and designedly not included thereunder.

15. The heading of Section 163A also needs a special mention. It reads, "Special Provisions as to Payment of Compensation on Structured Formula Basis". It is abundantly clear that Section 163A, introduced a different scheme for expeditious determination of accident claims. Expeditious determination would have reference to a provision wherein litigation was hitherto before (before the insertion of Section 163A of the Act) being long drawn. The only such situation (before the insertion of Section 163A of the Act) wherein the litigation was long drawn was under Chapter XII of the Act. Since the provisions under Chapter XII are structured under the "fault" liability principle, its alternative would also inferentially be founded under the same principle. Section 163A of the Act, catered to shortening the length of litigation, by introducing a scheme regulated by a pre-structured formula to evaluate compensation. It provided for some short-cuts, as for instance, only proof of age and income, need to be established by the claimant to determine the compensation in case of death. There is also not much discretion in the determination of other damages, the limits whereof are also provided for. All in all, one cannot lose sight of the fact that claims made under Section 163A can result in substantial compensation. When taken together the liability may be huge. It is difficult to accept, that the legislature would fasten such a prodigious liability under the "no-fault" liability principle, without reference to the "fault" grounds. When compensation is high, it is legitimate that the insurance company is not fastened with

liability when the offending vehicle suffered a "fault" ("wrongful act", "neglect", or "defect") under a valid Act only policy. Even the instant process of reasoning, leads to the inference, that Section 163A of the Act is founded under the "fault" liability principle.

16. At the instant juncture, it is also necessary to reiterate a conclusion already drawn above, namely, that Section 163A of the Act has an overriding effect on all other provisions of the Motor Vehicles Act, 1988. Stated in other words, none of the provisions of the Motor Vehicles Act which is in conflict with Section 163A of the Act will negate the mandate contained therein (in Section 163A of the Act). Therefore, no matter what, Section 163A of the Act shall stand on its own, without being diluted by any provision. Furthermore, in the course of our determination including the inferences and conclusions drawn by us from the judgment of this Court in **Oriental Insurance Company Limited v. Hansrajbhai v. Kodala,** (2001) 5 SCC 175, as also, the statutory provisions dealt with by this Court in its aforesaid determination, we are of the view, that there is no basis for inferring that Section 163A of the Act is founded under the "no-fault" liability principle. Additionally, we have concluded herein above, that on the conjoint reading of Sections 140 and 163A, the legislative intent is clear, namely, that a claim for compensation raised under Section 163A of the Act, need not be based on pleadings or proof at the hands of the claimants showing absence of "wrongful act", being "neglect" or "default". But that, is not sufficient to determine that the provision falls under the "fault" liability principle. To decide whether a provision is governed by the "fault" liability principle the converse has also to be established, i.e., whether a claim raised thereunder can be defeated by the concerned party (owner or insurance company) by pleading and proving "wrongful act", "neglect" or "default". From the preceding paragraphs (commencing from paragraph 12), we have no hesitation in concluding, that it is open to the owner or insurance company, as the case may be, to defeat a claim under Section 163A of the Act by pleading and establishing through cogent evidence a "fault" ground ("wrongful act" or "neglect" or "default"). It is, therefore, doubtless, that Section 163A of the

Act is founded under the "fault" liability principle. To this effect, we accept the contention advanced at the hands of the Learned Counsel for the Petitioner."

12. In this case, the accident took place on account of the neglect or default of deceased Sunny himself. His legal representatives, therefore, would not be entitled to the grant of compensation from the owner under Section 163-A of the Act also. Similar view was taken by the Punjab and Haryana High Court in FAO No.1413/2000 titled **General Manager, Chandigarh Transport Undertaking-I, Chandigarh & Anr v. Kanwaljit Kaur & Ors.,** decided on 09.05.2011.

13. The personal accident cover (even if the Insurance Company could not avoid the policy) for Rs. 1,00,000/- was only for the owner-driver. In other words, where the owner himself suffers any injury while driving the vehicle or in any other accident, he/his legal representatives would be entitled to the compensation in terms of the contract of insurance.

14. Anybody and everybody borrowing the vehicle from an owner would not be covered on the principle in Ningamma & Anr. (supra) that he steps into the shoes of the owner.

15. The Appeal is devoid of any merit; the same is accordingly dismissed. No costs.

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W.P. (C)

APURVA **....PETITIONER**

VERSUS

UNIVERSITY OF DELHI & ANR. **....RESPONDENTS**

(HIMA KOHLI, J.)

W.P. (C) NO. : 7437/2011 **DATE OF DECISION: 25.01.2012**

Constitution of India, 1950—Article 226—Petition for directions to respondent No.2/College to issue a migration certificate in her favour to enable her to migrate from respondent No. 2/College to Vivekanand College, Vivek Vihar, Delhi by getting admission in the B.Com (Pass) Course in the second year (Academic Session 2011-12)—Directions have also been sought to be issued to respondent No.1/University to verify from all colleges affiliated to it as to whether migration certificates are being issued to students in a timely manner—Brief facts—Petitioner, a resident of Ghaziabad U.P., completed her schooling in the year 2009-10 and thereafter in July 2010, applied to respondent No.2/ College situated near Najafgarh, Delhi seeking admission in the B.Com (Pass) Course, which was duly granted to her—Petitioner continued her studies in the respondent No. 2/College and was declared as having passed the first year in July 2011—In the second session (i.e. the second academic year) of the aforesaid approached Vivekanand College, Delhi University with a request for grant of permission to migrate from respondent No.2/College to the said college—Upon receiving consent from the proposed transferee college, the petitioner submitted a representation dated 29.08.2011 to respondent No.1/ University stating *inter alia* that though she had

obtained a no objection from the Principal of Vivekanand College for her migration to the same course in the second year, respondent No.2/College had failed to issue a migration certificate to her—It is stated that, in the meantime, Vivekanand College issued a circular dated 21.09.2011, confirming the migration of the petitioner from respondent No.2/ College to the course of B.Com. (Pass) in the second year—Despite the issuance of the said circular, as respondent No. 2/College refused to issued a migration certificate to the petitioner, she had to approach this Court by filing the present petition. Petitioner contended that respondent No.2/College has been arbitrarily withholding her migration certificate and it has adopted a pick and chose policy for issuing migration certificates—Held:- Division Bench in *Aman Ichhpuniani* has held that to migrate from one college to another is not a vested right—The welfare of the student and the institution have both to be kept in view and weighed—If there be conflict between the two—A student has a right to choose an educational Institution of his choice while seeking an admission, but such right cannot be exercised with the same vigour and vitality while seeking migration—Petitioner had been shifting her stand from time to time with regard to the reasons given by her for seeking migration—Representation filed by the Petitioner reveals that while initially, the petitioner took a plea of "distance from college to home" as a ground for seeking migration from respondent No.2/College to Vivekanand College, Vivek Vihar, subsequently, she took the plea of financial hardship of her father as a ground for seeking migration—The Petition is accordingly dismissed.

The law on the issue of right of a student to claim migration from one college to the other was examined and settled in the case of **Aman Ichhpuniani**(supra) wherein a Division Bench of this Court when confronted with a question as to

whether a student has a "vested right" to claim migration from one college to the other or merely "a right" and if so, whether the said right is capable of being enforced and exercised in writ jurisdiction of the High Court, held as below:

> "16. Nevertheless, the existence of Ordinance-IV does contemplate migration. The provision also casts a duty on the Principal of the college from which migration is sought to exercise his discretion and take a decision on prayer for migration guided by reason keeping in view the relevant considerations and not merely by whim and caprice. **Like all other discretionary powers vesting in public authorities, the power to forward an application seeking migration is also coupled with a duty. Each prayer shall have to be dealt with on its own individual merits. If the prayer for migration be a bald prayer it may not be allowed merely for asking. On the contrary if there are valid reasons assigned providing reasonable justification for such demand, the Principal on being satisfied of the availability of just grounds for migration, is duty bound to forward the application. Else the exercise of discretionary power would stand vitiated for unreasonableness or arbitrariness.**
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> 17-19. xxx
>
> 20. The mind of a student is immature. In an educational institution it is in the process of being trained. The teachers and the Principal of the Institution are trustees of the students and their parents, who repose faith and confidence in them for training the mind of the students and shaping them so as to be fit to face the world and bear the burden of life. **For valid reasons the Principal may form an opinion that it would not be in the interest of the student to permit migration howsoever keen he may be to do so. He may have to weigh the interest of**

> **the Institution also. Some times the interest of the Institution and the interest of the student may conflict. He shall have to strike a balance and find the weighty side to which the decision shall have to swing. The whole process shall have to be objective.**
>
> If the decision making process be vitiated or the decision itself be vitiated for failure to take into consideration the relevant ones and/or for having been influenced by the irrelevant and extraneous consideration or want of bonafide, the decision will be open to judicial review. Of course, as held in **Vice Chancellor, Utkal University & Ors. Vs. S.K. Ghose & Ors.** (AIR 1954 SC 217), it is not the function of the courts of law to substitute their wisdom and discretion for that of the persons to whose judgment the matter in question is entrusted by the law.
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> 21. xxx
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> 22. xxx
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> 23. To sum up, in our opinion :-
>
> (i)**To migrate from one college of the University to another is not a vested right of student.** A student may seek migration from one College to another, if there be reasons for doing so. **Ordinance-IV confers discretionary power on the Principal of the College from which migration is sought to forward or not to forward a prayer by a student seeking migration.** The power is coupled with a duty to act reasonably guided by relevant consideration not by whim or caprice. **The welfare of the student and the institution have both to be kept in view and weighed - if there be conflict between the two**;
>
> (ii) A student has a right to choose an educational

Institution of his choice while seeking an admission, but such right cannot be exercised with the same vigour and vitality while seeking migration;

(iii)A request by student seeking migration for reasons relevant and germane to such prayer may not be denied unless the Principal be satisfied of the non-availability of the grounds or be of the opinion that the migration will not be in the interest of the student or the interest of the Institution outweighs the interest of the student. The choice of the student has to be respected by giving due weight; for no sensible student would ordinarily like to leave the Institution which he had chosen to join." (emphasis added) **(Para 15)**

In the case of **Chetan Goel** (Supra) while relying on a series of decisions on the same issue, namely, **'Hanspal Singh Bhinder Vs. University of Delhi',** 1997 II AD (Delhi) 270, **'Aman Ichhpuniani** (Supra), and CWP No.3089/1995 entitled **'Sumeet Sawhney Vs. The Principal, Sri Aurobindo College, Malviya Nagar'** decided on 19.12.1997, a Single Judge of this Court held that a student does not have a vested right to demand migration from one college to another. It was further explained that the aforesaid uniform view had been taken by the Courts that a cogent reason must be given by the student for seeking migration and the decision taken by the College should not be found to be capricious, arbitrary or unreasonable. The learned Single Judge also referred to the decisions of a co-ordinate Bench of this Court in the case of **Anant Madan Vs. University of Delhi,** 1999 I AD (Delhi) 249, W.P.(C) No.5504/1998 entitled **G. Girish Vs. PGDAV College** decided on 11.12.1998 and W.P.(C) No.15651/2004 entitled **Vineeta Sharma Vs. Satyawati Co-Ed College (Day)** decided on 02.05.2005 and while rejecting the case of the petitioner therein as being devoid of merits, reiterated that a student must give cogent reasons for seeking migration and observed as under:-.

"4. The interests of the College have to be balanced with the interests of the student. It has been contended on behalf of the College that its high and constantly improving academic achievements are obvious in the acceptance of the Petitioners in other Colleges. The Faculty would be aversely affected, for no fault ascribable to it, if students who have achieved excellence in the Examinations are secreted away by other Colleges. This practice has been experienced even at the school level. **Depleted number of students in a course would not only cause financial strain on the College concerned but would also have a demoralizing effect on the Faculty. One should also not lose sight of the fact that for every student who is granted admission in a College there may be many who have been disappointed. The unsuccessful students cannot get admission in the second year. The question of migration is, therefore, not a trivial matter and must be viewed with seriousness.** Had the Petitioners obtained higher marks in their 12th Class Examination they may have gained admittance to the College to which migration is now sought." (emphasis added) **(Para 17)**

Important Issue Involved: To migrate from one college to another is not a vested right. The welfare of the student and the institution have both to be kept in view and weighed if there be conflict between the two.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. V.K. Sharma, Advocate.

FOR THE RESPONDENT : Mr. Mohinder Rupal, Advocate with Ms. Shawana Bari, Adv. for R-1/D.U. Mr. Amit Bansal, Advocate for R-2.

CASES REFERRED TO:

1. *Chetan Goel & Ors.* vs. *University of Delhi & Anr.* 2005 VIII AD (Delhi) 316.
2. *Vineeta Sharma* vs. *Satyawati Co-Ed College (Day)* decided on 02.05.2005.
3. *G. Girish* vs. *PGDAV College* decided on 11.12.1998 and W.P.(C) No.15651/2004.
4. *Jatin Behl* vs. *University of Delhi & Ors.* 99 (2002) DLT 546.
5. *Anant Madan* vs. *University of Delhi,* 1999 I AD (Delhi) 249.
6. *Aman Ichhpuniani* vs. *The Vice Chancellor, Delhi University & Ors.* 71 (1998) DLT 202 (DB).
7. *Hanspal Singh Bhinder* vs. *University of Delhi.,* 1997 II AD (Delhi) 270.
8. *Sumeet Sawhney* vs. *The Principal, Sri Aurobindo College, Malviya Nagar'* decided on 19.12.1997.
9. *Vice Chancellor, Utkal University & Ors.* vs. *S.K. Ghose & Ors.* (AIR 1954 SC 217).

RESULT: Petition dismissed.

HIMA KOHLI, J (ORAL)

1. The petitioner has filed the present petition praying inter alia for directions to respondent No.2/College to issue a migration certificate in her favour to enable her to migrate from respondent No.2/College to Vivekanand College, Vivek Vihar, Delhi by getting admission in the B.Com (Pass) Course in the second year (Academic Session 2011-12). Directions have also been sought to be issued to respondent No.1/University to verify from all colleges affiliated to it as to whether migration certificates are being issued to students in a timely manner.

2. Briefly stated, the facts of the present case are that the petitioner, who is a resident of Ghaziabad, U.P., completed her schooling in the year 2009-10 and thereafter in July 2010, applied to respondent No.2/College situated near Najafgarh, Delhi seeking admission in the B.Com (Pass) Course, which was duly granted to her. The petitioner continued her

studies in the respondent No.2/College and was declared as having passed the first year in July 2011. The second session (i.e. the second academic year) of the aforesaid course began on 01.08.2011. On 17.08.2011, the petitioner approached Vivekanand College, Delhi University with a request for grant of permission to migrate from respondent No.2/College to the said college. Counsel for the petitioner refers to a copy of the aforesaid representation dated 17.08.2011 and points out that an endorsement was made thereon by Vivekanand College that the case of the petitioner had been recommended for migration in the second year.

3. Immediately, upon receiving the said consent from the proposed transferee college, the petitioner submitted a representation dated 29.08.2011 to respondent No.1/University stating inter alia that though she had obtained a no objection from the Principal of Vivekanand College for her migration to the same course in the second year, respondent No.2/college had failed to issue a migration certificate to her and therefore, intervention of respondent No.1/University was sought by the petitioner. It is the case of the petitioner that a representation dated 05.09.2011 was submitted by her to the Principal of respondent No.2/College for issuance of a migration certificate in her favour on the ground that her father was facing acute financial problems. The aforesaid representation submitted by the petitioner was received by respondent No.2/College on 07.09.2011. It is stated by the counsel for the petitioner that, in the meantime, Vivekanand College issued a circular dated 21.09.2011, confirming the migration of the petitioner from respondent No.2/College to the course of B.Com.(Pass) in the second year (Annexure P-6). But, despite the issuance of the said circular, as respondent No.2/College refused to issue a migration certificate to the petitioner, she had to approach this Court by filing the present petition on 03.10.2011.

4. It is the contention of learned counsel for the petitioner that respondent No.2/College has been arbitrarily withholding her migration certificate and it has adopted a pick and chose policy for issuing migration certificates.

5. Notice was issued on the present petition on 12.10.2011. Counsel for respondent No.1/University entered appearance on the very same date and sought time to file a counter affidavit. Thereafter, appearance was also entered on behalf of respondent No.2/college and time was sought

to file a counter affidavit. Counter affidavits have been filed by the respondents.

6. Respondent No.2/College raised a preliminary objection in the counter affidavit to the effect that the petitioner has failed to implead the proposed transferee college, i.e., Vivekanand College as a co-respondent in the present proceedings and that the no objection granted by the said college to the petitioner was on 17.08.2011 and much time has passed ever since then. Therefore, it was urged that it would have been appropriate for the Court to have obtained a response from the proposed transferee college as to the status of the migration of the petitioner at such a belated stage. Counsel for respondent No.2/College submits that even otherwise, the petitioner had approached this Court quite belatedly in the month of October 2011 when three months of the academic session 2011-12 had already passed and by now only two months of the said session are left for completion, whereafter the annual examinations are to commence in the month of April 2012. It is further stated that the petitioner had also filled up her examination form on 30.09.2011 and submitted it to the respondent No.2/College, which has in turn forwarded the same to respondent No.1/University.

7. Counsel for respondent No.2/College submits that while filing the present petition, the petitioner has also withheld material information from the Court. He states that initially, the petitioner had approached the Principal of respondent No.2/College with a representation that was received on 18.08.2011, wherein she had requested for issuance of a migration certificate to Vivekanand College on the ground that she was a resident of Ghaziabad and Vivekanand College was closer to her residence. However, in her second representation dated 24.08.2011 addressed to the Dean, Students Welfare, Delhi University, the petitioner did not furnish any reason whatsoever for seeking migration from respondent No.2/College. In her third representation dated 5.9.2011 addressed to respondent No.2/College, the reason given by the petitioner for seeking migration from respondent No.2/college was that her father had been facing financial problems.

8. Learned counsel for respondent No.2/College submits that in the academic session 2011-12, the Department of Commerce of respondent No.2/College had received 26 applications from different students seeking migration to other colleges. Confronted with such a slew of applications

seeking migration, the Staff Council of the respondent No.2/College took a decision in its meeting dated 13.09.2011 that it would not allow migration to any student solely on the ground of distance. The aforesaid decision was taken in view of the fact that respondent No.2/College found that many students had been taking admission in the college with the intention to migrate to colleges of their choice in the second year which had resulted in adversely affecting the working of the College and a marked reduction of the workload of the college/Department. The other consequence of such migration was that it was resulting in denying admission to genuine students who wanted to take admission in B.Com (Pass) course, but, were denied such an opportunity at that stage.

9. In support of the aforesaid submission, counsel for respondent No.2/College draws the attention of this Court to the minutes of the meeting dated 13.09.2011 held by the Department of Commerce in respondent no.2/College (Annexure P-3) wherein the Department observed that the respondent No.1/University had opened respondent No.2/College in a rural area so as to address the socio-economic hardship faced by students living in such areas, who were keen to take admission at college level for undertaking higher studies, but were unable to do so as they could not get admission in other premier colleges affiliated to respondent No.1/University. It was also observed in the said meeting that apart from the petitioner herein, there were many other students who had submitted applications seeking migration on the ground of "distance from college to home" but their requests made on this basis were denied in view of an earlier decision of the Staff Council. The minutes of the meeting record the fact that later on, applications for migration were received from students giving different grounds including medical grounds of their parents and the economic problems being faced by their families, but only two such students who had applied for migration on economic grounds and were consistent on the said ground taken by them, were allowed migration on compassionate grounds. However, all the other applications, including that of the petitioner were turned down for the reason that the said students had changed the initial ground taken for migration to other grounds on an assumption that the same would be found to be more suitable/acceptable for respondent No.2/College to grant them a migration certificate.

10. The aforesaid decision taken by the Department of Commerce of respondent No.2/College was reiterated in the meeting of the Staff

Council held on 17.10.2011(Annxure R-6) which stand was echoed by respondent No.2/College in its reply dated 19.09.2011 addressed to respondent No.1/University on the same issue.(Annexure R-5).

11. Counsel for respondent No.2/College states that the decision taken by respondent No.2/College to decline the request of the petitioner for issuance of a migration certificate is neither arbitrary nor whimsical for the reason that as is apparent from the records, the petitioner had earlier applied for migration solely on the ground of "distance from college" but, later on, she sought to improve upon her case by taking an additional ground of economic hardship in order to overcome the aforesaid decision of the Staff Council. It is further stated that the decision of the Staff Council has been uniformly applied to all the students including the petitioner and the respondent No.2/College has not adopted a pick and chose policy as alleged by the petitioner. To buttress his argument that a student does not have a vested right to claim migration from one college to another within the same University, learned counsel for respondent No.2/College relied on the following judgments:

i. **Aman Ichhpuniani Vs. The Vice Chancellor, Delhi University & Ors.** 71 (1998) DLT 202 (DB).

ii. **Jatin Behl Vs. University of Delhi & Ors.** 99 (2002) DLT 546.

iii. **Chetan Goel & Ors. Vs. University of Delhi & Anr.** 2005 VIII AD (Delhi) 316.

12. In the course of arguments, counsel for respondent No.2/College hands over a copy of a recent Notification dated 22.11.2011 issued by the Deputy Registrar(Academic), University of Delhi, wherein it was informed that the last date for migration of students from the School of Open Learning to Regular Colleges or between Regular Colleges had been extended till 30.11.2011 for the academic year 2011-12. The said Notification dated 22.11.2011 is taken on record. It is stated that in view of the aforesaid Notification dated 22.11.2011, the petitioner's request for issuance of migration certificate cannot be entertained any longer when only two months are left for completion of the academic year.

13. Though the counter affidavit of respondent No.1/University is not on record, learned counsel states that he had filed the same in the Registry yesterday with advance copies to counsel for the petitioner and

respondent No.2. He hands over a copy of the said counter affidavit which is taken on record. In the said counter affidavit, respondent No.1/University has also confirmed the fact that the petitioner had changed the ground for seeking migration from the one she had taken initially, i.e., from the ground of 'distance from home to college' to 'financial hardships'. He states that clause 2 of Ordinance IV of the Ordinances of the University of Delhi which deals with the provision of migration clarifies that it is a permissive permission and cannot be claimed as a matter of right and, therefore, a No Objection Certificate is required not only from the proposed transferee college but also from the transferor college.

14. This Court has considered the submissions made by counsels for the parties, perused the documents placed on record and examined the decisions relied upon by the counsels.

15. The law on the issue of right of a student to claim migration from one college to the other was examined and settled in the case of **Aman Ichhpuniani**(supra) wherein a Division Bench of this Court when confronted with a question as to whether a student has a "vested right" to claim migration from one college to the other or merely "a right" and if so, whether the said right is capable of being enforced and exercised in writ jurisdiction of the High Court, held as below:

> "16. Nevertheless, the existence of Ordinance-IV does contemplate migration. The provision also casts a duty on the Principal of the college from which migration is sought to exercise his discretion and take a decision on prayer for migration guided by reason keeping in view the relevant considerations and not merely by whim and caprice. **Like all other discretionary powers vesting in public authorities, the power to forward an application seeking migration is also coupled with a duty. Each prayer shall have to be dealt with on its own individual merits. If the prayer for migration be a bald prayer it may not be allowed merely for asking. On the contrary if there are valid reasons assigned providing reasonable justification for such demand, the Principal on being satisfied of the availability of just grounds for migration, is duty bound to forward the application. Else the exercise of discretionary power would stand vitiated for unreasonableness or arbitrariness.**

17-19. xxx

20. The mind of a student is immature. In an educational institution it is in the process of being trained. The teachers and the Principal of the Institution are trustees of the students and their parents, who repose faith and confidence in them for training the mind of the students and shaping them so as to be fit to face the world and bear the burden of life. **For valid reasons the Principal may form an opinion that it would not be in the interest of the student to permit migration howsoever keen he may be to do so. He may have to weigh the interest of the Institution also. Some times the interest of the Institution and the interest of the student may conflict. He shall have to strike a balance and find the weighty side to which the decision shall have to swing. The whole process shall have to be objective.**

If the decision making process be vitiated or the decision itself be vitiated for failure to take into consideration the relevant ones and/or for having been influenced by the irrelevant and extraneous consideration or want of bonafide, the decision will be open to judicial review. Of course, as held in **Vice Chancellor, Utkal University & Ors. Vs. S.K. Ghose & Ors.** (AIR 1954 SC 217), it is not the function of the courts of law to substitute their wisdom and discretion for that of the persons to whose judgment the matter in question is entrusted by the law.

21. xxx

22. xxx

23. To sum up, in our opinion :-

(i) **To migrate from one college of the University to another is not a vested right of student.** A student may seek migration from one College to another, if there be reasons for doing so. **Ordanance-IV confers discretionary power on the Principal of the College from which migration is sought to forward or not to forward a prayer by a student seeking migration.** The power is coupled with a duty to act reasonably guided by relevant consideration not by whim or caprice. **The welfare of the student and the institution have both to be kept in view and weighed - if there be conflict between the two**;

(ii) A student has a right to choose an educational Institution of his choice while seeking an admission, but such right cannot be exercised with the same vigour and vitality while seeking migration;

(iii) A request by student seeking migration for reasons relevant and germane to such prayer may not be denied unless the Principal be satisfied of the non-availability of the grounds or be of the opinion that the migration will not be in the interest of the student or the interest of the Institution outweighs the interest of the student. The choice of the student has to be respected by giving due weight; for no sensible student would ordinarily like to leave the Institution which he had chosen to join." (emphasis added)

16. Following the aforesaid decision in the case of **Jatin Behl** (Supra), a Single Judge of this Court took into consideration the legal position with regard to permitting migration of students and observed as below:-

"15. The reason as subsequently disclosed by the petitioner is that with a view to advance his career his wishes to join the coaching classes for the entrance examination for Chartered Accountancy. These classes are said to be available only near his residence in the evening. As noted in **Aman Ichhpuniani** (Supra) **a student has no vested right to claim migration. What has to be considered is whether the consent was being unreasonably withheld by respondent No. 3 college.** In the instant case petitioner was not entitled to admission in the morning college based on the results of his 12th Class Board Examination. He had accordingly obtained and secured admission in the evening College based on the marks obtained. This was not a case either of extreme hardship or any other supervening circumstance like the transfer of the parents of the petitioner resulting in change of residence or such other reasons for which migration has become inevitable. All that is claimed is that transfer to the morning college would enable the petitioner to take coaching

classes, which would help him in preparation for the Entrance Examination. It is not as if morning classes are not at all available. They are available at an inconvenient distance from the petitioner's house. The respondent in their counter affidavit have brought out that the petitioner did not even seek the consent of respondent No. 3 initially. It is claimed by respondent No. 3 that the cut off marks at which admission had been closed by respondent No. 4 was 80% The petitioner having got 69.75% in his qualifying 12th Class Examination could not have secured admission in respondent No. 4 college. He cannot now be permitted to secure the same through the back door, by-passing the claims of a large number of students, who had got higher marks than him in order of merits by seeking admission by way of migration. A further factor, which is pointed out is that while respondent No. 3 evening college, is having less students than the sanctioned strength, the morning college is having 150 students as against the sanctioned strength of 120.

16. In these circumstances respondent No. 4 college could not have given its no objection as the same would be contrary to the UGC Guide-lines which required the colleges not to accede its sanctioned strength and adhere to the permitted sanctioned strength. The respondent No. 4 college against a sanctioned student strength of 400 was having 2000 students. Relevant part of ordinance 4 which governs the case of migration is as under:-

"Applications for migrations from one college of the University to another shall only be entertained by the Principal, if forwarded by the Principal of the college from which migration is sought, and the necessary alteration in the enrolment entries shall only be made in the University register by the Registrar after obtaining the consent in writ of both Principals."

17. **The initial application also did not disclose any reason for seeking migration. The plea of pursuing the coaching classes for chartered Accountancy Entrance Examination and computer course was subsequently taken."**(emphasis added)

17. In the case of **Chetan Goel** (Supra) while relying on a series of decisions on the same issue, namely, **'Hanspal Singh Bhinder Vs. University of Delhi',** 1997 II AD (Delhi) 270, **'Aman Ichhpuniani**

(Supra), and CWP No.3089/1995 entitled **'Sumeet Sawhney Vs. The Principal, Sri Aurobindo College, Malviya Nagar'** decided on 19.12.1997, a Single Judge of this Court held that a student does not have a vested right to demand migration from one college to another. It was further explained that the aforesaid uniform view had been taken by the Courts that a cogent reason must be given by the student for seeking migration and the decision taken by the College should not be found to be capricious, arbitrary or unreasonable. The learned Single Judge also referred to the decisions of a co-ordinate Bench of this Court in the case of **Anant Madan Vs. University of Delhi,** 1999 I AD (Delhi) 249, W.P.(C) No.5504/1998 entitled **G. Girish Vs. PGDAV College** decided on 11.12.1998 and W.P.(C) No.15651/2004 entitled **Vineeta Sharma Vs. Satyawati Co-Ed College (Day)** decided on 02.05.2005 and while rejecting the case of the petitioner therein as being devoid of merits, reiterated that a student must give cogent reasons for seeking migration and observed as under:-.

> "4. The interests of the College have to be balanced with the interests of the student. It has been contended on behalf of the College that its high and constantly improving academic achievements are obvious in the acceptance of the Petitioners in other Colleges. The Faculty would be aversely affected, for no fault ascribable to it, if students who have achieved excellence in the Examinations are secreted away by other Colleges. This practice has been experienced even at the school level. **Depleted number of students in a course would not only cause financial strain on the College concerned but would also have a demoralizing effect on the Faculty. One should also not lose sight of the fact that for every student who is granted admission in a College there may be many who have been disappointed. The unsuccessful students cannot get admission in the second year. The question of migration is, therefore, not a trivial matter and must be viewed with seriousness.** Had the Petitioners obtained higher marks in their 12th Class Examination they may have gained admittance to the College to which migration is now sought." (emphasis added)

18. In the present case also, the facts brought on record reveal that the petitioner had been shifting her stand from time to time with regard to the reasons given by her for seeking migration respondent No.2/

College and further, that she had not placed on record her first representation made to respondent No.2/College for seeking migration. The said representation has been filed by respondent No.2/College alongwith its counter affidavit which reveals that while initially, the petitioner took a plea of "distance from college to home" as a ground for seeking migration from respondent No.2/College to Vivekanand College, Vivek Vihar, but subsequently, she took the plea of financial hardship of her father as a ground for seeking migration. The plea of financial hardship taken by the petitioner later on to seek migration ought to have been substantiated by her by placing relevant documents in support thereof.

19. Pertinently, the medical records of the petitioner's father enclosed with the writ petition to support the plea of financial hardship being faced by the petitioner's family, only reveal that he had undergone a surgery for Hernioplasy (ventral) in a hospital on 30.06.2011 and was discharged on 02.07.2011. Apart from the aforesaid medical documents, which noted that the post operative recovery of the petitioner's father was uneventful and he was being discharged in a satisfactory condition, there is no other document placed on record by the petitioner to show that her father had remained so unwell/sick and was thus in such a financial strait that she was compelled to seek migration from respondent No.2/College.

20. Even otherwise, having perused the decisions taken in the meetings held by the Staff Council of the College, wherein a policy was formulated for dealing with the representations received from students seeking migration from the said college and having noticed that the said policy has been consistently followed by respondent No.2/College, this Court is of the opinion that the petitioner has not been able to point out any such discrimination, arbitrariness or capriciousness on the part of respondent No.2/College for this Court to interfere by invoking its powers of judicial review. The Principal of respondent No.2/College has had to strike a balance between the interests of the students and that of the Institution and rightly so. The minutes of the meeting of the Staff Council dated 17.10.2011 is a telling remark on how the incessant requests of students in the second year of the college, seeking migration to other colleges without any cogent reasons has demoralized the teaching faculty and adversely affected the financial health of the institution. In the absence of any valid reasons provided by the petitioner to seek migration from respondent no.2/college, there is no compulsion on the Principal of the

college to accede to such a request just for the asking. The shifting stand of the petitioner is itself a pointer to the absence of valid reasons in her case for seeking migration.

21. It is also relevant to note that in view of the latest Notification dated 22.11.2011 issued by respondent No.1/University wherein the last date for migration of students between regular colleges had been extended till 30.11.2011 for the academic year 2011-12, this Court is not in favour of granting any such relaxation to the petitioner at this belated stage. It is pertinent to note that the academic year 2011-12 is at its fag end with only two months left for the examinations of the said academic year to commence in April 2012. In such circumstances, there is no justification to accede to the request of the petitioner for permitting her to migrate from respondent No.2/college at this belated stage.

22. For all the aforesaid reasons, this Court declines to grant the relief as sought by the petitioner in the present petition. The petition is accordingly dismissed while leaving the parties to bear their own costs.

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LPA

UNION OF INDIA ....APPELLANT

VERSUS

RAIL COACH FACTORY MEN'S UNION ....RESPONDENT

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

LPA NO. : 550/2010 DATE OF DECISION: 30.01.2012

Trade Union Act, 1926—Writ Petition under Article 226 of the Constitution of India for issue a Writ of Mandamus requiring the Respondent to recognize the registered trade unions in the Railways Production Units as Railway Trade Unions—Brief Facts—

Respondent, a duly registered trade union of workers of Railway Coach Factory (RCF), Kapurthala—RCF workers are treated at par with the Railway Production Units (RPUs)—In respect of Zonal Railways, the Ministry of Railway (Central) has the policy for recognition of unions based on secret ballot, this system is not available in RPUs—As per Rules for the Recognition of Service Associations of Railway Servants the Government agreed to accord official recognition to Associations of its Industrial employees, which includes the railway servant—In all Central Government Ministries and Departments including the Railways, Joint Consultative Machinery (JCM) has been set up in 1966—JCM provided that it would " supplement and not replace the facilities provided to employees to make only representations, or the associations of employees to make representation of matters concerning their respective constituent service grade etc"—In this JCM, the representatives of the recognized Unions participate on behalf of the employees in Zonal Officers—In RPUs, no system of recognition of trade unions—Only Staff Councils are allowed to represent the cause of the workers and trade unions are not permitted—Writ Petition filed—Ld. Single Judge allowed the Petition—Hence the LPA—Appellant contended that the system of Staff Council was introduced in 1954 and subsequently approved by the Cabinet, Govt. of India in the year 1967—Pursuant to the system, the appellant shows one post of Zonal Secretary belonging to each recognized association at the production units—Since its inception, the Staff Council has worked properly and efficiently—At no point of time has there been any allegation that on account of mechanism of Staff Council, genuine grievances of workmen employed in the production units have not been redressed to the entire satisfaction of the employees and in the public interest—Staff Council is comprised of members

directly elected by workers themselves, to represent the grievances and interest through regular meetings with the local management at local level—Also, hold meeting with the Board once a year where policy as well as the issues of common concern for the employees are taken up, discussed threadbare and ways and means are devised to sort them out amicably and peacefully—Held:- No doubt, recognition of Union is not a right—It is the prerogative of the employer to recognize a Union or not—In the Trade Union Act also, no provision for recognition—It is also well established law that when the Government introduced the system of recognition, it was well within the rights of the Government to impose conditions for recognition—Such conditions are not to be treated as unreasonable restriction within the meaning of Article 19(4) of the Constitution—The question, however, as rightly delineated by the learned Single Judge is that when the rules of recognition are provided for zonal railways, whether excluding the RPUs from the purview thereof would amount to discrimination and would be impermissible under Article 14 of the Constitution—In order to justify such an exclusion of RPUs, the Government is required to demonstrate that there is a reasonable classification between RPUs on the one hand and Zonal Railways on the other hand and this classification is based in intelligible differentia having nexus with the objective sought to be achieved—Appellant has not been able to provide any satisfactory answer for this classification which appears to be irrational and arbitrary—Claim of the appellant that Staff Councils have worked properly, efficiently, satisfactorily or in public interest and have addressed genuine grievance of the workers is refuted by the respondent union—It is pointed out that such Staff Councils which existed in Zonal Railways as well were abolished long ago but continue to remain in Railway Production Units—This is so even when it enjoys the

same status as the Railway Workshops where Staff Council system has been abolished—No valid reason is forthcoming as to why such Staff Council are abolished in the Railway Zonal Office but continue to remain in RPUs—Respondent union as well as its IAIRF have consistently been protesting against the dissatisfactory and improper working of the Staff Council for decades and have raised such issues from time to time—Even the Staff Council at the RCF Kapurthala itself recorded "the apathetic and indifferent attitude adopted by the RCF Administration to solve the most genuine and legitimate demands of the employees"—RPUs are deprived of their representation in JCM by the aforesaid mechanism—Not wise to keep them away from this consultative machinery while deciding their fate and representation to them will be conducive to a healthy atmosphere and in public interest—No merit in this appeal—Accordingly dismissed with costs quantified at Rs. 15,000/-.

The arguments advanced before us in the present appeal remain the same. No doubt, recognition of union is not a right. It is the prerogative of the employer to recognize a union or not. In the Trade Union Act also there is no provision for recognition. It is also well established law that when the Government introduced the system of recognition, it was well within the rights of the Government to impose conditions for recognition. Such conditions are not to be treated as unreasonable restriction within the meaning of Article 19(4) of the Constitution. The question, however, as rightly delineated by the learned Single Judge is that when the rules of recognition are provided for zonal railways, whether excluding the RPUs from the purview thereof would amount to discrimination and would be impermissible under Article 14 of the Constitution. In order to justify such an exclusion of RPUs, the Government is required to demonstrate that there is a reasonable classification between RPUs on

the one hand and Zonal Railways on the other hand and this classification is based in intelligible differentia having nexus with the objective sought to be achieved. We find that in the instant case the appellant has not been able to provide any satisfactory answer for this classification which appears to be irrational and arbitrary. **(Para 15)**

The claim of the appellant that Staff Councils have worked properly, efficiently, satisfactorily or in public interest and have addressed genuine grievance of the workers is refuted by the respondent union. It is pointed out that such Staff Councils which existed in Zonal Railways as well were abolished long ago but continue to remain in Railway Production Units. This is so even when it enjoys the same status as the Railway Workshops where Staff Council system has been abolished. No valid reason is forthcoming as to why such Staff Council are abolished in the Railway Zonal Office but continue to remain in RPUs. The respondent further states that the respondent union as well as its IAIRF have consistently been protesting against the dissatisfactory and improper working of the Staff Council for decades and have raised such issues from time to time. Even the Staff Council at the RCF Kapurthala itself recorded "the apathetic and indifferent attitude adopted by the RCF Administration to solve the most genuine and legitimate demands of the employees". The members of the Staff Council vide Circular dated 10th January, 2006 tendered their resignation stating that the RCF administration would be entirely held responsible for not maintaining industrial peace and harmony in the organization **(Para 17)**

We also agree with various reasons given by the learned Single judge holding that the impugned action is discriminatory. It will also be a pertinent aspect, which cannot be ignored that the RPUs are deprived of their representation in JCM by the aforesaid mechanism. It is not wise to keep them away from this consultative machinery while deciding their fate and representation to them will be conducive to a healthy atmosphere and in public interest.

Even if the Railway Board had deliberated upon the matter in 1988 and 1996, it would not be of any avail when the decision itself suffers from the vice of discrimination.

(Para 18)

Important Issue Involved: Indian Trade Union Act, 1926-Recognition of Union is not a right—It is the prerogative of the employer to recognize a union or not—When the rules of recognition are provided for zonal railways, excluding the RPUs from the purview thereof would amount to discrimination and would be impermissible under Article 14 of the Constitution—In order to justify such an exclusion of RPUs, the Government is required to demonstrate that there is a reasonable classification between RPUs on the one hand and Zonal Railways on the other hand and this classification is based in intelligible differentia having nexus with the objective sought to be achieved.

[Sa Gh]

FOR THE APPELLANT : Mr. Jagjit Singh, Advocate.

FOR THE RESPONDENT : Dr. Aman Hingorani, Advocate with Ms. Swati Sumbly, Advocate.

RESULT: Appeal dismissed.

A.K. SIKRI, ACTING CHIEF JUSTICE

1. The respondent herein is a trade union of workers of Railway Coach Factory (RCF), Kapurthala. It is duly registered under the Indian Trade Unions Act, 1926 and is affiliated to the All India Railwaymen's Federation (AIRF), New Delhi as also to the Hind Mazdoor Sabha, Mumbai.

2. The Railway Coach Factory workers are the members of the respondent union which is treated at par with the Railway Production Units (RPUs). Though in respect of Zonal Railways, the Ministry of Railway (Central) has the policy for recognition of unions based on secret ballot, though this system is not available in RPUs.

3. Chapter XXV of the Indian Railway Establishment Manual, Volume-II (IREM) provides for 'Rules for the Recognition of Service

Associations of Railway Servants'. As per Rule 2503 'Every gazetted Railway servant of the same class must be eligible for membership of the association'. Rule 2510 which is relevant in this behalf reads as under:

> "2510.Government is prepared to accord official recognition to associations of its industrial employees. The grant and continuance of recognition rests in the discretion of Government, but recognition when granted will not be withdrawn without due cause and without giving an opportunity, to the association to show cause against such withdrawal."

As per this rule, the Government agreed to accord official recognition to Associations of its 'industrial employees.. The term 'industrial employees' includes the railway servant. In all Central Government Ministries and Departments including the Railways, Joint Consultative Machinery (JCM) has been set up. This is existing since 1966. Clause-II of the Scheme for JCM provided that it would "supplement and not replace the facilities provided to employees to make only representations, or the associations of employees to make representation of matters concerning their respective constituent service grade etc". In this JCM, the representatives of the recognized Unions participate on behalf of the employees. As pointed out above, these recognized unions are in Zonal Offices. Insofar as Railway Production Units are concerned, there is no system of recognition of trade unions. Instead only Staff Councils are allowed to represent the cause of the workers and trade unions are not permitted. As per the appellant, the system of Staff Council was introduced in 1954 and subsequently approved by the Cabinet, Govt. of India in the year 1967. Pursuant to the system, the appellant shows one post of Zonal Secretary belonging to each recognized association at the production units.

Chapter XXVI of the IREM deals with 'Staff Council and Negotiating Machinery'. Rule 2616 falling in this Chapter provides for the detailed procedure for the working of the negotiating machinery. Since RCF, Kapurthala is treated as part of RPUs, the appellant has allowed only Staff Council to represent cause of the workers As pointed out above, as per the appellant this system was introduced in the year 1954 and approved by the Cabinet in the year 1967. The appellant also maintains that since its inception, the Staff Council has worked properly and efficiently and at no point of time there has been any allegation that on

account of mechanism of Staff Council, genuine grievances of workmen employed in the production units have not been redressed to the entire satisfaction of the employees and in the public interest. The Staff Council is comprised of members directly elected by workers themselves, to represent the grievances and interest through regular meetings with the local management at local level, they also hold meeting with the Board once a year where policy as well as the issues of common concern for the employees are taken up, discussed threadbare and ways and means are devised to sort them out amicably and peacefully. It is also claimed that as far as mechanism is concerned, its efficiency and efficacy has never been in doubt and even the respondent does not make any such allegations about the efficacious functioning of the Staff Council system.

4. The respondent was aggrieved by the fact that why there should not be a system of recognition of trade unions in the Railway Production Units. The respondent thus filed writ petition under Article 226 of the Constitution of India before this Court which was registered as Writ Petition (C) No. 26 of 2008. The following reliefs were claimed by the respondent in the said writ petition:-

> "(a) Issue an appropriate Writ Order of Direction, and in particular
>
> (i) A Writ of Mandamus requiring the Respondent to recognize the registered trade unions in the Railways Production Units as Railway Trade Unions.
>
> (ii) A Writ of Mandamus directing the Respondent of extend to the Railway Production Units the application of Modalities published on 09.10.2007 for conducting "Secret Ballot" for the purpose of granting recognition to the Railway Trade Unions."

5. The appellant herein contested the aforesaid petition by filing its counter affidavit. The matter was finally argued on 29th January, 2010 when the orders were reserved which was pronounced on 3rd March, 2010. The learned Single Judge allowed the writ petition and issued the writ of mandamus directing the appellant herein to apply the modalities for recognition spelt out in the Circular dated 9th October, 2007 to the RPU, Kapurthala as well and permit the respondent union to participate in the 'secret ballot' for determining which railway unions should be accorded recognition and consequently granted representation in the JCM.

6. At the time of hearing the appellant had relied upon the Union Cabinet decision dated 26th May, 1967 for retaining the Staff Council in the RPUs and in this decision it was also stated that the Railway Board would examine further the question about the future set up in the due course. According to the respondent, it could not be pointed out as to whether any further decision in this behalf was taken at the time of arguments. However, after the judgment was reserved the officials of the appellant could lay hands on the decision of the Railway Board taken in the year 1988 and 1996 where the question of continuance of staff council was taken up and it was decided by the Railway Board to continue existing system of staff council in all the six production units of the Indian Railways. However, by the time the affidavit was prepared, the judgment was pronounced. The appellant, therefore, based on the aforesaid material, filed review petition, the Learned Single Judge has, however, dismissed the review petition as well vide orders dated 18th May, 2010.

7. Assailing both these orders dated 3rd march, 2010 passed in the writ petition and 18th may, 2010 passed in the review petition, present intra-court Appeal is preferred by the appellants.

THE SCOPE OF CONTROVERSY:

8. From the facts narrated above, it is clear that whereas the system of recognition of railway unions is prevalent in the Zonal Offices of recognized unions are allowed to participate in the JCM, insofar as production units are concerned, the Railways has the system of staff Council. These Staff Council take up the legal issues pertaining to their respective production units and have no representation in the JCM which functions on all India basis. The respondent union is, thus, aggrieved by the action of the appellant in excluding them from 'secret ballot' and recognition and for this reason, prayer was made in the writ petition to extend the modalities for conducting secret ballot as provided in Circular dated 9th October, 2007 to the Railway Production Units as well. The case of the respondent was that the Indian Railway Code for Mechanical Department (Workshops) has specific provisions concerning Railway Production Units. In terms of the said Code, RPUs are treated at par with "Mechanical Departments (Workshops)". Clause 1302 of Chapter XIII of the Code makes it clear that the provisions of the Code that apply to Workshops (such as organizational set up, labour etc.) apply mutatis mutandis to RPUs. It is pointed out that by Circulars dated 29th August,

1997 and 15th September, 1997 that the Ministry of Railways has granted facilities to all India OBCs Railway Employees Association and all India Railway SC/ST Railway Employees Association in the RPUs to take up the grievances of their members with the Railway Management. It was also urged that JCM did not exclude Railwaymen in RPUs and that the Staff Council in the RPUs had been in effective in dealing with the violations of the provisions of Minimum Wages Act, 1948 and the Contract Labour (Regulation & Abolition) Act, 1970. The respondent also pointed that on 26th June, 2002 the Railways had issued instructions to consider the applications by the affiliates of Bharat Rail Mazdoor Sangh (BRMS) and others for grant of recognition. In these instructions, it was stipulated that for grant of such recognition, the concerned union who fulfilled the condition of at least 30% membership of the non-gazetted employees they seek to represent as well as certain other conditions. These instructions were challenged by the Southern Railway Mazdoor Union in WP No.25274/2002 filed in the Madras High Court. The Madras High Court allowed the said writ petition vide orders dated 17th October, 2003 and set aside the instructions dated 26th June, 2002 holding that the only feasible and reliable way of testing the strength of a trade union was to adopt the secret ballot system and to give up the present system of annual return. The matter was taken up to the Supreme Court and the Supreme Court upheld the aforesaid decision of the Madras High Court by dismissing the SLP vide orders dated 8th March, 2004. Pursuant to the aforesaid directions, the respondent ultimately framed guidelines for secret ballot which was circulated vide letter dated 9th October, 2007 addressed to all the General Managers of Indian Railways except the RPUs. On this basis, the respondent union in its writ petition filed in this Court also claimed that, adoption of "secret ballot" in compliance with the High Court direction was required to be initiated.

9. The case of the appellant on the other hand is that there is no need to have any such recognition of the unions insofar as RPUs are concerned where separate system of Staff Council is working satisfactorily and these Staff Council have been set up pursuant to a policy decision of the Government of India and as approved by the Cabinet as well as Railway Board on Review of the matter from time to time. It is submitted that the Cabinet decision of the Government was taken to continue the system of Staff Council in the production unit in view of the nature of functions of production units. It is further stated by the appellant that

there is no vested right in the respondent to seek recognition and the Government is well within its power to decide, as a matter of policy, that Staff Council would be only mechanism of grievance redressal of the employees in the RPUs and not trade unions. The policy decision, as per the appellant was based on the following rational:-

> "In case, unions are recognized in Production Units, these unions would demand representation I the Department Council of JCM as well as National Council. Since the number of representatives of the staff side in both the for a is limited, representation to unions of Production Units would be at the cost of Members of the Federations, which would not be acceptable to the Federation.
>
> If the system of recognized union in Production Units is allowed, although the staff of Production Units consists of around 3% of the total staff strength of Indian Railways, in all the major decisions, it may become necessary to associate unions of Production Units alongwith Federations. At present the decisions taken for Zonal Railways is equally binding on Production Units. This is possible because there are no recognized union in Production Units and as such there is no opposition to the decision taken with Federations."

10. As per the respondent, it has the right to participate in JCM. The respondent points out that although the JCM envisaged a three-tier machinery, i.e. National, Departmental and Office/Regional Council, the third tier of the JCM Scheme in the RPUs was not operationalised. Notwithstanding the consistent demand by even the federations, the Railways were maintaining that the demand was not feasible for acceptance. It was pointed out that there are 7200 Group C and D staff at the RCF, Kapurthala who constitute the petitioner union and they have fundamental right to form a trade union and to participate through secret ballot in the JCM and take the benefit of collective bargaining. It is more so when the Staff Council is merely an advisory body headed by gazetted officers nominated by the General Manager, and whose constitution, composition and rules are at the discretion of the General Manager and subject to directives of the Government.

JUDGMENT OF THE LD. SINGLE JUDGE:

11. The learned Single Judge, after taking note of the area of

dispute and the respective contention, accepted the legal position that though right to form a trade union may be a fundamental right under Article 19 (1) (c) of the Constitution of India, the imposition of conditions for recognition would not per se be viewed as an unreasonable restriction within the meaning of Article 19 (4). It is the prerogative of the employer to set out the condition for recognition. According to the learned Single Judge, the moot question was as to whether in the form of Rules of recognition, a union in one part of the establishment i.e. the RPU can be subject to a differential treatment as regards the conditions for recognition. It has been observed that the respondent was aggrieved by the threshold bar imposed on not being even allowed to participate in the process that would enable it to seek recognition. The learned Single Judge, thereafter examined the provisions of IREM. It has been noted that part C of the IREM sets out the conditions precedent to the recognition of a union by the Railway administration. One is that the union must be registered under the TU Act. The second is that the union should agree that the union should agree that "all representations from them must be through the Central Executive Committee to the General Manager and representations from branches of the Union must also be made only through the Central Executive Committee." However, it is open to the Railway administration by agreement with the union to arrange for matters relating exclusively to one department to be referred directly to the head of that department and for matters of purely local interest to be referred by a branch of the union to a Divisional or District Officer for discussion. The petitioner fulfills both conditions. In its reply to this assertion, it is sought to be contended that the IREM does not create any right in favour of the petitioner "much less a right enforceable by way of the issuance of a writ of mandamus by this Court." There is absolutely no provision of the IREM pointed out by the respondents whereby despite a union satisfying the conditions of part C of the IREM it can be denied recognition. The Court thus held that IREM does not bring out any distinction between the unions and RPUs and other establishments within the Railways unless such a restriction is spelt out in the IREM itself, the respondent which is a union in RPUs cannot be discriminated against.

12. The learned Single judge also rejected the distinction sought to be drawn by the appellant between the RPUs and other workshops. The Court noted that the distinction given by the appellant was that the product profile of Production Units, their functioning and establishment

are quite different from Zonal Railway's composition, organizational structure and functioning of staff councils had been kept different and separate from Zonal Railways recognized unions. It is observed that this can hardly constitute a rational basis to discriminate against unions in RPUs by excluding them from the applicability of the modalities set down by the circular dated 9th October, 2007. Further, this kind of classification of unions in RPUs separately from other unions, which classification is on the face of it suspect, has no reasonable nexus with the object of ensuring that only truly representative trade unions are recognized for participation in the JCM. Thus, opined the learned Single Judge, that the denial to the respondent right to participate in the secret ballot for determining whether it should be accorded recognition cannot be sustained on the touchstone of Article 14 of the Constitution.

13. Other reason given by the appellant to deny the recognition namely there is staff council in the RCF, Kapurthala which can be a substitute for a recognized trade union also did not find favour with the court below. It was noted that Union Cabinet took a decision on 26th may, 1967 i.e. 40 years ago and as per that decision the Railway Board was to examine further the question about the future setup and the review was to be done as to whether at the level of Zonal Railways or of the Divisions, the Staff Council should be abolished, the Review Committee for RCF was not even set up.

14. As pointed out above, at that time, the appellant did not produce Railway Board decision in the year 1988 and 1996 when such a decision was taken to continue the Staff Council in RPUs. Be as it may, according to us, that would not make much difference in view of further solid reason given by the learned Single Judge that the intention not to grant recognition to trade unions in the RPUs is not justified and in any event such decision does not appear to have found expression in any specific provision of the IREM

PRESENT APPEAL:

15. The arguments advanced before us in the present appeal remain the same. No doubt, recognition of union is not a right. It is the prerogative of the employer to recognize a union or not. In the Trade Union Act also there is no provision for recognition. It is also well established law that when the Government introduced the system of recognition, it was well

within the rights of the Government to impose conditions for recognition. Such conditions are not to be treated as unreasonable restriction within the meaning of Article 19(4) of the Constitution. The question, however, as rightly delineated by the learned Single Judge is that when the rules of recognition are provided for zonal railways, whether excluding the RPUs from the purview thereof would amount to discrimination and would be impermissible under Article 14 of the Constitution. In order to justify such an exclusion of RPUs, the Government is required to demonstrate that there is a reasonable classification between RPUs on the one hand and Zonal Railways on the other hand and this classification is based in intelligible differentia having nexus with the objective sought to be achieved. We find that in the instant case the appellant has not been able to provide any satisfactory answer for this classification which appears to be irrational and arbitrary.

16. Let us first discuss the structure of the Staff Council which the appellant perceive as justifiable substitute for trade unions. The stand of the appellant is that there is no necessity for recognition of the respondent union as the Railway Trade Union as there is a Scheme of Staff Councils which can redress the grievances of the employees. However, the rules regulating the formation and functions of the Staff Council would demonstrate that it is not so inasmuch as:

(i) The staff Council is to function as a purely advisory body;

(ii) The General Manager has the right to amend the Constitution of the Staff Council, as and when necessary;

(iii) The President of the Staff Council is to be a Gazetted Officer (not below SA Grade) to be nominated by the General Manager;

(iv) The Secretary of the Staff Council is to be a Gazetted Officer to be nominated by the General Manager

(v) The composition of the Staff Council includes nominated members and members co-opted adhoc;

(vi) The nominated members could be gazette officers and are to be nominated by the General Manager in such number as will be decided by the General Manager

(vii) The co-opted members could be gazette officers and are

to be nominated by the General Manager;

(viii) The General Manager has the right to revise the composition of the Staff Council;

(ix) Interim vacancies in the Council are to be filled by the President of the Council by nominated;

(x) Only those non gazette staff are eligible for election to the Staff Council who have more than three years of continuous service;

(xi) Matters concerning pay scales and allowances, regulation of hours of work and other matters of high policy affecting all Railways shall not be discussed at the meeting;

(xii) It is open to the President to delete from proposed agenda for the meeting subjects which are not open for discussion;

(xiii) The General manager has the absolute powers to change, modify, add, delete, amend etc. to any or all rules and sub rules at any time with or without consulting the Staff Council;

(xiv) Any directive of the Railway Board on the functioning of the Staff Council supersedes or alters the rules to the extent indicated in the directives.

17. The claim of the appellant that Staff Councils have worked properly, efficiently, satisfactorily or in public interest and have addressed genuine grievance of the workers is refuted by the respondent union. It is pointed out that such Staff Councils which existed in Zonal Railways as well were abolished long ago but continue to remain in Railway Production Units. This is so even when it enjoys the same status as the Railway Workshops where Staff Council system has been abolished. No valid reason is forthcoming as to why such Staff Council are abolished in the Railway Zonal Office but continue to remain in RPUs. The respondent further states that the respondent union as well as its IAIRF have consistently been protesting against the dissatisfactory and improper working of the Staff Council for decades and have raised such issues from time to time. Even the Staff Council at the RCF Kapurthala itself recorded "the apathetic and indifferent attitude adopted by the RCF Administration to solve the most genuine and legitimate demands of the employees". The members of the Staff Council vide Circular dated 10th

January, 2006 tendered their resignation stating that the RCF administration would be entirely held responsible for not maintaining industrial peace and harmony in the organization.

18. We also agree with various reasons given by the learned Single judge holding that the impugned action is discriminatory. It will also be a pertinent aspect, which cannot be ignored that the RPUs are deprived of their representation in JCM by the aforesaid mechanism. It is not wise to keep them away from this consultative machinery while deciding their fate and representation to them will be conducive to a healthy atmosphere and in public interest. Even if the Railway Board had deliberated upon the matter in 1988 and 1996, it would not be of any avail when the decision itself suffers from the vice of discrimination.

19. We thus do not find any merit in this appeal which is accordingly dismissed with costs quantified at Rs.15,000/-.

ILR (2012) III DELHI 99
CRL. M.C.

SURENDER KUMAR JAIN **....PETITIONER**

VERSUS

STATE & ANR. **....RESPONDENTS**

(M.L. MEHTA, J.)

CRL. M.C. NO. : 299/2008 **DATE OF DECISION: 30.01.2012**

Indian Penal Code, 1860—Section-406—Code of Criminal Procedure, 1973—420, 468, 482—Petitioner charge sheeted for having committed offence punishable under section 406—Charge framed under Section 406 by learned Trial Court upheld in revision—Petitioner assailed said order and filed Crl.M.C. urging, cognizance under Section 406 was taken beyond period of limitation of three years, therefore, FIR is to be quashed—Held:- For the purpose of computing limitation, it is the date of the complaint that is material and not the date on which the cognizance comes to be taken by the Magistrate and the process is issued against the petitioner.

For the purpose of computing limitation, it is the date of the complaint that is material and not the date on which the cognizance come to be taken by the Magistrate and the process was issued against the petitioner. The subsequent stages such as examination of complainant and the witnesses, the consideration of the case, the preliminary inquiry etc. take considerable time and it would therefore, be unreasonable and irrational to compute the period of limitation from the date when the cognizance was taken or the process was issued. Furthermore, these processes are dependent on various factors including the time available to the court which is something over which the complainant has no control. It would, thus, be wholly untenable to hold that a complaint if presented within the period of limitation would be barred merely because a certain amount of time elapsed until the cognizance could be taken or the order of process could be passed. Since the complainant continued requesting the petitioner to return the file and it was not returned for two years, the complainant was compelled to file a complaint with the police on 30th October 1998. I do not find any merit in the submission that the complaint was time barred.

(Para 9)

Important Issue Involved: For the purpose of computing limitation, it is the date of the complaint that is material and not the date on which the cognizance comes to be taken by the Magistrate and the process is issued against the petitioner.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Ashok Bhasin, Senior Advocate

with Mr. Uday Gupta, Mr. S.B. Sharma, Mr. M.K. Tripathi, Mr. Sunklan Porwal & Ms. Anuradha, Advocates.

FOR THE RESPONDENTS : Ms. Fizani Hussain, APP with ASI Ram Phal, P.S. Lahori Gate Mr. K.K. Aggarwal & Mr. H.J.S. Ahluwalia, Advocate for R-2.

CASES REFERRED TO:

1. *SW. Palanitkar & Ors.* vs. *State of Bihar and V.P. Shrivastava* vs. *Indian Explosives Limited & Ors* (2010) 10 SCC 361.
2. *Suneet Gupta* vs. *Anil Triloknath Sharma and others* (2008) 11 SCC 670.
3. *Krishnan & Anr.* vs. *Krishnaveni & Anr and Kailash Verma Vs. Punjab State Civil Supplies Corporation and Anr* (2005) 2 SCC 571.
4. *Raj Kapoor* vs. *State (Delhi Administration)* 1980 Cri.L.J. 202.
5. *State of Bihar* vs. *Ramesh Singh* AIR 1977 SC 2018.
6. *Madhu Limaye* vs. *State of Maharashtra* (1977) 4 SCC 551.
7. *State of Orissa* vs. *Ram Chander Aggarwal,* AIR SC 87.

RESULT: Petition dismissed.

M.L. MEHTA, J.

1. The present petition is preferred under section 482 Cr.P.C. r/w Article 227 of the Constitution assailing the order of the Ld. ASJ dated 19.09.2007 upholding the decision of the Ld. MM dated 12.05.2006 vide which the charge under section 406 IPC was ordered to be framed.

2. The brief facts necessitating the present petition are that the complainant on 30.10.1998 lodged a complaint at police station, Lahori Gate alleging that a file of the complainant containing Sales Tax Forms has been misappropriated by the petitioner. On enquiry a report was given by the ACP concerned that no case is made out. The complainant/

respondent No. 2 filed a criminal writ before this court against the police officials which was disposed of with direction to the DCP, North, to look into the complaint and proceed in accordance with law. In pursuance of the direction of this court the ACP conducted an enquiry and submitted a report concluding that an offence under section 406/420 IPC is prima facie made out. On the basis of this report the DPC directed P.S. Lahori Gate to register an FIR whereupon FIR No. 492/1999 under section 406/420 IPC was registered against the petitioner. After investigation, a charge-sheet was filed under section 406 IPC and the trial court took cognizance under section 406 IPC vide its order dated 16.02.2002. The petitioner filed a criminal writ in this court for quashing of the FIR and the same was disposed of vide order dated 21.03.2003 wherein liberty was granted to the petitioner to raise all the contentions before the trial court as the charge-sheet had already been filed in the case. The trial court framed charges against the petitioner under section 406 IPC vide its order dated 12.05.2006. This order was challenged in the court of Ld. ASJ under section 397 Cr.P.C. wherein the order of the Ld. MM framing charge against the petitioner was upheld vide impugned order dated 19.09.2007.

3. At the outset, learned counsel for respondent No. 2/complainant objected to the maintainability of the petition submitting that though the petition was preferred under section 482 Cr.P.C. read with under Article 227 of the Constitution, but the petition, in fact, was a second revision against the order of MM framing charges under section 406 IPC. He submitted that the second revision being barred under section 397(3) Cr. P.C. was not maintainable in this Court.

4. There was, in fact, no dispute with regard to the proposition that there was statutory bar contained in section 397(3) Cr.P.C. for the second revision petition. The power of this Court and that of the Court of Sessions, so far as a revision is concerned, are concurrent. The intention of the Legislature under section 397(3) Cr.P.C. is definite and the scheme therein is unambiguous and clear. Sub section (3) does not permit the repetition in exercise of jurisdiction of revision under section 397(1) Cr.P.C. It curtails the chance availing second remedy and therefore, an unsuccessful revisionist in the court of Sessions cannot be entertained for the second time by the High Court. In fact, sub section (3) intends and aims to secure finality. The choice lies with the revisionist either to file revision directly in this Court or in the Sessions Court. Having availed the remedy by filing revision before the Sessions Court, one cannot be

permitted to avail second chance to file revision in view of the bar of sub section (3) of section 397 Cr.P.C.

5. The issue regarding filing of petition before the High Court after having availed first revision petition before the Court of Sessions has come up before the Supreme Court and this Court repeatedly. While laying that section 397(3) Cr.P.C. laid statutory bar of second revision petition, the courts have held that High Court did enjoy inherent power under section 482 Cr.P.C. as well to entertain petitions even in those cases. But, that power was to be exercised sparingly and with great caution, particularly, when the person approaching the High Court has already availed remedy of first revision in the Sessions Court. This was not that in every case the person aggrieved of the order of the first revision court would have the right to be heard by the High Court to assail the same order which was the subject matter of the revision before Sessions Court. It was all to depend not only on the facts and circumstances of each case, but as to whether the impugned order bring about a situation which is an abuse of process of court or there was serious miscarriage of justice or the mandatory provisions of law were not complied with. The power could also be exercised by this Court if there was an apparent mistake committed by the revisional court. Reference in this regard can be made to the judgments of the Supreme Court in **Madhu Limaye Vs. State of Maharashtra** (1977) 4 SCC 551, **State of Orissa Vs. Ram Chander Aggarwal,** AIR SC 87, **Raj Kapoor Vs. State (Delhi Administration)** 1980 Cri.L.J. 202, **Krishnan & Anr. Vs. Krishnaveni & Anr and Kailash Verma Vs. Punjab State Civil Supplies Corporation and Anr** (2005) 2 SCC 571.

6. Now having seen the dictum of law that the second revision petition was ordinarily not to be entertained by this court and it was only in those cases which would come within the parameters of invoking inherent jurisdiction under section 482 Cr.P.C. and under Article 227 of the Constitution of India, that such a petition could be entertained, I may proceed to see as to whether the instant petition, fall within that category of cases which require invoking of inherent jurisdiction of this Court under these provisions.

7. The submissions of learned counsel for the petitioner was twofold (i) that there was limitation of three years under section 468(2) (c) Cr. P.C. for taking cognizance of an offence under section 406 IPC (ii) that

there was no prima facie, case made out under section 406 IPC inasmuch as the ingredient of 'entrustment' was lacking in the complaint. In other words, the submission was that since there was no entrustment of the file containing Sales Tax Forms by the respondent to the petitioner, no offence under section 406 IPC was made out against the petitioner. In this regard reliance was placed on the cases of **Suneet Gupta Vs. Anil Triloknath Sharma and others** (2008) 11 SCC 670, **SW. Palanitkar & Ors. Vs. State of Bihar and V.P. Shrivastava Vs. Indian Explosives Limited & Ors** (2010) 10 SCC 361.

8. With regard to the contention of limitation of the petitioner, it is undisputed that in the case of section 406 IPC, the period of limitation was three years. The question, however, would be as to when this period is to be reckoned. In this case the offence was alleged to be committed in around 1996. The cognizance came to be taken by the Magistrate on 16th February 2002. If the date of cognizance was to be taken as the date for the purpose of computing limitation, one could agree that the cognizance was apparently time barred. The essential ingredient of the offence of criminal breach of trust is not the demand, but the refusal to accede to that demand. So long as there is no refusal on the part of the accused there does not arise the question of breach of trust. Here, the allegations against the petitioner are that he had come to the shop of the complainant and asked him to show the Sales Tax Forms. When the file was shown to him, he informed that there was difference in the accounts pertaining to the business and he desired to take the file containing those forms. Thereupon, referring to the business dealings and good relations which they had, the petitioner took away the file with the promise to return the same as and when the differences in the accounts were settled. Thereafter, the complainant continued requesting him to return the file, but the petitioner did not return the file on one pretext or the other. Instead of returning the file, he rather started blackmailing the complainant. The complaint was made against the petitioner in October 1998 to the police. From the averments in the complaint, as briefly noted above, it is seen that the petitioner had refused to return the file which was taken by him in good faith due to ongoing business relations with the complainant and also on the assurance to return the same after sorting out the difference in the account.

9. For the purpose of computing limitation, it is the date of the complaint that is material and not the date on which the cognizance come

to be taken by the Magistrate and the process was issued against the petitioner. The subsequent stages such as examination of complainant and the witnesses, the consideration of the case, the preliminary inquiry etc. take considerable time and it would therefore, be unreasonable and irrational to compute the period of limitation from the date when the cognizance was taken or the process was issued. Furthermore, these processes are dependent on various factors including the time available to the court which is something over which the complainant has no control. It would, thus, be wholly untenable to hold that a complaint if presented within the period of limitation would be barred merely because a certain amount of time elapsed until the cognizance could be taken or the order of process could be passed. Since the complainant continued requesting the petitioner to return the file and it was not returned for two years, the complainant was compelled to file a complaint with the police on 30th October 1998. I do not find any merit in the submission that the complaint was time barred.

10. With regard to the submission that there was no case made out under section 406 IPC, it may, at the outset, be borne in mind that section 405 IPC which defines criminal breach of trust does not contemplate the creation of a trust with all the technicalities of the law of trust. It contemplates the creation of relationship whereby the owner of the property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event. There would be creation of entrustment if one is entrusted with property *'in any manner' or 'with any dominion over the property'*. Entrustment of the property creates a trust which is only an obligation increased with the ownership of the property and arise out of confidence reposed and accepted by the owner.

11. From the facts briefly noted above, it would be seen that ingredient of entrustment was fulfilled as the file in question was taken by the petitioner in good faith from the respondent for the purpose of reconciling the accounts and the same was never returned despite repeatedly asking by the complainant. The cases of **Suneet Gupta** (Supra), **SW. Palanitkar & Ors.** (supra) and **V.P. Shrivastava** (supra) which were relied upon by the petitioner are entirely distinguishable from the facts of the present case. It would all depend on the facts and circumstance of each case to see as to whether there was entrustment or not and since the element of entrustment in the cited cases was

lacking, the courts rightly held that the offences under section 406 IPC were not made out.

12. In the case of **State of Bihar Vs. Ramesh Singh** AIR 1977 SC 2018 it was held as under:

> "at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and Judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused."

13. In view of my above discussion and having seen that the present case was at the stage of framing of charges and that both the courts below have appreciated the allegations against the petitioner and have formed a prima facie view of the framing of charges under section 406 IPC. In view of entrustment and refusal to return the file, I do not find any infirmity or illegality in the impugned order. Not only that, the case does not fall within the parameters of invoking inherent and extraordinary jurisdiction under section 482 Cr.P.C. or under Article 227 of the Constitution of India, even otherwise it does not call for any interference by this court on merits. Hence, the petition is hereby dismissed.

Nothing in this order shall amount to expression of opinion on the merits of case.

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CRL. REV. P.

ISHWAR SINGH ....PETITIONER

VERSUS

STATE ....RESPONDENT

(MUKTA GUPTA, J.)

CRL. REV. P. NO. : 675/2009 DATE OF DECISION: 08.02.2012

Indian Penal Code, 1860—Sections 279 and 304A—As per prosecution, petitioner driving DTC bus in rash and negligent manner so as to endanger human life and safety of others—While doing so, bus hit stationery tempo and crushed deceased in between both vehicles—MM convicted appellant u/s 279 and 304-A—ASJ upheld judgment of MM—PW3/12 eye-witness to incident—Held, no witness identified petitioner as person on whose negligence accident took place—Tempo with which bus stated to have collided had no marks or any fresh damage on body as per mechanical inspector—If bus collided with tempo and crushed deceased as alleged by prosecution, there would have been marks on the body of the tempo—Further nothing placed on record by prosecution to prove that vehicle driven in rash and negligent manner—Neither any passenger of bus nor owner of filling station where eye-witness was said to be standing, examined by prosecution—Chain of evidence connecting petitioner to alleged accident not complete—Only basis on which prosecution tried to implicate petitioner is because he was driving offending vehicle as per duty slip—Driving offending vehicle not denied by petitioner—However, same does not prove that accident took place due to his negligent or rash driving—Essential ingredients u/s 279 is that there must be rash and negligent driving on public way and act must be so as to endanger human life or be likely to cause hurt or injury to any person—For offence u/s 304A, act of accused must be rash and negligent which should be responsible for death which does not amount to culpable homicide—Prosecution failed to prove how act of petitioner was rash or negligent to bring under purview of Sections 279/304A—Accused acquitted—Appeal allowed.

The essential ingredients to constitute an offence punishable under Section 279 IPC are that there must be rash and negligent driving or riding on a public way and the act must be so as to endanger human life or be likely to cause hurt or injury to any person. For an offence under Section 304A, the act of accused must be rash and negligent, which should be responsible for the death which does not amount to culpable homicide. The prosecution in the present case has failed to prove how the act of the Petitioner was rash or negligent to bring the same under the purview of Sections 279/304A IPC. **(Para 12)**

Important Issue Involved: The essential ingredients of Section 279 IPC are that there must be rash and negligent driving on public way and act must be so as to endanger human life or be likely to cause hurt or injury to any person.

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Mr. Virendra Singh, Advocate.

FOR THE RESPONDENT : Mr. Manoj Ohri, APP for the State with SI Pankaj Saroha, P.S. Nangloi.

RESULT: Appeal Allowed.

MUKTA GUPTA, J.

1. By the present petition the Petitioner seeks setting aside of the order dated 25th November, 2009 passed by the learned Additional Sessions Judge upholding the order of conviction of the Petitioner passed by the learned Metropolitan Magistrate under Sections 304A and 279 IPC. The learned Metropolitan Magistrate vide order dated 4th April, 2009 had sentenced the Petitioner to undergo Simple Imprisonment for 6 months for offence punishable under Section 279 IPC and a fine of Rs. 500/- and in default of payment of fine to undergo Simple Imprisonment for five days and Simple Imprisonment for 18 months and Rs. 5000/- fine under Section 304A IPC.

2. Briefly the prosecution case is that on 17th February, 1997 at about 6.40 pm at Rohtak Road near Stadium Swarna Park, Nangloi, the Petitioner was driving DTC Bus bearing No.DL1P 9802 in rash and negligent manner so as to endanger human life and safety of others and while doing so the bus hit stationary tempo No.HR 46 9896 and crashed Naveen Kumar in between both the vehicles who succumbed to injuries. Accordingly FIR was registered under Sections 279/304A IPC. After completion of investigation charge sheet was filed. Learned Metropolitan Magistrate after recording the prosecution evidence and statement of the accused convicted and sentenced him as mentioned above. Aggrieved by the judgment and order on sentence, the Petitioner preferred an appeal. The learned Additional Sessions Judge vide order dated 25th November, 2009 dismissed the appeal and upheld the judgment passed by the learned Metropolitan Magistrate.

3. Learned Counsel for the Petitioner contends that the impugned judgments are based on conjectures and surmises. Learned courts below failed to appreciate the fact that despite examining 13 witnesses including two alleged eye witnesses the prosecution has failed to establish the identity of the accused and also his presence at the spot. Neither during investigation nor during trial it was established that the deceased Naveen Kumar was working as an employee at the air filling station. No independent witness like the proprietor of the air filling station has been made a witness to the case. It is further stated that by merely on the basis of reply to notice under Section 133 M.V. Act, the requirement of law that the accused/Petitioner was driving the offending vehicle and that too in rash or negligent manner does not stand fulfilled. As per the site plan also

there is no bus stop where the deceased could have got down. Further, the mechanical inspection report also does not support the case of the prosecution as there are no damages on the offending vehicle. The chain of events in the present case clearly shows that the deceased was himself negligent and sustained injuries by falling from the bus. Hence, the findings of the learned Courts are perverse and based on no evidence. No passenger of the bus has been examined by the prosecution to prove its case though it is stated that there were other passengers present in the bus when the alleged accident took place. Thus, in the absence of any evidence to support the Prosecution story and the fact that the injuries sustained by the deceased were because of the negligence of the deceased, the impugned judgments are liable to be set aside.

4. Per contra learned APP for the State submits that impugned judgments suffer from no illegality. PW 10 has stated that from the reply to the notice under Section 133 of the Motor Vehicles Act given to the petitioner it stands proved that the accused/petitioner was driving the offending vehicle at the time of incident. Thus his presence at the spot is clearly proved. Further, PW 11 though has turned hostile but has identified his signatures on the initial statement. Hence the revision petition is liable to be dismissed.

5. I have heard the learned Counsels for parties and perused the record.

6. PW 3/12 Pushpender who is the alleged eye witness of the incident has deposed that on the day of incident at about 6.40 pm he was standing at Swaran Park Kanta near Tempo stand. Mukesh Kumar was getting filled his tempo tyre from a shop from one person. Meanwhile, a DTC Bus bearing No.DL 1P 9802 came from Nangloi side and hit the tempo from behind as a result of which one 18 year old received injuries. They tried to apprehend the driver of the bus but he ran from the spot alongwith bus towards village Mundka. This witness has been cross-examined as PW 12. In his cross-examination he has stated that while he was standing at the shop of Mukesh one boy alighting from DTC Bus was crushed between the tempo and the bus. He has further stated that on the day of incident he had not signed any statement but had only signed on a paper which he had not read. He has further stated that he does not know that whether any seizure memo or site plan was prepared or not on that day.

7. PW 11 Mukesh Kumar has deposed that he plies a tempo bearing No. HR 46A 9886. On 27th February, 1997 at about 6.45 pm while he was on Rohtak Road the tyre of his tempo got deflated. He went to a shop in Swarna Park to get the puncture of the tyre repaired. While he was inside the shop he heard some noise outside and when he came out he saw that an accident had taken place and a DTC Bus was going away. Police had reached the spot and he had not witnessed the accident taking place. This witness has even stated the incorrect date of incident. This witness had been declared hostile by the prosecution and was also re-examined by APP. But nothing material could be elicited from his examination. PW 10 R.B. Chaudhary, Manager of DTC Depot Piragarhi has deposed that on 18th February, 1997 he was posted as Depot Manager at DTC Depot Nangloi and on that day he was served with a notice under Section 133 of M.V.Act. He directed Shri Nand Kishore, Dealing Assistant to reply the same and he replied to the said notice. This witness has further stated that Shri R.Dahiya was authorized by him to take the offending vehicle on superdari and R.Dahiya had also issued duty slip Exhibit PW 10/D on his instructions. The said duty slip issued by the Depot records that the petitioner herein and Conductor Azad Singh (DW-1) were performing their duties in bus no.DL1P 9802 on Route 708 Nangloi to Narela from 14: 15 hours to 22: 35 hours on 17th February, 1997.

8. PW 1 J.S.Pawar, Mechanical Engineer has deposed that on 18th February, 1997 he had inspected a Tata Tempo bearing No.HR 46 9886. The vehicle was alright and no fresh damages were found on the body of vehicle. This witness had given his report as Ex.PW 1/A.

9. DW 1 Azad Singh has deposed that on the date of incident he was posted as a Conductor with the petitioner as the driver of the alleged offending vehicle. This witness has stated that in his presence neither any accident with the bus had taken place nor it was seized by the police.

10. It may be noted that in the present case none of the witnesses have identified the Petitioner herein as the person by whose negligence the accident took place. The tempo with which the bus is stated to have collided has no marks or any fresh damages on its body as stated by the mechanical inspector who examined the said tempo. Had the bus collided with the tempo and crushed the deceased as alleged by the prosecution there would have been some marks on the body of the stationary tempo.

Further, nothing has been placed on record by the prosecution to prove that the said vehicle was being driven negligently and rashly by the petitioner as no witness has stated anything with regard to the manner in which the offending vehicle was being driven. Neither any passenger of the bus has been examined nor the owner of the air filling station where PW 3 was said to standing and witnessed the accident has been examined by the prosecution.

11. In the present case, the chain of evidence connecting the petitioner to the alleged accident is not complete. The only basis on which the prosecution has tried to implicate the Petitioner is because he was driving the offending vehicle as per the duty slip. Driving the offending vehicle has not been denied by the Petitioner, however the same does not prove that the accident had taken place due to his negligence or rash driving. The prosecution has not been able to establish its case beyond reasonable doubt against the petitioner.

12. The essential ingredients to constitute an offence punishable under Section 279 IPC are that there must be rash and negligent driving or riding on a public way and the act must be so as to endanger human life or be likely to cause hurt or injury to any person. For an offence under Section 304A, the act of accused must be rash and negligent, which should be responsible for the death which does not amount to culpable homicide. The prosecution in the present case has failed to prove how the act of the Petitioner was rash or negligent to bring the same under the purview of Sections 279/304A IPC.

13. Hence keeping in view the circumstances of the present case, the impugned orders convicting the Petitioner are set aside. The Petitioner is acquitted of the charges punishable under Section 279/304A IPC. The petition is accordingly allowed. The bail bond and surety bond of the Petitioner are discharged.

14. Petition stands disposed of.

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LPA

BALBIR TYAGI ....APPELLANT

VERSUS

A. DHANWANTI CHANDELA & ANR. ....RESPONDENTS

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

LPA NO. : 438/2011 DATE OF DECISION: 15.02.2012

Delhi Municipal Corporation Act, 1957—Sec. 15 & 17—Election Petition—Respondent No.1 filed election petition challenging the election of appellant on the ground of corrupt practices including the appellant's act of appointing a permanent employee of MCD as polling agent—Trial Court on the basis of evidence dismissed the petition—Challenged by way of writ petition—Hon'ble Single Judge, by impugned judgment, reversed the findings of trial court and allowed the petition—Letters Patent Appeal—After analysis of evidence on record, findings of Hon'ble Single Judge set aside and petition dismissed—Held, standard of proof required to establish a charge of corrupt practice alleged in an election petition is same as that of criminal charge; in election disputes it is unsafe to accept oral evidence on its face value unless backed by incontrovertible documentary evidence; and while exercising writ jurisdiction, as against appeal, unless some perversity could be shown, the judgment of trial court should not be disturbed.

We are of the opinion that the approach of the learned Single Judge is not in accordance with law. We may first refer to the principle of law relating to prove the corrupt practices as lucidly numerated by the Supreme Court in **Pradip Buragohain** (supra). After scanning the relevant

law on the subject the Court pointed out that conspectus of the pronouncements show that three distinct aspects emerged that need to be kept in view while dealing with the election dispute involving corrupt practices namely;

(i) the first and foremost of these aspects to be borne in mind is the nature of a criminal charge has to be proved beyond reasonable doubt. The standard of proof required for establishing a charge of corrupt practice is the same as is applicable to a criminal charge. This implies that a charge of corrupt practice is taken as proved only if there is clear cut evidence which is entirely credible by the standards of appreciation applicable to such cases. (See **Rahim Khan Vs. Khurshid Ahmed and Ors.** (1974 (2) SCC 660), **D. Vankata Reddy Vs. R. Sultan and Ors.** (1976 (2) SCC 455) and **Ramji Prasad Singh Vs. Ram Bilas Jha and Ors.** (1997(1) SCC 260).

(ii) The second aspect that distinctly emerges from the pronouncements of this Court is that in an election dispute it is unsafe to accept oral evidence at its face value unless the same is backed by unimpeachable and incontrovertible documentary evidence. The Court highlighted the danger underlying the acceptance of oral evidence in support of a charge of corrupt practice.

(iii) The third aspect that is equally important and fairly well-settled is that while as a Court of first appeal there are no limitations on the powers of this Court in reversing a finding of fact or law which has been recorded on a misreading or wrong appreciation of the evidence or law, it would not ordinarily disregard the opinion of the trial Judge more so when the trial Judge happens to be a High Court Judge who has recorded the evidence and who has had the benefit of watching the demeanour of the witnesses in forming first hand opinion regarding their credibility.

(Para 15)

Once we keep these principles in mind, we are one with the learned Trial Court that the respondent no.1 was not able to prove the charge of corrupt practice beyond reasonable doubt. Various anomalies and loopholes pointed out in the testimony in support of this allegation are sufficient to raise reasonable doubt. We have already pointed out above that it is not in dispute that " Rajpal" is not written in same hand writing. It is also an accepted case that "Rajpal" is written in different ink. Further PW-7 had admitted in his cross-examination that one form is meant for one agent. If a candidate wants to appoint another agent there has to be a reliever of the first agent and for that different form is to be filled and signed. PW-7 had also admitted in his cross-examination that at the time of accepting the form, which was given to him by the appellant/candidate, he had only seen the election identity card of Mr. Rajpal on the basis of which he was satisfied and appointed him as a polling agent. A suggestion was put to him that the name of Mr. Rajpal was inserted, added and interpolated by him later in connivance with respondent no.1 which suggestion he denied. He, however, accepted that there was no indication in the form that Mr. Rajpal was a reliever. He also accepted that no reliever for any other candidate had been appointed since there was no request. On the other hand, the approach of the learned Single Judge was that of a Civil Court examining the preponderance and probabilities of the evidence. More significantly what cannot be lost sight is that it was not a statutory appeal against the order of the Trial Court. On the contrary, in a writ petition the Court was exercising the power of judicial review in the assumption of extra ordinary jurisdiction. Therefore, unless some perversity in the judgment of the Trial Court could be shown, the judgment of the Trial Court should not have been disturbed. Not only the re-appreciation of the same evidence by the appellate Court is not permissible, but merely because the higher court comes to a different conclusion then what has been arrived at by

the Trial Court will not be a ground to substitute its finding. Since we are holding that issue no.1 was rightly decided by the learned Trial Court, it is not necessary to go into the question as to whether mere appointment of a government/ MCD official as a polling agent is sufficient or " in order to prove the assistance" it is also to be proved that such an agent had acted as polling agent or a counting agent as well. **(Para 16)**

Important Issue Involved: In election disputes it is unsafe to accept oral evidence on its face value unless backed by incontrovertible documentary evidence.

[Gi Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Sandeep Sethi, Sr. Advocate with Mr. Rajesh Yadav. Mr. Dhananjay. Advocate.

FOR THE RESPONDENTS : Mr. Rakesh Khanna, Sr. Adv. with Ms. Seema Rao Mr. Rajiv Misra, Mr. Virender Singh, Advocates.

CASES REFERRED TO:

1. *Ramji Prasad Singh* vs. *Ram Bilas Jha and Ors.* (1997(1) SCC 260).
2. *D. Vankata Reddy* vs. *R. Sultan and Ors.* (1976 (2) SCC 455).
3. *Rahim Khan* vs. *Khurshid Ahmed and Ors.* (1974 (2) SCC 660).

RESULT: Appeal Dismissed.

A.K. SIKRI, ACTING CHIEF JUSTICE

1. The appellant herein was elected as Municipal Councilor from Ward No. 116, Vikaspuri East, Delhi in the municipal election held in April, 2007, results whereof were published on 9th April, 2007. The

respondent no.1 filed Election Petition under Sections 15 & 17 of the Delhi Municipal Corporation Act, 1957 (hereinafter referred to as 'the Act') challenging the election of the appellant alleging that the appellant had indulged in corrupt practices and a prayer was made that the election of the appellant be declared null and void and in his place the respondent no.1 be declared as elected. This Election Petition was premised on three grounds namely:

(i) the appellant had appointed one Mr.Raj Pal as his polling agent at the polling station no.107 in ward no. 116 on the day of election i.e. 5th April, 2007 even when Mr. Raj Pal was a permanent employee of the Municipal Corporation of Delhi and this amounted to corrupt practice under the provisions of Section 17 of the Act read with Rule 92 of the Delhi Municipal Corporation (Election of Councillors) Rules.

(ii) With a view to allure the voters a full page advertisement was inserted in newspaper 'Jan Manas Weekly' edition dated 18-24th March, 2006, 25-31st March, 2007 and 1-6th April, 2007 and had paid a sum of Rs. 24,000/- for each publication and the expenses towards the said advertisement had not been shown in the statement of expenses.

(iii) The appellant appointed Mr. Rohtash, a permanent employee of Delhi Transport Corporation as a polling agent at the polling station No. 106 which also amounted to corrupt practices.

The appellant contested the aforesaid Election Petition denying each and every allegations. The Ld. Trial Court framed 8 issues on the basis of pleadings between the parties which are as under:-

"1. Whether Raj Pal an employee of Horticulture Department of MCD had been appointed as an election agent of the Respondent No.1? If yes, its effect. (OPP)

2. Whether Rohtash an employee of DTC had been appointed as an election agent of the Respondent No.1? if yes, its effect. (OPP)

3. Whether the Respondent No.1 has failed to submit the details of expenses as required under Chapter 5 (A) of the DMC (Election of Councillors) Rules? If yes, its effect. (OPP)

4. Whether the Respondent No.1 has exceeded the prescribed expenses? If yes, its effect. (OPP)

5. Whether the petition has not been properly verified as required and there has been a violation of Section 15 of the DMC Act? (OPR-1)

6. Whether the election of Respondent No.1 from Ward No. 116, Vikaspuri (East), New Delhi-18 is liable to be declared void? (OPP)

7. In case if the aforesaid issue is decided in affirmative, whether the election petition is liable to be declared as elected from Ward No. 116, Vikaspuri(East) New Delhi-18? (OPP)

8. Relief."

Evidence was led by both the parties. The learned Trial Court after examining the evidence in the light of the argument advanced, decided these issues in favour of the appellant and dismissed the election petition vide orders dated 3rd April, 2010. Order of the learned Trial Court was challenged by the respondent no. 1 by filing writ petition under Article 226 & 227 of the Constitution of India. The Learned Single Judge has decided this writ petition vide judgment dated 26th April, 2001 reversing the findings of the Trial Court on issue no.1. As a result, the election petition of the respondent has been allowed and the election of the appellant has been set aside. We may point out that though some observations are made regarding insertion of full page advertisement in the local newspaper in the impugned order but it does not appear that any categorical finding is given in this behalf. Therefore, at the time of argument before us it was conceded by the learned counsel for the

respondent no.1 that the only dispute was in respect of the finding on issue no.1 and the fate of the case depends upon the outcome thereof.

2. As noted above, issue no.1 pertains to alleged appointment of Mr. Raj Pal, an employee of Horticulture Department, MCD as an election agent of the appellant. Before we discuss the findings of the learned Trial Court and that of the learned single Judge on this issue, we would like to refer to the relevant provisions. In the light of the evidence, it is to be discerned as to whether a case of corrupt practice by the appellant was made out or not. Section 17 of the Act provides the grounds for declaring the election to be void including the ground of corrupt practices which is reproduced below:-

> "17. **Grounds for declaring elections to be void:-** (1) Subject to the provision of sub-Section (2) if the court of the district judge is of the opinion-
>
> a) That on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen as a councilor under this Act, or
>
> b) That any corrupt practice has been committed by a returned candidate or his agent or by any other person with the consent of a returned candidate or his agent or;
>
> c) That any nomination appear has been improperly rejected, or
>
> d) That the result of the election, in so far as it concerns a returned candidate, has been materially affected-
>
> (i) by the improper acceptance of any nomination, or
>
> (ii) by any corrupt practice committed in the interests of the returned candidate by a person other than that candidate or his agent or a person acting with the consent of such candidate or agent, or
>
> (iii) by the improper acceptance or refusal of any vote or reception of any vote which is void, or
>
> (iv) by the non-compliance with the provisions of this

> Act or of any rules or orders made thereunder.
>
> The court shall declare the election of the return candidate to be void."

3. What constitutes corrupt practices is stipulated in Rule 92 of the Delhi Municipal (Election of Councillors) Rules and the same reads as under:-

> "92. **Corrupt Practices:** In addition to the corrupt practice specified in section 25, the **following shall be deemed to be corrupt practice:-**
>
> **The obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or by any other person with the consent of a candidate any assistance** (other than the giving of vote) for the furtherance of the prospects of that candidate's election from any person:-
>
> (a) **In the service of the Corporation; or**
>
> (b) **In the service of the Government** and belonging to any of the following classes; namely:
>
> (i) Gazette officers;
>
> (ii) Stipendiary judges and magistrates;
>
> (iii) Member of the armed forces of the Union;
>
> (iv) Members of the police force;
>
> (v) Excise officers;
>
> (vi) Revenue officers other than village revenue officers known as lambardars, malaguzars or by any other name whose duty is to collect land revenue and who are remunerated by a share of or commission on the amount of lan revenue collected by them but who do not discharge any police functions; and
>
> (vii) Such other class of persons in the service of the

Government as may be notified by the Government.

Explanation: for the purposes of this rule, a person shall be deemed to assist in the furtherance of the prospects of a candidate's election if the acts as a polling agent or a counting agent of that candidate."

4. Allegation in the petition preferred by the respondent no.1 was that since Mr. Rajpal was in the service of the Corporation, appointing him as an election agent amounted to corrupt practice. Specific pleading in the election petition of the respondent no.1 in this behalf is as under:-

"b. the respondent No.1 appointed the following as his following as his polling agents at the polling booth in ward No. 116 on the election day i.e. 5.4.2007 and at that point of time these persons were/are the permanent employees of Municipal Corporation of Delhi and even circulated the names of these polling agents to the Returning Officer of the polling booth/station, which amounts to mal practice, unhealthy and corrupt practice adopted by the respondent No.1 for purpose of winning the elections and which is also against the provisions of election rules:

NAME OF THE POLLING AGENT AT POLLIING STATION

i. Rajpal son of 107

The person mentioned above is the permanent govt. employee. Under these circumstances the election of respondent No.1 is liable to be declared void."

5. It is not in dispute that Mr. Rajpal, at the relevant time, was working as Mali (permanent) with the Horticulture Department of MCD. In any case this fact was proved by PW-2 Kuldeep Singh, Section Officer, West Zone of Horticulture Department who produced the relevant record. In order to prove that Mr. Rajpal was appointed as a polling agent, the respondent no.1 also produced Mr. KPS Chauhan as PW-7. Mr. KPS Chauhan was the Presiding Officer of Ward No. 116, polling Station 107. He produced the attested copies of the original Form 8-B in which name of Mr. Rajpal was shown as polling agent alongwith another person Mr. Devender Chadha. As much turns on what is written in this

form, we are reproducing the scanned copy of this form to appreciate the controversy which we would point out hereinafter:-

6. What is discernable is that the appellant Mr. Balbir Tyagi had appointed Mr. Devender Chadha s/o Shri B.K. Chadha as polling agent. After the name of Sh. Devender Chadha, there is slash (/) and thereafter name of "Rajpal" appears. It is not in dispute that " Rajpal" is not written in same hand writing. It is also an accepted case that "Rajpal" is written in different ink. Further PW-7 had admitted in his cross-examination that one form is meant for one agent. If a candidate wants to appoint another

agent there has to be a reliever of the first agent and for that different form is to be filled and signed. PW-7 had also admitted in his cross-examination that at the time of accepting the form, which was given to him by the appellant/candidate, he had only seen the election identity card of Mr. Rajpal on the basis of which he was satisfied and appointed him as a polling agent. A suggestion was put to him that the name of Mr. Rajpal was inserted, added and interpolated by him later in connivanc with respondent no.1 which suggestion he denied. He, however, acce ted that there was no indication in the form that Mr. Rajpal was a reliever. He also accepted that no reliever for any other candidate had been appointed since there was no request.

7. In view of the aforesaid circumstances appearing on record shaking his testimony and having regard to the specific denial by the appellant about the insertion of name of Rajpal as polling agent with specific allegation, there was heavy burden upon the respondent to discharge onus in this regard. The learned Trial Court accordingly held that the respondent no.1 was not able to discharge this burden that Rajpal was appointed as reliever and thus held that issue no.1 was not proved. Accordingly, the election petition was dismissed. This order was challenged by the respondent no.1 by filing writ petition under Article 226/227 of the Constitution of India. By impugned judgment findings of issue no.1 are reversed holding that the appellant had appointed Rajpal as his relieving agent and thus committed corrupt practice. This order is in appeal before us.

8. Questioning the aforesaid findings of the learned Single Judge, Mr. Sandeep Sethi, Sr. Advocate and Mr. Rajesh Yadav, Advocate who appeared for the appellant argued that the findings of fact arrived at by the learned Trial Court could not be brushed aside lightly when the Trial Court had pointed out glaring loop holes. It was also submitted that the allegation of corrupt practices is in the nature of criminal charge and has to be proved beyond reasonable doubt and it was unsafe to accept oral evidence at its face value unless the same is backed by unimpeachable and incontrovertible documentary evidence. Learned Senior Counsel also referred to the judgment of Supreme Court in the case of **Pradip Buragohain Vs. Pranati Phukan JT** 2010 (6) SC 614 as well as various judgments dealing with the same principle of law. It was also argued that in any case the only allegation was that Mr. Rajpal was appointed as polling agent (and not even relieving agent as per the allegation in the

petition) but there was no allegation that he acted in that capacity which was also a necessary ingredient to be proved to show corrupt practice as per the provisions of Rule 92 of the Rules. For this purpose, the learned Senior Counsel specifically referred to the Explanation to Rule 92.

9. Mr. Rakesh Khanna, learned Senior Counsel appearing for respondent no.1 on the other hand referred to those aspects in the testimony which was highlighted by the learned Single Judge as well and submitted that once signatures of Rajpal on the form were admitted by him, it was for the appellant to explain as the onus stood discharged by the respondent no.1 He further submitted that the interpretation of Rule 92 as suggested by the appellant is not correct inasmuch as Rule 92 is a deeming provision which makes not only actual assistance of a Government employee but even attempt to obtain assistance from such an employee as deemed corrupt practice. He submitted that the nature of assistance mentioned in Explanation was another deeming provision which would not militate the main provision that includes even attempt to obtain the assistance as corrupt practice.

10. We have given our due consideration to the respective submissions. Section 17 of the Act stipulates certain grounds on which election of a candidate can be declared void and one of the grounds is commission of corrupt practice by a returned candidate or his agent or by any other person with the consent of a returned candidate or his agent. It is not in doubt that as per the said provision if the assistance of a person who is in the service of the Corporation is taken, then that is deemed to be a corrupt practice. First question is as to whether Mr. Rajpal was appointed as polling agent, because only then the question of obtaining his assistance or attempt to obtain assistance would arise. The learned Trial Court on the basis of the evidence categorically held that it could not be proved beyond reasonable doubt that Rajpal was appointed as polling agent or reliever.

11. Appreciating the testimony in the light of the provisions of the Act and the Rules as well as the practice which the Presiding Officer was supposed to follow, the learned Trial Court made the following observations:-

> "After having gone through the rival contentions and perusal of Form -8B, I am of a considered view that **firstly** there is no dispute that the name of Raj Pal finds a mention as Reliever for

Balbir Tyagi in form 8-B and bear his signatures. Secondly, it is not denied that the Raj Pal is a mali in the Horticulture Department of the Municipal Corporation of Delhi and therefore, is an employee under Clause 9a) of Rule 92 of Delhi Municipal Councillors (Election of Councillors) Rules. **Thirdly,** it is evident from Form 8-B Ex. PW1/7 duly proved by PW7 who is the Presiding Officer of Ward No. 116 that the same bear the signatures of Balbir Tyagi at one place. The name of Davinder Chadha has been put in a different ink and handwriting whereas the name of Raj Pal appears to have been inserted later in a different ink and in a different handwriting by putting a slash (/) after the name of Davinder Chadha S/o late B.K. Chadha. **Fourthly,** it is evident that the detail parentage of Davinder Chadha and his address has been mentioned in the Form 8-B whereas in case of Raj Pal neither his parentage nor his address finds a mentioned in the said Form. PW7 K.P.S. Chauhan the Presiding Officer in Ward no. 116 has deposed on the basis of the document placed on record. He has in his cross-examination admitted that he did not ask the reliever the name of his father and address and states that he had only seen the identity Card by which he was satisfied and he appointed the agent but he is not aware if Raj Pal was on duty on the said day. He has denied the suggestion that the name of Raj Pal has been inserted and interpolated laterojn. On a court question the witness has informed that therse is no separate form for reliever polling agent and Form 8-B is given to the candidate and is filled up by the candidate or his agent but not explanation is forthcoming with regard to the difference in ink and the handwriting by way of which the name of Raj Pal has been inserted. **Fifthly** the Returning Officer Sant Ram Kapor who has been examined as PW5 has deposed on the basis of the official record and according to him Davinder Chadha S/o Late B.K. Gupta was in the Polling Agent for Balbir Tyagi but the name of Raj Pal has also been shown. The Returning Officer has specifically deposed that as per the procedure the Reliever can be appointed by the Presiding Officer but it has to be done in separate form and not in the manner as done in the present case. The Presiding Officer is unable to provide any explanation as to why the name of Raj Pal was not put in a separate form and therefor, an adverse inference is liable

to be drawn on the aforesaid aspect. **Lastly,** the respondent no.1 has in his affidavit of evidence specifically alleged manipulation and interpolation in so far as the name of Raj Pal is concerned. Having denied the aforesaid, the onus of proving that the name of Raj Pal had been inserted at the instance of Balbir Tyagi, shifts upon the petitioner which onus the petitioner has not been able to discharge. No explanation is forthcoming as to why a different form was not used while appointing Raj Pal as Reliever and also on the aspect of different ink and handwriting."

It is clear from the above that following infirmities were pointed out in the so called appointment of Rajpal as the polling agent:-

(i) the form appears the name of Devender Chadha as polling agent and the name of Rajpal is to be in different ink and hand writing which appears to have been inserted later by putting a slash (/).

(ii) Though details of parentage of Devender Chadha, polling agent, and his address is mentioned in the form, in the case of Rajpal, neither his parentage nor is address is mentioned therein.

(iii) According to PW-7 he had seen the identity card by which he was satisfied and appointed him as his agent. But he was not aware if Rajpal was on duty on the said date.

12. The learned Trial Court summed up the discussion in the judgment of the Trial Court:-

"Therefore, in view of my aforesaid discussion, I hereby hold that no doubt Raj Pal is an employee of the Corporation and is covered under Clause (a) of Rule 92 of the Delhi Municipal Corporation (Election of Councillors) Rules, yet it was necessary for the election petitioner to have proved that it is the candidate Balbir Tyagi or his agent who had taken the assistance of the services of the employee of Corporation in furtherance of his prospects in the elections. The respondent no.1 having denied taking any services of Raj Pal and no explanation being forthcoming for the different ink and the hand writing on form B-8 coupled with the fact that the Presiding Officer had inserted the name of Raj Pal on the same form whereas according to the Returning Officer it should have been done in a separate form:

raises a doubt in the mind of the court which the petitioner has not been able to clear and therefore, the arguments of the respondent no.1 that the name of Rajpal was surreptitiously added at a later stage by interpolation cannot be unfounded. Issue is decided against the election petition and in favour of the respondent no.1."

13. The learned Single Judge, however, did not accept the aforesaid finding. After going through the evidence all over again, opinion is formed by the learned Single Judge that the statement of PW-7 is creditworthy and when he had specifically stated that Form 8-B was signed by Devender Chadha as well as Rajpal and signatures of Rajpal were not disputed, it should be accepted that Rajpal was appointed as the polling agent. Thus, two things which weighed in the mind of the learned Single Judge in upsetting the aforesaid findings are the testimony of PW-7 which according to the learned Single Judge remained unshaken about the fact that he added the name of Rajpal at the instance of appellant and Rajpal signed in his presence and further that Rajpal who appeared as RW-4 has admitted his signatures.

14. We may point here that the appellant produced Sh. Rajpal as his witness who deposed that on the election date, he performed his official duties. This fact was also provided by the official witness. It will have to be remarked by us at this stage that if the PW-7 had seen the identity card of Rajpal, he could immediately find out that Rajpal was an employee of MCD and such a person could not have been appointed as polling agent. This raises doubt in the veracity of the statement of PW-7 landing credence to the case set up by the appellant that the name of Rajpal was inserted later which appears in different ink and different hand writing. PW-7 admitted that separate form for reliever was required but has not given any explanation why he allowed Rajpal to be the reliever, that too, when the name was in different ink and hand writing, if PW-7 is to be believed.

15. We are of the opinion that the approach of the learned Single Judge is not in accordance with law. We may first refer to the principle of law relating to prove the corrupt practices as lucidly numerated by the Supreme Court in **Pradip Buragohain** (supra). After scanning the relevant law on the subject the Court pointed out that conspectus of the pronouncements show that three distinct aspects emerged that need to

be kept in view while dealing with the election dispute involving corrupt practices namely;

(i) the first and foremost of these aspects to be borne in mind is the nature of a criminal charge has to be proved beyond reasonable doubt. The standard of proof required for establishing a charge of corrupt practice is the same as is applicable to a criminal charge. This implies that a charge of corrupt practice is taken as proved only if there is clear cut evidence which is entirely credible by the standards of appreciation applicable to such cases. (See **Rahim Khan Vs. Khurshid Ahmed and Ors.** (1974 (2) SCC 660), **D. Vankata Reddy Vs. R. Sultan and Ors.** (1976 (2) SCC 455) and **Ramji Prasad Singh Vs. Ram Bilas Jha and Ors.** (1997(1) SCC 260).

(ii) The second aspect that distinctly emerges from the pronouncements of this Court is that in an election dispute it is unsafe to accept oral evidence at its face value unless the same is backed by unimpeachable and incontrovertible documentary evidence. The Court highlighted the danger underlying the acceptance of oral evidence in support of a charge of corrupt practice.

(iii) The third aspect that is equally important and fairly well-settled is that while as a Court of first appeal there are no limitations on the powers of this Court in reversing a finding of fact or law which has been recorded on a misreading or wrong appreciation of the evidence or law, it would not ordinarily disregard the opinion of the trial Judge more so when the trial Judge happens to be a High Court Judge who has recorded the evidence and who has had the benefit of watching the demeanour of the witnesses in forming first hand opinion regarding their credibility.

16. Once we keep these principles in mind, we are one with the learned Trial Court that the respondent no.1 was not able to prove the charge of corrupt practice beyond reasonable doubt. Various anomalies and loopholes pointed out in the testimony in support of this allegation are sufficient to raise reasonable doubt. We have already pointed out above that it is not in dispute that " Rajpal" is not written in same hand

writing. It is also an accepted case that "Rajpal" is written in different ink. Further PW-7 had admitted in his cross-examination that one form is meant for one agent. If a candidate wants to appoint another agent there has to be a reliever of the first agent and for that different form is to be filled and signed. PW-7 had also admitted in his cross-examination that at the time of accepting the form, which was given to him by the appellant/candidate, he had only seen the election identity card of Mr. Rajpal on the basis of which he was satisfied and appointed him as a polling agent. A suggestion was put to him that the name of Mr. Rajpal was inserted, added and interpolated by him later in connivance with respondent no.1 which suggestion he denied. He, however, accepted that there was no indication in the form that Mr. Rajpal was a reliever. He also accepted that no reliever for any other candidate had been appointed since there was no request. On the other hand, the approach of the learned Single Judge was that of a Civil Court examining the preponderance and probabilities of the evidence. More significantly what cannot be lost sight is that it was not a statutory appeal against the order of the Trial Court. On the contrary, in a writ petition the Court was exercising the power of judicial review in the assumption of extra ordinary jurisdiction. Therefore, unless some perversity in the judgment of the Trial Court could be shown, the judgment of the Trial Court should not have been disturbed. Not only the re-appreciation of the same evidence by the appellate Court is not permissible, but merely because the higher court comes to a different conclusion then what has been arrived at by the Trial Court will not be a ground to substitute its finding. Since we are holding that issue no.1 was rightly decided by the learned Trial Court, it is not necessary to go into the question as to whether mere appointment of a government/MCD official as a polling agent is sufficient or " in order to prove the assistance" it is also to be proved that such an agent had acted as polling agent or a counting agent as well.

17. This appeal is accordingly allowed. The impugned judgment of the learned Single Judge is set aside and that of the learned Trial Court is restored. 18. The appellant shall also be entitled to costs of Rs. 10,000/ - to be paid by the respondent no.1.

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CRL. M.C.

CHANDER KANT PANDIT ....PETITIONER

VERSUS

DAPINDER PAL SINGH ....RESPONDENT

(SURESH KAIT, J.)

CRL. M.C. NO. : 217/2011 DATE OF DECISION: 23.02.2012

Code of Criminal Procedure,1973—Sections 397, 399 & 401—Audi Alteram Partem—Respondent filed revision petition against order of ACMM—Revision Petition disposed off without issuing notice to respondent or hearing him—Held ASJ while dealing with revision should have issued notice and heard petitioner. Impugned order set aside.

Learned counsel has relied upon a judgment of the Supreme Court in the case of **Raghu Raj Singh Rousha v. M/s. Shivam Sundasram Promoters (P) Ltd. & Anr.,** 2009 [1] JCC 405. Whereby one of the questions arises for consideration is as to whether the learned magistrate has taken cognizance of the offence. Indisputably, if he had taken cognizance of the offence and merely issuance of summons upon the accused persons had been postponed; in a criminal revision filed on behalf of the complainant, the accused was entitled to be heard before the High Court. **(Para 7)**

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Mr. P.L. Sharma, Advocate.

FOR THE RESPONDENT : Mr. M.P.S. Kasana, Advocate.

CASE REFERRED TO:

1. *Raghu Raj Singh Rousha* vs. *M/s. Shivam Sundasram Promoters (P) Ltd. & Anr.,* 2009 [1] JCC 405.

RESULT: Petition Allowed.

SURESH KAIT, J. (Oral)

1. The said petition being filed against the impugned judgment dated 21.10.2010, whereby the learned ASJ has reversed the order dated 09.04.2010 passed in Criminal Complaint No.4910/2009 instituted by Dapinder Pal Singh/respondent.

2. Vide the said petition, the petitioner has raised the legal ground that the ld. ASJ has violated the principle of Audi Alteram partem by not issuing notice and even not given a chance for hearing to the petitioner before passing the order/judgment dated 21.10.2010 in Crl. Rev. No.30/2010.

3. Being aggrieved by the order dated 09.04.2010 passed by ld. Magistrate, respondent filed the revision petition No.30/10 before the sessions court while challenging the same as the petitioner not been summoned by the trial court.

4. The co-accused, Vaid Prakash Sharma also challenged the same order passed by the ld. Magistrate, vide revision petition No.54/10.

5. Learned ASJ, thereafter, clubbed both the revision petitions and passed the common impugned judgment in both the revision petitions.

6. Learned counsel has further submitted that the effected party is the petitioner who has never been heard or even notice has not been issued in revision petition No.30/10. Therefore, this is clear cut violation of natural justice.

7. Learned counsel has relied upon a judgment of the Supreme Court in the case of **Raghu Raj Singh Rousha v. M/s. Shivam Sundasram Promoters (P) Ltd. & Anr.,** 2009 [1] JCC 405. Whereby one of the questions arises for consideration is as to whether the learned magistrate has taken cognizance of the offence. Indisputably, if he had taken cognizance of the offence and merely issuance of summons upon the accused persons had been postponed; in a criminal revision filed on behalf of the complainant, the accused was entitled to be heard before

the High Court.

8. Section 397 of the Code empowers the High Court to call for records of the case and exercise its power of revision in order to satisfy itself as regards to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior court. Sub-section (2) of Section 397 of the Code, however, prohibits exercise of such power in relation to any interlocutory order passed in any proceeding. Whereas Section 399 of the Code deals with the Sessions Judge's power of revision; Section 401 thereof deals with the High Court's power of revision.

Sub-section (2) of Section 401 of the Code reads, thus:

"(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence."

9. Learned counsel for respondent has submitted that the petitioner is the son of Vaid Prakash Sharma, who has challenged the order dated 9th April, 2010 by filing a revision petition No.54/10. Therefore, the petitioner was well aware of the revision being filed against him and he was made a respondent therein.

10. It is further submitted that both the revisions vide No.30/10 and 54/10 were clubbed and heard together and disposed of by a common order. Therefore, the petitioner cannot take the ground of not being heard by the Ld. ASJ.

11. Undisputedly, order dated 9th April, 2010 has been passed in Crl. Case. No.4910/2009, by the Ld. ACMM/1/Est./Karkardooma, after considering the facts that the allegations made in Crl. Case No.4910/2009 were of the criminal conspiracy. However, there does not appear sufficient material on record which show that accused Chander Kant Sharma/petitioner has any criminal conspiracy with A-1, so he was not summoned.

12. Admittedly, in both revisions mentioned above, neither he was revisionist nor any notice had been issued by the Ld. ASJ and by passing the order in the revision order dated 09.04.2010 has been reversed and the petitioner has been made accused.

13. Therefore, I am of the considered opinion that learned ASJ while dealing with the revision, would have issued notice in a revision

No.30/10 and would have heard the petitioner, which he fails to do so.

14. Keeping in view the facts and circumstances of the case, the order dated 21.10.2010 passed in revision No.30/10 qua petitioner is set aside. The learned ASJ is further directed to hear the petitioner and thereafter pass a fresh order in this regard.

15. As jointly prayed by learned counsel for the parties, to save the precious public time, they shall appear before the Ld. ASJ on 01.03.2012 for directions.

16. Accordingly, M.C. 217/2011 is allowed in the above terms.

17. No order as to costs.

18. Dasti.

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CM (M)

NARESH CHAND JAIN & ANR. ....PETITIONERS

VERSUS

KM TAYAL ....RESPONDENT

(INDERMEET KAUR, J.)

CM.(M). NO. : 1405/2009 DATE OF DECISION: 23.02.2012
& CM NO. : 17389/2009

Code of Civil Procedure, 1908—Sec.89—Mediation—On 07.06.08 settlement arrived at before the mediator and terms of settlement signed by parties and their counsel and matter referred back to the referral court—On 11.08.08 both sides through their counsel appeared before the Court and the Court recorded a positive finding that the parties had settled their disputes—Till 29.08.08 there was no dispute as regards

settlement—On 29.08.08 the court allowed petitioner's application for reconsideration of mediation settlement and referred the parties back to mediation—But on 04.09.08, the Judge-In-Charge, Mediation Cell remanded the matter back to court for disposal on merits, observing that no useful purpose would be served by mediation efforts—Challenged—Held, there being no dispute about the settlement till 29.08.08, there was a mandate of law upon the Court to pass a settlement decree and Court could not have relegated the parties to regular trial.

In the instant case as well, the parties having arrived at settlement duly signed by them which settlement was again reiterated on a subsequent date, by both the parties as also through their counsel and there being no dispute about this settlement right up to 29.08.2008 there was a mandate upon the Court to pass a decree on the aforenoted settlement arrived at between the parties. **(Para 6)**

The whole purpose and import of Section 89 of the Code would become frustrated if such like settlements arrived at by the will and consent of the parties are thereafter permitted to be withdrawn; moreover it was also not the contention of the petitioner before the Court below that this settlement was not arrived at between the parties; he had only sought a clarification on which application, the impugned order had relegated the parties to a regular trial. The parties are clearly bound by their settlement arrived at between them on 07.06.2008. **(Para 7)**

Important Issue Involved: Settlement once arrived at during mediation cannot be permitted to be withdrawn.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONERS : Ms. Shalini Kapoor, Advocate.

FOR THE RESPONDENT : None.

CASES REFERRED TO:

1. *Sh. Abdul Saliq Khan* vs. *Shri Nahid Khan & Others* delivered on 25.02.2011 in RSA No. 30/2011.
2. *Smt. Surinder Kaur & Others* vs. *Sh. Pritam Singh & Others* CS(OS) No. 656/2003.

RESULT: Petition allowed and Compromise Decree passed.

INDERMEET KAUR, J. (Oral)

1. Order impugned before this Court is the order dated 07.11.2009 which has dismissed the review petition filed by the defendant seeking a review of the order dated 29.08.2008. Vide order dated 29.08.2008 on the application filed by the petitioner seeking a reconsideration of the mediation settlement arrived at between the parties, the Court had allowed the prayer and had noted that parties again be referred for mediation and the parties had been directed to go back for mediation for 04.09.2008; relevant would it be to state that on 04.09.2008, the Court was of the view that no clarification is required of the mediation proceedings and since after the date of mediation, written statement has also been filed, the Court shall proceed to deal with the case on its merits. The impugned order had in fact noted that the mediation talks have failed between the parties.

2. This is the grievance of the present petitioner. Respondent is also present in person. Record shows that on 07.06.2008, a mediation settlement had been arrived at between the parties; the attorney of the plaintiff Krishan Mohan Tyal had signed this settlement; there is no dispute to this factum; defendant No. 1 had also signed this settlement; their respective counsel were also signatories to this settlement. In view of this aforenoted settlement which was arrived at before the Mediator Mr. Sudhir Kumar Jain, the parties in terms of para 2 of the settlement had agreed to withdraw certain cases and to get other compounded; details of the aforenoted cases have been noted in this settlement effected on 07.06.2008. As a part of the aforenoted settlement, it had also been agreed that defendant No. 1 shall pay a total sum of '15 lacs to Krishan Mohan Tyal in full and final settlement of all their disputes. Admittedly this mediation settlement arrived at before the Mediation Mr. Sudhir Kumar Jain, was

signed by the attorney of the plaintiff and defendant No. 1, as also by their counsel. The matter had been referred back to the referral Court on 02.07.2008; matter was taken up on 11.08.2008 where counsel for both the parties were present; the Court had recorded a specific finding that the settlement between the parties has been effected; matter was posted for 25.08.2008. On 29.08.2008, an application had been filed by the plaintiff seeking reconsideration of the mediation proceedings; contention was that the clarifications were required; on 29.08.2008, the Court was of the view that the matter again be referred to mediation but on 04.09.2008 (as noted supra) the Judge In-charge of the Mediation Cell was of the view that there would be no useful purpose in sending the matter again for mediation and the matter again be remanded back to the trial Court for disposal on its merit.

3. Learned counsel for the petitioner submits that the very purpose of provision of Section 89 of the Code of Civil Procedure (hereinafter referred to as the 'Code') would be frustrated if settlements arrived at between the parties are allowed to be given a go-bye and the parties are allowed to wriggle out of a settlement which has admittedly been arrived at in their presence and duly signed by both the parties. To support this submission, reliance has been placed upon the judgment passed in CS(OS) No. 656/2003 **Smt. Surinder Kaur & Others Vs. Sh. Pritam Singh & Others** delivered on 20.12.2005; submission being that this settlement was in fact binding upon the parties and neither of the parties could wriggle out of it.

4. Section 89 was introduced into the Code by the amendment of 2002; the legislative intent was to encourage settlement of disputes through the mechanism of Alternate Dispute Resolution (ADR); Section 89 (2) provides that where the dispute has been referred for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed. Rules 24 & 25 of the Mediation and Conciliation Rules, 2004 also stipulates the manner in which the settlement has to be recorded and after the settlement has been recorded i.e. on the receipt of settlement, the Court, if satisfied that the parties have settled their disputes, shall pass a decree in accordance thereof. In this case there is not dispute that on 07.06.2008, a settlement had been arrived between the parties i.e. between the attorney of the plaintiff and defendant No. 1; they had signed the settlement; it is not the contention of the respondent before this Court that this settlement was obtained

from him under some kind of pressure or coercion or that he was not a party or a signatory to this settlement. In fact this settlement arrived at between the parties had been duly signed by the parties; on 07.06.2008 the matter had been referred by the referral Court; the matter had again taken up for hearing on 11.08.2008. Even on 11.08.2008, the parties had been represented through their respective counsel and the Court had recorded a positive fact finding that the parties had settled their disputes.

5. In fact a Bench of this Court in **Sh. Abdul Saliq Khan Vs. Shri Nahid Khan & Others** delivered on 25.02.2011 in RSA No. 30/2011 while dealing with the Mediation and Conciliation Rules, 2004 in this context had noted as under:-

> "A cojoint reading of Rule 24 (b) and 25 (a) shows that where an agreement has been reached between the parties with regard to all the issues in the suit or proceeding of some of the issues, the same shall be reduced to writing and signed by the parties or their constituted attorney; the agreement so signed shall be submitted to the Mediator/Conciliation who shall, with a covering letter signed by him, forward the same to the Court in which the suit or proceeding is pending. There is then a mandate upon the court to pass a decree after the afore-noted settlement has been arrived at."

6. In the instant case as well, the parties having arrived at settlement duly signed by them which settlement was again reiterated on a subsequent date, by both the parties as also through their counsel and there being no dispute about this settlement right up to 29.08.2008 there was a mandate upon the Court to pass a decree on the aforenoted settlement arrived at between the parties.

7. The whole purpose and import of Section 89 of the Code would become frustrated if such like settlements arrived at by the will and consent of the parties are thereafter permitted to be withdrawn; moreover it was also not the contention of the petitioner before the Court below that this settlement was not arrived at between the parties; he had only sought a clarification on which application, the impugned order had relegated the parties to a regular trial. The parties are clearly bound by their settlement arrived at between them on 07.06.2008.

8. Decree is passed in terms of the aforenoted compromise. Petition is allowed and disposed of in the above terms.

ILR (2012) III DELHI 138
RFA

GULAB CHAUDHARY ....APPELLANT

VERSUS

GOVINDER SINGH DAHIYA & ANR. ....RESPONDENTS

(VALMIKI J. MEHTA, J.)

RFA NO. : 465/2010 DATE OF DECISION: 28.02.2012

(A) Limitation Act, 1963—Regular First Appeal (RFA) filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) against judgment of the Trial Court dated 15.01.2010 dismissing the suit filed by the appellant/plaintiff/sister for declaration, possession and injunction with respect to the property of the deceased father—Held—The suit which was filed on 2.11.2006 seeking rights in the suit property for declaration and injunction was clearly barred by time inasmuch as form of the suit cannot conceal the real nature of the suit which was really a suit for partition and possession of the property which belonged to the father. A suit for possession of an immovable property is covered by Article 65 of the Limitation Act, 1963 as per which, the suit for recovery of an immovable property has to be filed within 12 years of the date the possession of the property becomes adverse to that of the appellant/plaintiff. In the present case, the suit was ex facie barred by limitation, and in fact need not even have gone for trial inasmuch as the appellant/plaintiff in the plaint itself admits that the respondent No.1/defendant

No.1 immediately after the death of the father, Sh. Bhagwan Singh in the year 1987 proclaimed himself to be the owner of the suit property on the basis of a Will.

In my opinion, the suit which was filed on 2.11.2006 seeking rights in the suit property for declaration and injunction was clearly barred by time inasmuch as form of the suit cannot conceal the real nature of the suit, and which was really a suit for partition and possession of the property which belonged to the father. A suit for possession of an immovable property is covered by Article 65 of the Limitation Act, 1963 and as per which, the suit for recovery of an immovable property has to be filed within 12 years of the date the possession of the property becomes adverse to that of the appellant/plaintiff. In the present case, the suit was ex facie barred by limitation, and in fact need not even have gone for trial inasmuch as the appellant/plaintiff in the plaint itself admits that the respondent no1/defendant no.1 immediately after the death of the father, Sh. Bhagwan Singh in the year 1987 proclaimed himself to be the owner of the suit property on the basis of a Will. This admission is made by the appellant/plaintiff in para 4 of the plaint which reads as under:-

> "4. That after the death of the father of the plaintiff, the plaintiff was told by the defendant no.1 that their late father had made a 'WILL' of the above said properties in the name of the defendant no.1. The plaintiff believing the words of the defendant no.1 did not ask for the "WILL" left behind or any share in the properties of their late father, assuming that the defendant no.1 will take probate or letter of administration regarding the properties and then the plaintiff will file her objections." **(Para 8)**

(B) Imposition of costs—Relying on the case of *Ramrameshwari Devi and Others v. Nirmala Devi and Others* (2011) 8 SCC 249 wherein the Supreme Court

has held that unless actual costs are imposed a dishonest litigant will take unnecessary benefit of the false litigation, cost of Rs. 25.000 was imposed on the Appellant.

The Supreme Court in the recent judgment in the case of **Ramrameshwari Devi and Others v. Nirmala Devi and Others** (2011) 8 SCC 249, has held that in certain dishonest litigations, actual costs must be imposed. The Supreme Court has held that unless actual costs are imposed a dishonest litigant will take unnecessary benefit of the false litigation. In this case, I take into account the state of mind of the respondent no.1/defendant no.1, who suddenly after 19 years of the death of the father, late Sh. Bhagwan Singh, and surely 19 years is a very long period of time, was faced with the suit claiming rights in the suit property. The respondent no.1/defendant no.1 has also incurred costs of litigation. Accordingly, I deem it fit that the appeal should be dismissed with costs of Rs. 25,000/-. **(Para 19)**

Important Issue Involved: The form of the Suit cannot conceal the real nature of the suit, and which was really a suit for partition and possession of the property cannot be concealed as an injunctive suit. A suit for possession is covered by Article 65 of the Limitation Act, 1963 as per which it has to be filed within 12 years of the date the possession of the property becomes adverse to that of the plaintiff.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Ms. Deepika, Advocate.

FOR THE RESPONDENTS : Mr. Ajay Dahiya, Advocate for R-1.

CASES REFERRED TO:

1. *Ramrameshwari Devi and Others* vs. *Nirmala Devi and Others* (2011) 8 SCC 249.

2. *Santosh Kakkar* vs. *Ram Prasad & Ors.* reported in 71 (1998) DLT 147.

3. *Murlidhar Dua & Ors.* vs. *Shashi Mohan* reported in 68 (1997) DLT 284.

RESULT: Appeal dismissed.

VALMIKI J. MEHTA, J. (ORAL)

1. The challenge by means of this Regular First Appeal (RFA) filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the Trial Court dated 15.1.2010 dismissing the suit filed by the appellant/plaintiff/sister for declaration, possession and injunction with respect to the property of the father, late Sh. Bhagwan Singh.

2. The appellant/plaintiff in the plaint pleaded that she was the daughter of late Sh. Bhagwan Singh and was entitled to one-fourth share in the suit property bearing no. 6301/1A(2), Kamla Nagar, Delhi. The appellant/plaintiff/sister also prayed for possession of the suit property to the extent of her one-fourth share. Direction was also sought against the defendant no.2/respondent no.2/Municipal Corporation of Delhi to mutate one-fourth share of the property in the name of the appellant/plaintiff, and injunction was prayed for restraining the respondent no.1/defendant no.1 from transferring etc the suit property. The appellant/plaintiff claimed that the father-Bhagwan Singh died on 25.11.1987 leaving behind, besides the appellant/plaintiff-the daughter and the defendant no.1-son, two other daughters namely, Smt. Daya and Smt. Kamla. It was pleaded in the plaint that in 1987, in around the time of death of her father the respondent no.1/defendant no.1 told her of a Will executed in his name by the father. It is pleaded that till 2006, i.e. for 19 years, the appellant/plaintiff took no action because she only came to know in May, 2006 that the Will was a manipulation done by the defendant no.1/respondent no.1. The appellant/plaintiff claimed to have sent the legal notice dated 3.5.2006 and thereafter in the absence of response filed the subject suit.

3. The respondent no.1/defendant no.1contested the suit on two basic grounds. The first was that the suit was barred by limitation and the second was that the respondent no.1/defendant no.1 became the owner of the suit property by virtue of a registered Will dated 20.9.1986 executed by the father, and which was registered with the sub-Registrar

at Sonepat, Haryana on 29.9.1986.

4. After completion of pleadings, the Trial Court framed the following issues:

"1. Whether the suit has not been valued for the purpose of court fees and pecuniary jurisdiction? (OPD)

2. Whether the suit is barred by limitation? (OPD)

3. Whether the Will dated 29.9.1986 of late Sh. Bhagwan Dass is genuine as per the pleadings in the Written Statement? If yes, its effect upon the relief for declaration sought for by the plaintiff in the plaint? (OP Parties)

4. Whether the plaintiff is entitled to the relief of possession as asked for in the plaint? (OPP)

5. Whether the plaintiff is entitled to the relief of permanent and mandatory injunction as asked for in the plaint? (OPP)

6. Relief."

5. The Trial Court held the suit to be within limitation, however, dismissed the suit by holding that the father-late Sh. Bhagwan Singh had executed a Will dated 29.9.1986, Ex.PW2/1, bequeathing the suit property in favour of the respondent no.1/defendant no1. The reasoning of the Trial Court to uphold the Will dated 29.9.1986 is on the basis of following observations:-

"I have given my careful consideration to the aspects raised before me. **Firstly** the Will in dispute dated 29.9.1986 which is **Ex.PW2/1** is a registered document and proved by PW2 is admissible in evidence. **Secondly** it is not disputed that late Sh. Bhagwan Singh who had executed the Will, was highly qualified having studied in London and was a retired Class I Gazetted Officer from the Indian Railway Services. **Thirdly** it has been duly proved by the defendant that both the attesting witnesses namely Mahender Singh S/o Late Sh. Swaroop Singh and Sh. Sukhbir Singh S/o Late Sh. Kali Ram have expired whose death certificate are **Ex.DW3/A** & **Ex.DW3/B** have been duly proved by the witness from the Sub Registrar Office (Death & Birth) Sonepat, Haryana. Both the said witnesses were from the same village as that of the testator, the witness Mahender Singh being

the close relative of the deceased testator being the first cousin. **Fourthly** the plaintiff has not denied the signatures of her father on the Will rather she has admitted the same. The relevant portion of her cross examination is as under:

> **"..... It is correct that in the written statement as well as in my previous affidavit/ evidence I have not denied the signatures of my father on the Will exhibit PW2/ 1...."**

This being so, the signatures of the testator have been duly admitted by both the parties. **Fifthly** it has been pleaded by the plaintiff in the plaint that at the time of execution of the Will her father was not in a proper state of mind and could not distinguish between right and wrong and it is probable that the defendant no.1 took the signatures of Bhagwan Singh with malafide intention. She has not produced any evidence on record to substantiate the aforesaid allegations rather in her cross examination she has deposed that she had never stated/ pleaded that her father was not in sound mental health at the time of execution of the Will. The relevant portion of his cross-examination is as under:

> "..... I have not stated/ pleaded that my father was not in sound mental health at the time of the execution of the Will....."

This being so the probability of the defendant no. 1 having induced his father seems remote. **Sixthly** it is alleged by the plaintiff that her father was highly educated having studied in London and could not have written the Will in Hindi and that too without mentioning the details of the various properties. In this regard, it is an admitted case that the testator was a Class I, Gazetted Officer and was working in Indian Railways. The plaintiff has admitted that her mother had studied till class 5th and his father used to normally converse in Hindi to her. She has also deposed that her father knew both Hindi and English as well. The relevant portion of his cross-examination is reproduced as under:

> **"..... My mother had studied till fifth standard. My father used to normally converse in Hindi. My father knew Hindi language. He knew both Hindi and English languages well....."**

This being so, the apprehension of the plaintiff that her father would not have written the Will in Hindi and the Will could not have been written by some other person, does not hold any merit, more so the plaintiff has failed to lead any evidence in this regard. **Seventhly** it had also been stated that the signatures of the attesting witnesses had not been proved. As observed herein above the factum of death of both the attesting witness has been duly proved. Both the attesting witnesses belong to the same village and Mahender Singh was a close relative to the testator being his cousin and his signatures have been duly identified by DW1. However, in so far as DW2 is concerned she has identified the signatures of Mahender Singh only on the basis of what has been written on the Will whereas she has never seen him writing and signing. Therefore, her testimony in so far as the identification of Mahender Singh cannot be taken as authentic in view of the fact that there is no dispute in so far as the signatures of the testator are concerned. The apprehensions of the plaintiff that the Will might be bearing the signatures and thumb impression of some other person, or that some other person might have been presented before the Sub Registrar before, is unfounded since the only evidence on record is the oral testimony of PW1 which does not find any corroboration or support from any other independent/ circumstantial evidence. **Eighthly** it is also alleged by the plaintiff that the property in question has been purchased from the common funds of his father and his three brothers and he did not have right to execute the said Will. The same also does not seem to be very convincing since she has not examined any of the brothers of late Sh. Bhagwan Singh to prove and substantiate the aforesaid allegations nor any other close relative has been examined. **Lastly** it is argued that the Will in question has not been got probated by the defendant no.1 and therefore, no mutation could have been effected. The legal position in this regard is very clear. The provisions of **Section 213** of the **Indian Succession Act** requiring probate do not apply to the Wills made outside Bengal and the local limits of the ordinary jurisdiction of the High Courts of Madras and Bombay except where such Wills relate to property situated in the territories of Bengal or within the aforesaid local limits. This view has also been reiterated in the case of **Murlidhar Dua & Ors. Vs. Shashi**

Mohan reported in 68 (1997) DLT 284 and **Santosh Kakkar vs. Ram Prasad & Ors.** reported in 71 (1998) DLT 147. The Will in the present case dated 29.9.1986 was executed at Sonepat Haryana and therefore, the defendant no.1 does not require any probate in respect of the same.

....

Therefore, in view of my aforesaid discussion, I hereby hold that the Will of late Sh. Bhagwan Singh dated 29.9.1986 is a genuine document and the plaintiff who is the daughter of the testator would not be entitled to any share in property bearing no. 6301/1A at Kamla Nagar as shown in the red colour in the site plan. Issue is decided against the plaintiff and in favour of the defendant no.1."

6. Learned counsel for the appellant/plaintiff argued the same aspects which were also argued before and dealt with by the Trial Court. It is argued that the father was an educated person who had studied in London, and had worked at a senior position in the Railways, and therefore, the Will which is prepared in Hindi is an unnatural document and hence a fabricated document. It is also argued that the Will is a fabrication because it does not contain names of the daughters of the deceased. It is also argued that the Will wrongly refers to the defendant no.1/respondent no.1 as an Advocate. It is argued that the Will therefore propounded by the defendant no.1/respondent no.1, Ex.PW2/1, is not a genuine document and the impugned judgment be set aside.

7. In my opinion, the arguments urged on behalf of the appellant/plaintiff have no merits and the appeal therefore is bound to fail. Before I advert to the aspect of validity of the Will, let me turn to the issue of limitation, inasmuch as, I am of the opinion that the Trial Court has fallen into a grave and clear error in holding the suit to be within limitation. I agree with the arguments urged on behalf of the respondent no.1/defendant no.1 that the suit was time-barred and this argument can be raised as per Order 41 Rule 22 CPC without filing any necessary objections/appeal.

8. In my opinion, the suit which was filed on 2.11.2006 seeking rights in the suit property for declaration and injunction was clearly barred by time inasmuch as form of the suit cannot conceal the real nature of the suit, and which was really a suit for partition and possession

of the property which belonged to the father. A suit for possession of an immovable property is covered by Article 65 of the Limitation Act, 1963 and as per which, the suit for recovery of an immovable property has to be filed within 12 years of the date the possession of the property becomes adverse to that of the appellant/plaintiff. In the present case, the suit was ex facie barred by limitation, and in fact need not even have gone for trial inasmuch as the appellant/plaintiff in the plaint itself admits that the respondent no1/defendant no.1 immediately after the death of the father, Sh. Bhagwan Singh in the year 1987 proclaimed himself to be the owner of the suit property on the basis of a Will. This admission is made by the appellant/plaintiff in para 4 of the plaint which reads as under:-

"4. That after the death of the father of the plaintiff, the plaintiff was told by the defendant no.1 that their late father had made a 'WILL' of the above said properties in the name of the defendant no.1. The plaintiff believing the words of the defendant no.1 did not ask for the "WILL" left behind or any share in the properties of their late father, assuming that the defendant no.1 will take probate or letter of administration regarding the properties and then the plaintiff will file her objections."

9. The aforesaid para 4 of the plaint shows that in and around the year 1987 itself the appellant/plaintiff was put to notice of the ownership of the defendant no.1/respondent no.1. The fact that ownership was claimed on the basis of the Will, is the reason for claiming the ownership, however, the claim of ownership, i.e. a claim adverse to the appellant/plaintiff was thus known to the appellant/plaintiff in the year 1987 itself. A suit for an immovable property thus ought to have been filed within 12 years of 1987 i.e. at the very maximum by the year 1999, however, the subject suit admittedly was filed only on 2.11.2006, i.e. after 19 years. No doubt remains of the appellant/plaintiff being aware of the claim of ownership of the suit property inasmuch as there are depositions in the affidavits by way of evidence filed on behalf of the defendant no.1/respondent no.1 as DW1 and sister of the parties, Smt. Kamla Chaudhary as DW2 which state that all the legal heirs of late Sh. Bhagwan Singh, including the appellant/plaintiff were made aware of the execution of the registered Will of the father. The relevant depositions which have been made in this regard are in para 4 of the affidavit by way of evidence filed by the defendant no.1/respondent no.1 and para 4 of the affidavit by way of evidence of Smt. Kamla Chaudhary. Para 4 of the deposition of Smt.

Kamla Chaudhary reads as under:

> "4. That all the legal heirs (including the plaintiff) were aware of the execution of the registered will of my father due to which we all three sisters never claimed any share in the properties after the death of my father. After the death of my father, my brother (defendant no.1) is in continuous, peaceful and exclusive possession of the suit property. The will in question is the genuine will of my father."

10. There is not even a single question which is put in the cross-examinations of either DW1 or DW2 that the appellant/plaintiff was not aware of the claim of ownership of the defendant no.1/respondent no.1 immediately after death of the father. In fact, the sister-Smt. Kamla Chaudhary deposed that all the three sisters did not claim any share in the property after the death of the father inasmuch as all the sisters, including the appellant/plaintiff, were aware of the registered Will executed by the father. Not only the fact that the appellant/plaintiff was aware right from the year 1987 of the claim of ownership of the defendant no.1/respondent no.1 on the basis of the Will, Ex.PW2/1, the defendant no.1/respondent no.1 had acted pursuant thereto and got the property mutated in the property tax records in his name. This mutation in the property tax records took place right in the year 1989 or so, and therefore there was proclamation to the world at large that the defendant no.1/respondent no.1 was claiming exclusive rights in the suit property. I also note that none of the other two sisters have supported the appellant/plaintiff. In my opinion, therefore the suit was clearly barred by limitation as it was filed more than 12 years after the claim of ownership was made by the respondent no.1/defendant no.1 of the suit property. After the expiry of the period of limitation, the respondent no.1/defendant no.1 became complete owner of the property by virtue of law of prescription contained in Section 27 of the Limitation Act, 1963. I therefore hold that the Trial Court was totally unjustified in holding the suit to be within limitation merely because the appellant/plaintiff claimed to have derived knowledge of fabrication of the Will in the year 2006. Obviously, this self-serving statement in the plaint of knowing of the fabrication of the Will in May, 2006 had no force because para 4 of the plaint itself talks of the appellant/plaintiff becoming aware of the Will soon after the death of the father. A mere self-serving saverment of the appellant/plaintiff waiting for a probate to be filed, cannot arrest the period of limitation,

inasmuch as, as per Section 9 of the Limitation Act, 1963 when once time has begun to run, no subsequent disability or inability in view of the suit stops him.

11. At this stage, I may also state that the suit was also barred because no declaration can be claimed when a person can ask for further and proper relief, but fails to do so. Though the appellant/plaintiff has pleaded causes of action of declaration and injunction, really, the suit is one for partition and possession of the disputed property. The appellant/plaintiff therefore could not file the suit for declaration and injunction, and which suit was barred by Section 34 of the Specific Relief Act, 1963 read with Section 41(e) thereof. Not only the further reliefs of partition and possession were to be claimed as per Section 34, but the alternative and efficacious remedy was of partition and possession, making the suit filed as not maintainable in view of Section 41(e) of the Specific Relief Act, 1963. Further, the appellant/plaintiff was out of possession and which is why the relief of possession has been asked for. Once ouster has been established, and which has clearly been established in the facts of the present case on account of the issue of limitation being decided against the appellant/plaintiff, the subject suit, without specifically paying Court fees with respect to the share of the appellant/plaintiff, was also barred. Therefore, in addition to the suit being barred by limitation, the suit was also barred by virtue of the provisions of Sections 34 and 41(e) of the Specific Relief Act, 1963 and also on account of not being properly valued for the purposes of Court fees and jurisdiction and not paying Court fees on the relief of possession.

12. The next issue is as to whether the deceased Bhagwan Singh left behind the Will, Ex.PW2/1. I must, immediately at this stage itself, state that even assuming that there was no valid Will, Ex.PW2/1, even then the suit was bound to be dismissed as also the present appeal, inasmuch as, I have held that the suit was barred by limitation, i.e. even assuming there was proved that there was no valid Will, Ex.PW2/1, the suit for possession as filed by the appellant/plaintiff claiming her share in the suit property was bound to be dismissed.

13. In my opinion, there is nothing illegal or unnatural about the Will, Ex.PW2/1. The Trial Court has already noted that the appellant/plaintiff does not dispute that the signatures on the Will were of the father. The appellant/plaintiff also did not dispute that no pleadings were

made with respect to the unsoundness of the mind of late Sh. Bhagwan Singh. The relevant admissions in this regard are contained in following portion of the cross-examination of the appellant/plaintiff:-

> "It is correct that in the written statement as well as in my previous affidavit/evidence I have not denied the signatures of my father on the Will exhibit PW-2/1, I have also not stated/ pleaded that my father was not in sound mental health at the time of the execution of the Will."

14. Therefore, the Trial Court was fully justified in holding that the deceased Bhagwan Singh was in sound state of mind and the disputed Will bore the signatures of late Bhagwan Singh. It is also relevant to note that there is no cross-examination by the appellant/plaintiff that the Will was not properly attested. The Will has been exhibited, and no objection was raised at the time of exhibition of the Will, possibly because the appellant/plaintiff had admitted the signatures of the father on the Will.

15. At the first blush, it appeared out of place as to why the father, who was highly educated and held a senior position in the Railways, would make a Will in Hindi. However, the answer is not far to seek. The deceased father-Bhagwan Singh, at the time when the Will was made, was living at Sonepat in Haryana along with the defendant no.1/respondent no.1. In Sonepat, Haryana the local language prevalent is Hindi. I must also take judicial notice of the fact that pleadings in Courts in Haryana are contained in Hindi language, and the usual language with respect to legal documents including Wills which are executed at Sonepat, Haryana is Hindi. The deceased therefore living at Sonepat would only have an assistance of a deed writer who would have made the Will in Hindi and therefore, there is nothing strange that the Will was made in Hindi. After all, it is not the case of the appellant/plaintiff that the deceased father did not know Hindi. In fact the father used to converse with his wife (mother of parties) in Hindi as she was educated only upto Class IV. I therefore hold that there is nothing unnatural in the Will having been drafted in Hindi.

16. So far as the objection raised on behalf of the appellant/plaintiff that the Will does not contain the name of the daughters, all I can say is that obviously a Will is preferable when details are given, however, lack of the names of the daughters in the Will cannot, in any manner, whittle down the validity of the Will in the facts of the present case,

where none of the other sisters have claimed any rights in the suit property and in fact, one of the sisters has deposed in support of the respondent no.1/defendant no.1. The fact that after the name of the respondent no.1/defendant no.1 in the Will, the word Advocate has been written, obviously, the same is a mistake by the typist or the draftsman of the Will, however too much emphasis cannot be laid on this minor typing mistake in the Will so as to invalidate the claim of the respondent no.1/defendant no.1 on the basis of this Will, Ex.PW2/1.

17. I may also note that the admitted fact, which has come on record, is that the deceased father, Sh. Bhagwan Singh at the time when the Will was executed, was living with the respondent no.1/defendant no.1 at Sonepat, Haryana. The Will also mentions the fact of the respondent no.1/defendant no.1/son taking care of all the needs of the father. The Will also notes that all the sisters have been married off and are settled in their homes. These facts in my opinion show that there is nothing unnatural about the Will, Ex.PW2/1 by which the suit property was bequeathed to the son/defendant no.1 who was living with and taking care of the father.

18. A civil case is decided on balance of probabilities. The balance of probabilities clearly show that the suit was ex facie barred by the limitation and the respondent no.1/defendant no.1 was the owner of the suit property by virtue of the provisions of Section 27 of the Limitation Act, 1963 read with Article 65 thereof. Even the Will relied upon was a validly executed Will and no challenge was laid to it for about 19 years after the death of the father. As already stated above, none of the other sisters have supported the appellant/plaintiff, and in fact one of the sisters, Smt. Kamla Chaudhary has deposed in favour of the respondent no1/ defendant no.1. Obviously, the suit was nothing but an endeavour to harass and unsettle the defendant no.1/respondent no.1 after 19 years of the death of the father, and during which period he had acted as an owner of the suit property.

19. The Supreme Court in the recent judgment in the case of **Ramrameshwari Devi and Others v. Nirmala Devi and Others** (2011) 8 SCC 249, has held that in certain dishonest litigations, actual costs must be imposed. The Supreme Court has held that unless actual costs are imposed a dishonest litigant will take unnecessary benefit of the false litigation. In this case, I take into account the state of mind of the

respondent no.1/defendant no.1, who suddenly after 19 years of the death of the father, late Sh. Bhagwan Singh, and surely 19 years is a very long period of time, was faced with the suit claiming rights in the suit property. The respondent no.1/defendant no.1 has also incurred costs of litigation. Accordingly, I deem it fit that the appeal should be dismissed with costs of Rs. 25,000/-.

20. In view of the above, there is no merit in the appeal, and which is therefore dismissed with the aforesaid costs. Costs be paid within a period of 2 months from today. Trial Court record be sent back.

ILR (2012) III DELHI 151
LPA

DOLLY KAPOOR & ANR. ....APPELLANTS

VERSUS

SHER SINGH YADAV & ORS. ....RESPONDENTS

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

LPA NO. : 164/2012 DATE OF DECISION: 28.02.2012

Contempt of Courts Act, 1971—Sec.19—Hon'ble Single Judge refused to issue notice and dismissed the Contempt Application—Appeal—Appellants contended that the Appeal is not under Sec. 19 but under the Letter Patent of High Court—Held, since under Sec.19, Contempt of Courts Act, appeal is maintainable against only an order of punishment and not order of dismissal of contempt application, and the Act does not provide for an intra Court appeal, Provisions of Letter Patent cannot be invoked to negate the statute to maintain such appeal—Further held, since an order refusing to exercise contempt jurisdiction does not determine

any right, it is not a judgment, so not appealable under Letters Patent.

We are however unable to agree. It has been held in **Fuerst Day Lawson Vs. Jindal Exports Ltd.** JT (2011) 7 SC 469 that where a special self contained statute, as the Arbitration Act in that case, does not provide for Intra-Court appeal, the provision of Letters Patent cannot be invoked to negate the statute to maintain such appeal. It was further held that a right of an appeal under the Letters Patent can be taken away by an express provision in an appropriate legislation – the express provision need not refer to Letters Patent; but if on a reading of the provision it is clear that all further appeals are barred, then even Letters Patent would be barred. We are of the view that the Contempt of Courts Act, 1971 promulgated to "define and limit the powers of certain Courts in punishing contempts of Court and to regulate their procedure in relation thereto" is a self contained Code and the same having provided for appeal only against order of punishment for contempt and not against the order refusing to issue notice of contempt has taken away the right if any of appeal under the Letters Patent. **(Para 3)**

As far as the order in the instant case is concerned, it is not of dismissal of contempt petition, after having initiated contempt proceedings, but of refusal to exercise contempt jurisdiction. The Supreme Court in **Baradakanta Mishra v. Justice Gatikrushna Misra, Chief Justice of the Orissa High Court** (1975) 3 SCC 535 held that the exercise of contempt jurisdiction being a matter entirely between the Court and the alleged contemnor, the Court, though moved by motion or reference, may in its discretion, decline to exercise its jurisdiction for contempt, it is only when the Court decides to take action and initiates a proceeding for contempt that it assumes jurisdiction to punish for contempt; the exercise of the jurisdiction to punish for contempt commences with the initiation of a proceeding for contempt, whether suo motu or on a motion or a reference. It was further held that where the Court rejects a motion or a

reference and declines to initiate a proceeding for contempt, it refuses to assume or exercise jurisdiction to punish for contempt and such a decision cannot be regarded as a decision in the exercise of its jurisdiction to punish for contempt. The same view was reiterated in **Purshotam Dass Goel v. Hon'ble Mr. B.S. Dhillon** (1978) 2 SCC 370. Again in **D. N. Taneja v. Bhajan Lal** (1988) 3 SCC 26 it was held that when the High Court acquits a contemnor, the High Court does not exercises its jurisdiction for contempt.

(Para 4)

Important Issue Involved: Appeal is maintainable only against an order of punishment for contempt and not against an order declining to initiate contempt proceedings.

[Gi Ka]

APPEARANCES:

FOR THE APPELLANTS : Mr. K.C. Mittal with Mr. R.K. Jain, Advocates.

FOR THE RESPONDENTS : None.

CASES REFERRED TO:

1. *Fuerst Day Lawson* vs. *Jindal Exports Ltd.* JT (2011) 7 SC 469.
2. *Inderjeet Singh (Since Deceased)* vs. *R.K. Singh* MANU/DE/0064/2009.
3. *The Bombay Diocesan Trust Association Pvt. Ltd.* vs. *The Pastorate Committee of the Saint Andrews Church* MANU/MH/0520/2008).
4. *Midnapore Peoples' Coop. Bank Ltd.* vs. *Chunilal Nanda* (2006) 5 SCC 399.
5. *Sh. A.S. Chatha* vs. *Malook Singh* MANU/PH/0192/1994.
6. *Kundan Ram* vs. *Darshan* MANU/HP/0080/1994.
7. *Shantha V. Pai* vs. *Vasanth Builders, Madras* MANU/TN/ 0147/1990.

8. *D. N. Taneja* vs. *Bhajan Lal* (1988) 3 SCC 26.
9. *Shah Babulal Khimji* vs. *Jayaben D. Kania* (1981) 4 SCC 8.
10. *Purshotam Dass Goel* vs. *Hon'ble Mr. B.S. Dhillon* (1978) 2 SCC 370.
11. *Baradakanta Mishra* vs. *Justice Gatikrushna Misra, Chief Justice of the Orissa High Court* (1975) 3 SCC 535.
12. *The Collector of Bombay* vs. *Issac Penhas* MANU/MH/0027/1947.

RESULT: Appeal Dismissed.

RAJIV SAHAI ENDLAW, J.

1. This Intra-Court appeal impugns the order dated 23rd August, 2011 of the Learned Single Judge refusing to issue notice of and dismissing Cont. Cas(C) No.219/2011 (filed by the appellants) arising out of order dated 5th September, 2008 of this Court in CM(M) No.958/2008 under Article 227 of the Constitution of India preferred by the appellants. Since Section 19 of the Contempt of Courts Act, 1971 provides for an appeal to this Bench only when the decision of the Single Judge is to punish for contempt and not when the decision is to dismiss the contempt petition, we have at the outset enquired from the counsel for the appellant as to how the present appeal is maintainable.

2. The counsel for the appellant has contended that this appeal is preferred not under Section 19 of the Contempt of Courts Act but under the Letters Patent of this Court. Our attention has been invited to **Midnapore Peoples' Coop. Bank Ltd. v. Chunilal Nanda** (2006) 5 SCC 399.

3. We are however unable to agree. It has been held in **Fuerst Day Lawson Vs. Jindal Exports Ltd.** JT (2011) 7 SC 469 that where a special self contained statute, as the Arbitration Act in that case, does not provide for Intra-Court appeal, the provision of Letters Patent cannot be invoked to negate the statute to maintain such appeal. It was further held that a right of an appeal under the Letters Patent can be taken away by an express provision in an appropriate legislation – the express provision need not refer to Letters Patent; but if on a reading of the provision it is clear that all further appeals are barred, then even Letters Patent would

be barred. We are of the view that the Contempt of Courts Act, 1971 promulgated to "define and limit the powers of certain Courts in punishing contempts of Court and to regulate their procedure in relation thereto" is a self contained Code and the same having provided for appeal only against order of punishment for contempt and not against the order refusing to issue notice of contempt has taken away the right if any of appeal under the Letters Patent.

4. As far as the order in the instant case is concerned, it is not of dismissal of contempt petition, after having initiated contempt proceedings, but of refusal to exercise contempt jurisdiction. The Supreme Court in **Baradakanta Mishra v. Justice Gatikrushna Misra, Chief Justice of the Orissa High Court** (1975) 3 SCC 535 held that the exercise of contempt jurisdiction being a matter entirely between the Court and the alleged contemnor, the Court, though moved by motion or reference, may in its discretion, decline to exercise its jurisdiction for contempt, it is only when the Court decides to take action and initiates a proceeding for contempt that it assumes jurisdiction to punish for contempt; the exercise of the jurisdiction to punish for contempt commences with the initiation of a proceeding for contempt, whether suo motu or on a motion or a reference. It was further held that where the Court rejects a motion or a reference and declines to initiate a proceeding for contempt, it refuses to assume or exercise jurisdiction to punish for contempt and such a decision cannot be regarded as a decision in the exercise of its jurisdiction to punish for contempt. The same view was reiterated in **Purshotam Dass Goel v. Hon'ble Mr. B.S. Dhillon** (1978) 2 SCC 370. Again in **D. N. Taneja v. Bhajan Lal** (1988) 3 SCC 26 it was held that when the High Court acquits a contemnor, the High Court does not exercises its jurisdiction for contempt.

5. We are of the view that an order refusing to entertain a contempt petition and / or to issue notice thereof is not a judgment for the same to be appealable under Letters Patent or under Section 10 of the Act. We are also of the view that the policy enshrined in Section 19 of the Act of limiting appeals only to cases where punishment for contempt is made out is in public interest. It intends to curtail vexatious litigation. If a party to a litigation could pursue applications in Courts of appeal to commit his opponents to contempt of Courts, when the trial Court whose process, it was alleged to have disobeyed was of the opinion that no vindication of its own order was necessary, would amount to encouraging vexatious

litigation. Refusal to exercise contempt jurisdiction does not determine any right and hence is not a judgment. As aforesaid, such refusal is in the exercise of discretionary powers and refusal of such exercise does not constitute a judgment as defined in **Shah Babulal Khimji v. Jayaben D. Kania** (1981) 4 SCC 8. A complainant or a relator in a contempt proceeding, who moves the machinery of the Court for punishing an alleged contemnor, only brings to the notice of the Court certain facts which, in his opinion, constitute a contempt. He has no other role. The proceedings thereafter are between the Court and the alleged contemnor and if the Single Judge, of whose order contempt is alleged, is of the opinion that no case for entertaining contempt is made out, the Single Judge does not determine any right of the complainant / relator. We are supported in this view by the Full Bench of the Bombay High Court in **The Collector of Bombay v. Issac Penhas** MANU/MH/0027/1947 (followed recently in **The Bombay Diocesan Trust Association Pvt. Ltd. v. The Pastorate Committee of the Saint Andrews Church** MANU/MH/0520/2008) as also by the Division Bench of the Madras High Court in **Shantha V. Pai v. Vasanth Builders, Madras** MANU/TN/ 0147/1990. We may notice that a Division Bench of this Court in **Inderjeet Singh (Since Deceased) v. R.K. Singh** MANU/DE/0064/2009 also, after noticing **Midnapore Peoples' Co-op. Bank Ltd.** (supra) held the Intra-Court appeal against the order discharging the contempt notice to be not maintainable. The High Court of Punjab & Haryana also, in **Sh. A.S. Chatha v. Malook Singh** MANU/PH/0192/1994 has held the order in a contempt petition, taking a lenient view and giving another chance to comply with the order, to be not a 'judgment' and appeal under letters patent to be not maintainable thereagainst. To the same effect is the view of the High Court of Himachal Pradesh in **Kundan Ram v. Darshan** MANU/HP/0080/1994.

6. The Restatement of Indian Law – Contempt of Court published by the Supreme Court Project Committee Indian Law Institute in this regard in the year 2011 has however in para 9.6 stated that there is lack of clarity on whether an order not appealable under Section 19 may still be appealable under Letters Patent. It has further been observed that most of the High Courts have taken the position that in view of the appeal provided in Section 19, the letters patent will not be applicable.

7. As far as the judgment cited by the counsel for the appellant is concerned, we are unable to cull out any such proposition therefrom

rather the Apex Court in the said judgment framed the following questions as arising for consideration therein:-

"(i) Where the High Court, in a contempt proceedings, renders a decision on the merits of a dispute between the parties, either by an interlocutory order or final judgment, whether it is appealable under section 19 of the Contempt of Courts Act, 1971 ? If not, what is the remedy of the person aggrieved?

(ii) Where such a decision on merits, is rendered by an interlocutory order of a learned Single Judge, whether an intra-court appeal is available under clause 15 of the Letters Patent?

(iii) In a contempt proceeding initiated by a delinquent employee (against the Enquiry Officer as also the Chairman and Secretary in-charge of the employer-Bank), complaining of disobedience of an order directing completion of the enquiry in a time bound schedule, whether the court can direct (a) that the employer shall reinstate the employee forthwith; (b) that the employee shall not be prevented from discharging his duties in any manner; (c) that the employee shall be paid all arrears of salary; (d) that the Enquiry Officer shall cease to be the Enquiry Officer and the employer shall appoint a fresh Enquiry Officer; and (e) that the suspension shall be deemed to have been revoked ?"

and answered the same as under:-

"I. An appeal under section 19 is maintainable only against an order or decision of the High Court passed in exercise of its jurisdiction to punish for contempt, that is, an order imposing punishment for contempt.

II. Neither an order declining to initiate proceedings for contempt, nor an order initiating proceedings for contempt nor an order dropping the proceedings for contempt nor an order acquitting or exonerating the contemnor, is appealable under Section 19 of the CC Act. In special circumstances, they may be open to challenge under Article 136 of the Constitution.

III. In a proceeding for contempt, the High Court can decide whether any contempt of court has been committed, and if so, what should be the punishment and matters incidental thereto. In

such a proceeding, it is not appropriate to adjudicate or decide any issue relating to the merits of the dispute between the parties.

IV. Any direction issued or decision made by the High Court on the merits of a dispute between the parties, will not be in the exercise of 'jurisdiction to punish for contempt' and therefore, not appealable under section 19 of CC Act. The only exception is where such direction or decision is incidental to or inextricably connected with the order punishing for contempt, in which event the appeal under section 19 of the Act, can also encompass the incidental or inextricably connected directions.

V. If the High Court, for whatsoever reason, decides an issue or makes any direction, relating to the merits of the dispute between the parties, in a contempt proceedings, the aggrieved person is not without remedy. Such an order is open to challenge in an intra-court appeal (if the order was of a learned Single Judge and there is a provision for an intra-court appeal), or by seeking special leave to appeal under Article 136 of the Constitution of India (in other cases)."

8. It would thus be seen that it was categorically held that appeal to a Division Bench from an order of the Single Judge lies only when the order is of punishing for contempt and not when the order is of declining to initiate proceedings for contempt or dropping the proceedings for contempt or of acquitting or exonerating the contemnor. It was further held by the Apex Court that the appeal under the Letters Patent as distinct from under Section 19 of the Contempt of Courts Act may lie also against orders incidental to or connected with the contempt proceedings. However in the instant case the order declining to initiate contempt proceedings cannot be said to be incidental or connected to the contempt proceedings and cannot thus be held to be appealable. It may also be noted that the proceedings, of order wherein contempt is averred, were under Article 227 of the Constitution of India; no appeal under letters patent lies against the order in such proceedings.

9. The appeal is therefore not maintainable and is dismissed as such. No order as to costs.

ILR (2012) III DELHI 159
W.P (CRL)

SIKANDER MOHD. SAHFI ....PETITIONER

VERSUS

STATE NCT OF DELHI & OTHERS ....RESPONDENTS

(MUKTA GUPTA, J.)

W.P. (CRL). NO. : 873/2010 & CRL. M.A. NO. : 7445/2010

DATE OF DECISION: 05.03.2012

Code of Criminal Procedure, 1973—Section—366, 433 A—Petitioner convicted for offence punishable under Section 302 IPC and awarded death sentence by learned Additional Sessions Judge—High Court answered reference for confirmation of death sentence in negative and awarded life sentence to petitioner—Special Leave Petition filed by petitioner dismissed by Supreme Court—On 12.07.2000, Government of NCT brought out notification framing guidelines for premature release of convicts under section 433 A Cr. P.C. by Sentencing Reviewing Board (SRB)—Petitioner filed writ petition before Delhi High Court seeking reference of his name to SRB for grant of premature release—His petition was disposed of with direction to treat his writ as representation and to be disposed of within a period of four weeks in terms of Sentence Reviewing Board Guidelines—Superintendent, Central Jail wrote letter submitting, petitioner not eligible for premature release as convicts whose death sentence was commuted to life imprisonment would be eligible for premature release after completing 20 years of imprisonment with remission—Petitioner had completed actual imprisonment of 14 years, 7 Months and 11 days but with remission his total imprisonment came to be 16 years, 9 months and 16 days, and thus, he was not considered eligible—On the other hand, it was urged on behalf of petitioner that he was not awarded death sentence, as learned Additional Sessions Judge had only pronounced death sentence which was subject to confirmation by the High Court—Since High Court did not confirm said sentence it could not be said that petitioner was awarded death sentence—Held:- A death sentence cannot be awarded by the Sessions Judge and the same is awarded only on confirmation in a reference by the High Court under Sections 366 Cr. P.C.—In absence of confirmation by High Court no death sentence was awarded on the Petitioner.

At the outset, it may be noted that the finding of the Superintendent, Tihar Jail and contention of Respondent No.1 that the Petitioner is a convict whose death sentence has been commuted to life is incorrect. A death sentence cannot be awarded by the Sessions Judge and the same is awarded only on confirmation in a reference by the High Court under Sections 366 Cr.P.C. In the present case, the death sentence pronounced for the Petitioner by the Additional Sessions Judge having not been confirmed by the High Court, it cannot be said that the death sentence was awarded to the Petitioner, which was commuted to life. As a matter of fact, in the absence of confirmation by this Court, no death sentence was awarded on the Petitioner.

(Para 9)

Important Issue Involved: A death sentence cannot be awarded by the Sessions Judge and the same is awarded only on confirmation in a reference by the High Court.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. K.K. Sud, Sr. Advocate with

Mr. Jayant K. Sud & Mr. Harender Singh, Advocates

FOR THE RESPONDENTS : Mr. Dayan Krishnan, ASC for the State with Inspector Vinod Kumar P.S. Chandni Mahal.

CASE REFERRED TO:

1. *State of Haryana and Others* vs. *Jagdish,* (2010) 4 SCC 216.

RESULT: Petition disposed of.

MUKTA GUPTA, J.

1. By this petition, the Petitioner seeks direction to Respondent No.1 to expeditiously place the case of the Petitioner before the Sentence Reviewing Board (in short 'SRB') with direction to dispose of the same within fortnight.

2. Learned counsel for the Petitioner contends that the Petitioner was convicted for offence under Section 302 IPC vide judgment dated 5th August, 1991. The Petitioner was awarded death sentence by the learned Additional Sessions Judge and the reference for confirmation of death sentence was sent to this Court. This Court answered the reference in negative and thus on 28th May, 1992 the Petitioner was awarded life sentence. Special Leave Petition filed by the Petitioner was dismissed by the Hon'ble Supreme Court on 6th April, 1999. On 12th July, 2000, the Government of NCT brought out a Notification framing the guidelines for premature release under Section 433A Cr.P.C. by the SRB, Delhi. This Notification was further reviewed on 5th March, 2004. The Notification dated 5th March, 2004 was thereafter reviewed on 16th July, 2004.

3. The Petitioner earlier filed a writ petition being WP(Crl.) No.1324/2009 before this Court seeking reference of his name to the SRB for grant of premature release, which petition was disposed of vide order dated 18th December, 2009 by this Court directing that the writ petition be treated as representation and disposed of within a period of four weeks in terms of the Sentence Reviewing Board Guidelines issued by Government of NCT of Delhi. On 25th January, 2010, the Superintendent, Central Jail No.2, Tihar wrote back that the Petitioner was not eligible for

premature release. As per the letter of the Superintendent, Central Jail No.2, Tihar it was noted that according to clause 3.1(a) & (c), the convict who have been imprisoned for life in heinous crimes such as multiple murder etc. and convict whose death sentence has been commuted to life imprisonment would be eligible for premature release after completing 20 years of imprisonment with remission. The Petitioner having completed actual imprisonment of 14 years, 7 months and 11 days of actual imprisonment and with remission total imprisonment of 16 years, 9 months and 16 days was thus not eligible for consideration by the SRB of Delhi.

4. Learned counsel for the Petitioner states that the view of the Superintendent, Central Jail 2, Tihar that the death sentence was commuted is illegal as no death sentence was awarded to the Petitioner. Learned Additional Sessions Judge had only pronounced the death sentence, however, the same was subject to the confirmation by this Court. Since this Court did not confirm the said death sentence, it cannot be said that the Petitioner was awarded the death sentence. Further relying upon **State of Haryana and Others v. Jagdish,** (2010) 4 SCC 216 it is contended that the policy at the time of conviction of the prisoner has to be considered while granting remission and if in the meantime some beneficial legislation comes, the benefit of the same should also be extended to him. According to learned counsel, the decision of Respondent No.1 in holding that the Petitioner was not eligible for consideration by the SRB was illegal and liable to be set aside.

5. Learned Additional Standing Counsel for the State on the other side contends that in the year 1991, the cases of life convicts used to be placed before the SRB for consideration of the premature release as per para 91 of Chapter III of "Admission and Release of the Prisoners of Delhi Jail Manual" which provided that the case of a prisoner shall be placed for consideration not less than six months before the expiry of completion of 14 years of imprisonment of a prisoner convicted on or after 18th December, 1978 for an offence punishable for death for a reference to the Administration for permission to release the prisoner on completion of 14 years of imprisonment with remission. The Petitioner was convicted in the year 1991 and his 14 years actual imprisonment completed in the year 2009. However, by that time, the guidelines dated 16th July, 2004 came into force and the subsequent guidelines being

more beneficial than the provisions of the Delhi Jail Manual, the case of the Petitioner was considered in accordance thereto. The contention of learned Additional Standing Counsel is that as per the Delhi Jail Manual, a person, who had been awarded life imprisonment for an offence for which death was one of the punishments, was eligible to be considered on completion of 14 years of actual imprisonment by the SRB. However, there was no cap provided by virtue of which he was bound to be released after having undergone a particular period. In the guidelines of 2004, two categories were carved out of the persons serving sentence of life. As per the first category, convicts, who are convicted for offence of murder, were to be considered for release on completion of 14 years imprisonment and in no case the same was to extend beyond 20 years with remission. In other category, which related to persons involved in heinous crimes such as murder with rape, murder with dacoity, multiple murder, convict's case for premature release was to be considered on his completion of imprisonment for 20 years including remission with an outer limit of 25 years with remission being the maximum period of incarceration. According to the State, since the subsequent policy was beneficial as it had an outer limit which was not provided in 1991 Delhi Jail Manual, the case of the Petitioner was not sent for consideration at that stage in terms of Delhi Jail Manual. However, since the Petitioner has now spent more than 19 years of imprisonment with remission, his case has been sent for consideration before the SRB.

6. I have heard learned counsel for the parties.

7. Briefly the facts of the case are that the Petitioner was convicted vide judgment dated 9th August, 1991 in case FIR No. 197/88 under Section 302 IPC registered at P.S. Chandni Mahal. The learned Additional Sessions Judge passed the sentence of death, which was not confirmed by the High Court and thus the sentence of life imprisonment was awarded to the Petitioner vide judgment dated 28th May, 1992 in Crl. Appeal No.109/91 and Murder Reference No.3 of 1992. The Petitioner was arrested on 17th October, 1988 and remained in custody till 25th September, 1994. He was granted bail by the Hon'ble Supreme Court vide order dated 30th September, 1994. After dismissal of the SLP, he was again admitted to jail on 16th June, 1999. This Court granted parole to the Petitioner for a period of one month from 5th April, 2002 to 5th May, 2002. However, the Petitioner jumped the parole with effect from 6th May, 2002 and was rearrested on 8th April, 2004 in another case

being FIR No.256/2004 under Sections 328/342/363/376 IPC registered at P.S. Shakarpur. As on 22nd June, 2011 the Petitioner had served 15 years, 11 months and 20 days of his sentence. The total period along with remission was 18 years, 10 months and 23 days. The case of the Petitioner was not placed before the SRB and thus, the Petitioner filed WP(Crl.) 1374/2009, which was disposed of by this Court vide order dated 18th December, 2009 with directions to treat the writ petition as a representation and consider the case of the Petitioner for placing before the SRB. In response thereto, an order dated 25th January, 2010 was communicated to the Petitioner by the Superintendent, Tihar Jail according to which by that time the Petitioner had completed 14 years, 7 months and 11 days of actual imprisonment and 16 years, 9 months and 16 days with remissions. It was stated that in view of the fact that the case of the Petitioner belonged to 3.1(a) & (c) i.e. he was awarded life sentence in a heinous crime such as multiple murders and was a convict whose death sentence was commuted to life, he would be eligible for premature release after 20 years of imprisonment with remission. Thus, the Petitioner filed the present petition.

8. On filing of the present petition, reply affidavits have been filed and learned Additional Standing Counsel states that the case of the Petitioner has been placed before the SRB. Though it was the contention that nothing further survives in the present petition, however, two issues still need consideration i.e. (i) whether the Petitioner is a convict whose death sentence has been commuted and (ii) whether the provisions of the Delhi Jail Manual as applicable in the year 1991 when the Petitioner was convicted or guidelines dated 5th March, 2004, which were subsequently revised on 16th July, 2004, would be applicable to the Petitioner.

9. At the outset, it may be noted that the finding of the Superintendent, Tihar Jail and contention of Respondent No.1 that the Petitioner is a convict whose death sentence has been commuted to life is incorrect. A death sentence cannot be awarded by the Sessions Judge and the same is awarded only on confirmation in a reference by the High Court under Sections 366 Cr.P.C. In the present case, the death sentence pronounced for the Petitioner by the Additional Sessions Judge having not been confirmed by the High Court, it cannot be said that the death sentence was awarded to the Petitioner, which was commuted to life. As a matter of fact, in the absence of confirmation by this Court, no death sentence was awarded on the Petitioner.

10. Before proceeding with the matter, it would be appropriate to reproduce the relevant provisions of Delhi Jail Manual and Guidelines dated 16th July, 2004. The relevant provision of the Delhi Jail Manual reads as under:-

"Release of convicts after 14 years of imprisonment

91.(1) Not less than six months before the expiry of completion of 14 years of substantive imprisonment of a prisoner convicted on and after 18th December, 1978 an offence punishable also by death, Superintendent shall make a reference to Administrator for permission to release the prisoner on completion of 14 years of substantive imprisonment."

The relevant portions of the Guidelines dated 16th July, 2004, read as under:-

3. Subject to the provision of Section 433 A of the Code of Civil Procedure, 1973 and Notification No.U-11011/2/74/ -UTL(I) dt. 20.03.74 of the Govt. of India Ministry of Home Affairs, the following categories of convicted Prisoners shall be eligible to be considered for premature release by the Board:-

Eligibility for premature release

3.1 Every convicted prisoner whether male or female undergoing sentence of life imprisonment and covered by the provisions of Section 433 A Cr.P.C. shall be eligible to be considered for premature release from the prison immediately after serving out the sentence of 14 years of actual imprisonment i.e. without the remissions. It is, however, clarified that completion of 14 years in prison by itself would not entitle a convict to automatic release from the prison and the Sentence Review Board shall have the discretion to release a convict, at an appropriate time in all cases considering the circumstances in which the crime was committed and other relevant factors like:

(a) whether the convict has lost his potential for committing crime considering his overall conduct in jail during the 14 years of incarceration.

(b) The possibility of reclaiming the convict as a useful member of the society; and

(c) Socio-economic condition of the convict's family

Such convict as stands convicted of a capital offence are prescribed the total period of imprisonment to be undergone including remission, subject to a minimum of 14 years of actual imprisonment before the convict prisoner is released. Total period of incarceration including remission in such cases should ordinarily not exceed 20 years.

Certain categories of convicted prisoners undergoing life sentence would be entitled to be considered for premature release only after undergoing imprisonment for 20 years including remissions. The period of incarceration inclusive of remissions even in such cases should not exceed 25 years. Following categories are mentioned in this connection.

(a) Convicts who have been imprisoned for life for murder in heinous Crimes such as murder with rape, murder with dacoity, murder involving the offence under the Protection of Civil Rights Act, 1955, murder for dowry, murder of a child below 14 years of age, multiple murders, murder committed after conviction while inside the jail, murder during parole, murder in a terrorist incident, murder in smuggling operation, murder of a public servant on duty.

(b) Gangsters, contract killers, smugglers, drug traffickers, racketeers awarded life imprisonment for committing murders as also the perpetrators of murder committed with pre-meditation and with exceptional violence and perversity.

(c) Convicts whose death sentence has been commuted to life imprisonment."

11. As regards the second contention though learned counsel for the Petitioner has strenuously contended that the Petitioner is eligible in terms of guidelines of 2000, according to which there was no distinction between the two categories of prisoners. However, the said contention is fallacious in view of the law laid down by the Hon'ble Supreme Court in **State of Haryana and others** (supra), which states:-

"54. The State authority is under an obligation to at least exercise its discretion in relation to an honest expectation perceived by the convict, at the time of his conviction that his case for premature release would be considered after serving the sentence, prescribed in the short-sentencing policy existing on that date. The State has to exercise its power of remission also keeping in view any such benefit to be construed liberally in favour of a convict which may depend upon case to case and for that purpose, in our opinion, it should relate to a policy which in the instant case, was in favour of the respondent. In case a liberal policy prevails on the date of consideration of the case of a "lifer" for premature release, he should be given benefit thereof."

12. Thus, the policy for remission applicable to the Petitioner would be the one which was in vogue on the date of his conviction i.e. Delhi Jail Manual. However, it may be noted that when the Petitioner completed his 14 years actual imprisonment i.e. in the year 2009, the policy in vogue was the guidelines as notified on 16th July, 2004. The guidelines notified on 16th July, 2004 provide for an outer limit of imprisonment which is absent in the 1991 Delhi Jail Manual and are more beneficial in the case of the Petitioner, though in other cases, 1991 Delhi Jail Manual may be more beneficial. It may be noted that the Petitioner besides being involved in multiple murders has also jumped the parole. While considering the case before the SRB, some of the factors to be considered are the nature and gravity of the offence and whether the prisoner has misused the concessions of bail or parole granted to him besides other considerations. Thus, in view of these peculiar facts in the present case, the guidelines invoked i.e. of the year 2004 are more beneficial to the Petitioner according to which on completion of 20 years with remission, the case of the Petitioner would be put up before the SRB and the Petitioner can be kept in the prison for a maximum period of 25 years including remission.

13. A latest nominal role of the Petitioner has been filed. As per the nominal roll as on 11th January, 2012, the Petitioner has undergone 20 years, 10 months and 26 days imprisonment. The case of the Petitioner has already been put up for consideration and thus, the same will be considered by the SRB keeping in view the criterion laid down i.e. whether the offence was an individual act of crime without affecting the society at large; whether there is any chance of future recurrence of committing a crime; whether the convict has lost his potentiality in

committing the crime; whether there is any fruitful purpose of confining the convict anymore; the socio-economic condition of the convict's family and other similar circumstances.

14. The petition and the application are disposed of accordingly.

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CS (OS)

UNION OF INDIA ....PLAINTIFF

VERSUS

VIDEOCON INDUSTRIES LTD. ....DEFENDANT

(REVA KHETRAPAL, J.)

CS (OS). NO. : 3314/2011 DATE OF DECISION: 05.03.2012

Code of Civil Procedure, 1908—Order XXXIX Rule 2 Arbitration and Conciliation Act, 1996—Section 9—Suit for declaration and perpetual injunction instituted by Plaintiff to restrain Defendant from pursuing the claim in the High Court of Justice, Queen's Bench Division, Commercial Court, London in relation to the issue and matter already finally determined by the Hon'ble Supreme Court of India—Union of India, the Plaintiff, as the owner of natural resources including petroleum in the territorial waters of India, entered into a Production Sharing Contract (PSC) on October 28, 1994 at New Delhi—PSC executed between the UOI on the one hand and a consortium of four companies—PSC contained a stipulation in Article 33.1 that the contract shall be governed and interpreted in accordance with the Laws of India subject to Article 34.12, which, inter alia, provided that the seat of

arbitration shall be Kuala Lumpur and the Arbitration Agreement as contained in Article 34 shall be governed by the Laws of England—In the year 2000, disputes arose pertaining to the correctness of certain cost recoveries and profit, which along with a few other disputes was referred to an Arbitral Tribunal—Arbitration case registered before the Tribunal at Kuala Lumpur, Malaysia—Malaysia hit by the outbreak of the epidemic SARS—Parties agreed to shift the seat of arbitration to London—Done, according to the plaintiff, without affecting the contractual and jurisdictional venue of Kuala Lumpur and without amendment of the arbitration agreement as contemplated in the PSC—Arbitral Tribunal passed a partial award dated 31.03.2005—Plaintiff on 10.05.2005 challenged this partial award before the Malaysian High Court at Kuala Lumpur—Defendant herein on 20.05.2006 questioned the jurisdiction of the Malaysian High Court on the ground that seat had shifted to London—Plaintiff requested the Arbitral Tribunal to hold its further sittings at Kuala Lumpur, the jurisdictional seat of arbitration—Opposed by the Defendant/Videocon—Arbitral Tribunal decided that further sittings be held at London from 30th June, 2006 to 2nd July, 2006—Aggrieved, the Plaintiff on 30.05.2006 filed OMP No. 255 of 2006 under Section 9 of the Arbitration and Conciliation Act, 1996, in Delhi High Court seeking a declaration that the seat arbitration is Kuala Lumpur—Defendant raised objection to the maintainability of the petition on the ground of jurisdiction—Single Judge of this Court decided in favour of the Plaintiff, rejecting the objection of the Defendant and proceeded to fix dates for hearing on the merits of OMP No. 255 of 2006—Defendant filed a Special Leave Petition subsequently converted to a Civil Appeal—On 05.08.2009, while the Special Leave Petition before the Supreme Court of India was pending, the High Court of Malaysia dismissed the Plaintiffs challenge to

the Partial Award on the Ground that the seat of arbitration had been shifted to London—The Plaintiff filed a Memorandum of Appeal—On 09.10.2009, the Defendant brought the decision of the Malaysian Court on the record of the Special Leave Petition pending before the Supreme Court—On 13.10.2009, while the matter was pending before the Supreme Court, the Defendant filed a Claim petition before the High Court of Justice, Queens Bench Division, Commercial Court, London—Defendant did not disclose the above filing to the Supreme Court or to the Plaintiff—On 10th August, 2010, the Plaintiff moved the Supreme Court by filing IA No. 4/2010 in Civil Appeal No. 4269/2011 pleading, inter alia, that the Supreme Court was seized of the matter including the question as to whether the seat of arbitration continued to be at Kuala Lumpur or the same had shifted to London—Simultaneously, on 12th August, 2010, an application was filed by the Plaintiff before the London Court stating that the juridical seat was not London and the issue of juridical seat was being contested in the Supreme Court of India—In the light of these facts, it was prayed that the London Court did not have the jurisdiction to hear the claim of juridical seat—After considering the matter, the Supreme Court by a consent order of the same date, i.e. 06.09.2010 disposed of the said application by recording that subject to completion of pleadings in the proceedings pending in the Courts in England as well as in Malaysia, neither the petitioner nor the respondent will proceed/take any pro-active steps for hearing in the proceedings/applications pending in the Court in England as well as in the Court in Malaysia, till the disposal of the present SLP—On 11.05.2011, the Supreme Court delivered its judgment holding that mere change in the physical venue of hearing from Kuala Lumpur to Amsterdam and London did not amount to change in the juridical seat of arbitration and negated the contention of the defendant that the

seat of arbitration had shifted to London—Further held by the Supreme Court that in view of the specific exclusion of Part I of the Arbitration and Conciliation Act, 1996, the Delhi High Court did not have the jurisdiction to entertain OMP No. 255/2006 and the said petition was liable to be dismissed—Consequently, on 30.05.2011, OMP No. 255/2006 was formally dismissed by the High Court in view of the judgment of the Supreme Court rendered on 11.05.2011—Plaintiff requested the Defendant to withdraw the proceedings before the Queens Bench Division, Commercial Court, London—London Court issued orders fixing the dates for hearing and prior thereto dates for evidence by way of witness statements and expert evidence to be filed by both the parties on the status and effect in Indian law of the judgment of the Supreme Court of India dated 11th May, 2011 and in particular whether the decision of the Supreme Court of India as to the seat of the First and third arbitrations are res judicata or are otherwise binding on the parties—Aggrieved, present suit has been preferred by the Plaintiff seeking declaration and perpetual injunction to restrain the Defendant from pursuing the aforesaid claim in London predicated on its stand that the matter had already been finally adjudicated upon by the judgment of the Supreme Court rendered on 11.05.2011—Plaintiff contended that attempt on part of defendant to re-litigate the issue of juridical seat of arbitration before English Court after having it settled/decided by the Supreme Court of India is in breach of PSC and barred by res judicata/issue estoppel—London Court which does not have jurisdiction to go into the issue of "juridical seat" cannot assume jurisdiction—Indian Courts have personal, subject matter and territorial jurisdiction—Thus determination on the seat issue, to decide applicability of Part I of the Act, was within competence of the Supreme Court—Plaintiff contend also defendant had suppressed material facts regarding

Supreme Court proceedings, London proceedings and proceedings relating to the present suit—Defendant contended that to grant the said anti-suit injunction the court must be satisfied that defendant is amenable to the personal jurisdiction of the court; that ends of justice will be defeated and injustice will be perpetuated, if injunction is declined and the principle of comity must be borne in mind—Forum non-conveniens—Court has to decide the jurisdiction of a court in regard to exclusive or non-exclusive jurisdiction invoked on the basis of jurisdiction clause is done on a true interpretation of the contract on the facts and circumstances of case—Court of natural Jurisdiction will not grant anti-suit injunction against a defendant where parties have agreed to submit to the exclusive jurisdiction of a Court, a forum of their choice for continuance of proceedings—Principle of Comity of Nations precludes grant of anti-suit injunctions barring the rarest of rare cases—Such Injunctions cannot be granted where a party has already challenged a foreign Courts jurisdiction until such party has failed in such challenge—Held:- A look at the judgment of the Supreme Court would suffice to show that the issue of seat of arbitration stood adjudicated by the judgment of the Supreme Court and the Supreme Court intended the said adjudication to be final and binding between the Parties said issue was addressed before the Supreme Court by both the parties and decided upon by the Supreme Court as the first question raised before it—Re-agitation of the question of seat of arbitration authoritatively pronounced upon by the Supreme Court would constitute abuse of the process of law and undoubtedly render the foreign proceedings vexatious and oppressive due to the attendant consequences—In PSC between the parties, the Indian Law has been given primacy and it has been specifically laid down in Article 33.2—Contract clearly lays down that

contravention of the laws of India is wholly impermissible—Res judicata which encompasses within its fold the principle of issue estoppel is an intrinsic part of the laws of India and its public policy—Conversely, the underlying object behind the doctrine of res judicata and issue estoppel is the public policy of India—Due regard to the laws of India and its public policy must, therefore, be held to be of paramount importance an anti-suit injunction should be granted only if there is an impending risk of conflicting judgments and if the proceedings in the Court of foreign jurisdiction would perpetuate injustice—While granting anti-suit injunction, it must tread cautiously having regard to all the facts and circumstances of the case, and be also mindful of the fact that an anti-suit injunction operates against the party concerned and not against the Court of foreign jurisdiction—Court cannot turn a blind eye to the vexation and oppression which would be caused to the plaintiff by compelling it to re-litigate on an issue upon which the Supreme Court has given its final and conclusive determination—To compel it to do so would constitute the worst imaginable case of abuse of the process of the Court, besides giving a complete go-by to the principle of res judicata and issue estoppel which govern the public policy of India—An injunction is granted as an ancillary to the main relief and flows out of a cause of action which has accrued to the plaintiff and even quia timet injunctions are granted by Courts on the plaintiff's establishing to the satisfaction of the Court that some threatened action by the defendant will constitute an actionable civil wrong, in contrast in an anti-suit injunction action the plaintiff does not have to establish either accrual of a cause of action or apprehension of an actionable wrong—An anti-suit injunction is unique in its conception and there is no denying that the equitable power to grant an anti-suit injunction in restraint of litigation in foreign soil exists

only to serve equity and shut out unconscionability—The grant or non-grant of such an injunction wholly depends upon whether the assumption of jurisdiction by a foreign court in the facts and circumstances of a particular case, taken in their entirety and viewed holistically, would be oppressive or vexatious or an abuse of the process or would amount to the loss of juridical or other advantage, in the context of all other factors, to one or the other party or an injustice would be perpetuated thereby—Present case prima facie appears to this Court to be one which could justify the passing of such an injunction order—Prima facie the initiation of proceedings by the defendant at London during the pendency of the Special Leave Petition before the Supreme Court of India was unconscionable, vexatious and oppressive and an abuse of the process of Law—It would be unduly harsh on the plaintiff to put the plaintiff through the inconvenience and uncertainty of litigating more than once on the same issue at a prohibitively high cost in a foreign land—The balance of convenience also tilts in favour of the plaintiff, as a necessary outcome of multiplicity of proceedings could be potentially conflicting decisions—Preservation of the integrity of the proceedings before the Hon'ble Supreme Court of India, Which culminated in the final judgment and order dated 11.05.2011, must necessarily be protected—Resultantly, an order of temporary injunction passed restraining the defendant from pursuing Claim No. 2009, Folio 1382 filed in the High Court of Justice, Queen's Bench Division, Commercial Court, London against the plaintiff—IA No. 21069/2011 is allowed accordingly.

Further, as regards the contention of the defendant that an order of anti-suit injunction ought not to be granted as it would transgress the norms of judicial comity, indubitably the settled position in law is that an anti-suit injunction should be granted only if there is an impending risk of

conflicting judgments and, if and only if the proceedings in the Court of foreign jurisdiction would perpetuate injustice. This Court is not oblivious to the fact that while granting anti-suit injunction it must tread cautiously having regard to all the facts and circumstances of the case, but this Court is also mindful of the fact that an anti-suit injunction operates against the party concerned and not against the court of foreign jurisdiction. Moreover, this Court cannot turn a blind eye to the vexation and oppression which would be caused to the plaintiff by compelling it to re-litigate on an issue upon which the Supreme Court has given its final and conclusive determination. To compel it to do so would constitute the worst imaginable case of abuse of the process of the Court, besides giving a complete go-by to the principle of *res judicata* and *issue estoppel* which govern the public policy of India. **(Para 97)**

While it is well established that an injunction is granted as an ancillary to the main relief and flows out of a cause of action which has accrued to the plaintiff and even *quia timet* injunctions are granted by Courts on the plaintiff's establishing to the satisfaction of the Court that some threatened action by the defendant will constitute an actionable civil wrong, in contrast in an anti-suit injunction action the plaintiff does not have to establish either accrual of a cause of action or apprehension of an actionable wrong. In that sense, an anti-suit injunction is unique in its conception and there is no denying that the equitable power to grant an anti-suit injunction in restraint of a litigation in foreign soil exists only to serve equity and shut out unconscionability. The grant or non-grant of such an injunction wholly depends upon whether the assumption of jurisdiction by a foreign court in the facts and circumstances of a particular case, taken in their entirety and viewed holistically, would be oppressive or vexatious or an abuse of the process or would amount to the loss of juridical or other advantage, in the context of all other factors, to one or the other party or an injustice would be perpetuated thereby. **(Para 109)**

Viewed from any angle, the present case *prima facie* appears to this Court to be one which could justify the passing of such an injunction order. On the other hand, if the injunction is declined, the plaintiff would be vexed twice over (that is, once in the natural forum and once in the foreign forum) for establishing its plea that Kuala Lumpur is the designated seat of arbitration which cannot be changed without altering the contract itself. It would be neither fair nor equitable to compel the plaintiff to re-commence pursuit of a matter in a foreign country when the highest court of this land has held in favour of the plaintiff, that too, on the defendant invoking its jurisdiction. This would amount to perpetuating injustice and possibly result in conflicting judgments of two courts causing significant harm to the arbitration proceedings and delaying the same for an indefinite period of time, possibly resulting in their abrupt termination. **(Para 110)**

Important Issue Involved: (A) When the judgment of the Supreme Court adjudicated the issue of seat of arbitration after the said issue was addressed by both the parties, the Supreme Court intended the said adjudication to be final and binding between the parties—Re-agitation of the same issue would constitute abuse of the process of law and undoubtedly render the foreign proceedings vexatious and oppressive due to the attendant consequences.

(B) Res judicata which encompasses within its fold the principle of issue estoppel is an intrinsic part of the laws of India and its public policy—Conversely, the underlying object behind the doctrine of res judicata and issue estoppel is the public policy of India—Due regard to the laws of India and its public policy must, therefore, be held to be of paramount importance.

[Sa Gh]

APPEARANCES:

FOR THE PLAINTIFF : Mr. A.S. Chandiok, ASG with Mr.

R. Sasiprabhu, Mr. Ritesh Kumar, Ms. Bindu K. Nair, Mr. Somiran Sharma, Mr. Sumit and Ms. Shweta, Advocates.

FOR THE DEFENDANT : Mr. Amit Sibal, Mr. Prashant Kalra, Mr. Rohan Dheman and Mr. Harsh Kaushik, Advocates.

CASES REFERRED TO:

1. *Essel Sports Pvt. Ltd.* vs. *BCCI and Ors.,* 178 (2011) DLT 465 (DB).
2. *A. Subash Babu* vs. *State of Andhra Pradesh and Anr.,* (2011) 7 SCC 616.
3. *Yograj Infrastructure Ltd.* vs. *Ssang Yong Engineering and Construction Co. Ltd.,* 2011 (9) SCALE 567.
4. *M. Nagabhushana* vs. *State of Karnataka and Others,* (2011) 3 SCC 408.
5. *Horlicks Ltd. and Anr.* vs. *Heinz India (Pvt.) Ltd.,* 2010 (42) PTC 156 (Del.) (DB).
6. *S. Nagaraj (dead) by LRs and Ors.* vs. *B.R. Vasudeva Murthy & Ors.,* (2010) 3 SCC 353.
7. *Muthavalli of Sha Madhari Diwan Wakf, S.J. Syed Zakrudeen and Anr.* vs. *Syed Zindasha and Ors.,* (2009) 12 SCC 280.
8. *Citation Infowares Ltd.* vs. *Equinox Corporation,* (2009) 7 SCC 220.
9. *Laxman Prasad* vs. *Prodigy Electronics Ltd.,* (2008) 1 SCC 618.
10. *Venture Global Engineering* vs. *Satyam Computer Services Ltd. and Anr.,* (2008) 4 SCC 190.
11. *Satish Nambiar* vs. *Union of India & Anr.,* 150 (2008) DLT 312 (DB).
12. *Munib Masri* vs. *Consolidated Contractors International Company SAL, Consolidated Contractors (Oil & Gas) Company SAL* [2008] EWCA Civ 625.

13. *Hasham Abbas Sayyad* vs. *Usman Abbas Sayyad and Others,* (2007) 2 SCC 355.
14. *Harshad Chiman Lal Modi* vs. *DLF Universal Ltd. and Anr.,* (2005) 7 SCC 791.
15. *Ishwar Dutt* vs. *Land Acquisition Collector and Anr.,* (2005) 7 SCC 190.
16. *Swamy Atmananda and Ors.* vs. *Sri Ramakrishna Tapovanam and Ors.,* (2005) 10 SCC 51.
17. *Makhija Construction & Engg. (P) Ltd.* vs. *Indore Development Authority and ors,* (2005) 6 SCC 304.
18. *Seismic Shipping Inc., Westerngeco Ltd.* vs. *Total E&P UK Plc, The Western Regent* (2005) EWHC 460 (Admlty).
19. *Man Roland Druckimachinen Ag* vs. *Multicolur Offset Ltd and Anr.,* (2004) 7 SCC 447.
20. *Modi Entertainment Network and Anr.* vs. *W.S.G. Cricket Pvt. Ltd.* (2003) 4 SCC 341.
21. *Pioneer Publicity Corporation* vs. *Delhi Transport Corporation & Anr.,* 103 (2003) DLT 442.
22. *Bhatia International* vs. *Bulk Trading S.A.,* (2002) 4 SCC 105.
23. *Rupa Ashok Hurra* vs. *Ashok Hurra and Anr.,* (2002) 4 SCC 388.
24. *Rachakonda Narayana* vs. *Ponthala Parvathamma & Anr.,* (2001) 8 SCC 173.
25. *Kunhayammed and Ors.* vs. *State of Kerala and Anr.,* (2000) 6 SCC 359.
26. *Hope Plantations Ltd.* vs. *Taluk Land Board, Peermade and Anr.,* (1999) 5 SCC 590.
27. *Pawan Kumar Gupta* vs. *Rochiram Nagdeo,* (1999) 4 SCC 243.
28. *K.K. Modi* vs. *K.N. Modi and Ors.,* (1998) 3 SCC 573.
29. *A.P. State Financial Corporation* vs. *M/s. Gar Re-Rolling Mills and Anr.,* (1994) 2 SCC 647.

30. *Sulochana Amma* vs. *Narayanan Nair,* (1994) 2 SCC 14].

31. *Ravi S. Naik* vs. *Union of India and Ors.,* 1994 Supp (2) SCC 641.

32. *National Thermal Power Corporation* vs. *Singer Company and Ors.* (1992) 3 SCC 551.

33. *Delhi Judicial Service Association, Tis Hazari Court, Delhi* vs. *State of Gujarat and Ors.,* (1991) 4 SCC 406.

34. *A.R. Antulay* vs. *R.S. Nayak and Anr.,* (1988) 2 SCC 602.

35. *Oil and Natural Gas Commission* vs. *Western Company of North America,* (1987) 1 SCC 496.

36. *D.S.V. Silo-Und Verwaltungs – Gesellschaft M.B.H.* vs. *Owners of the Sennar and 13 Other Ships,* (1985) 1 W.L.R. 490.

37. *Bank Mellat* vs. *Helliniki Techniki SA* (1983) 3 All E.R. 428 (CA).

38. *Syed Mohd. Salie Labbai (Dead) by L.R's and Ors.* vs. *Mohd. Hanifa (Dead) by L.R's and Ors.,* (1976) 4 SCC 780 at para 7.

39. *M/s. V.O. Tractoroexport, Moscow* vs. *M/s. Tarapore and Company and Anr.* 1969 (3) SCC 562.

40. *Sri Athmanathaswami Devasthanam* vs. *K. Gopalaswami Ayyangar,* (1964) 3 SCR 763.

41. *Sri Athmanathaswami Devasthanam* vs. *K. Gopalaswami Ayyangar,* (1964) 3 SCR 763.

42. *Tarini Charan Bhattacharjee* vs. *Kedar Nath Haldar* AIR 1928 Cal 777.

RESULT: Interim Application Allowed.

REVA KHETRAPAL, J.

IA No.21069/2011 (under Order XXXIX Rules 1 and 2 read with Section 151 CPC)

1. By way of present application, an anti-suit injunction is sought by the Plaintiff restraining the Defendant from pursuing Claim No.2009,

Folio 1382 filed in the High Court of Justice, Queen's Bench Division, Commercial Court, London. The aforesaid application is filed in a suit for declaration and perpetual injunction instituted by the Plaintiff to restrain the above named Defendant from pursuing the aforesaid claim in London in relation to the issue and matter already finally determined by the Hon'ble Supreme Court of India by its judgment and order dated 11.05.2011 between the parties.

2. The chronological factual matrix leading to the institution of the suit in which the present application is instituted is delineated as follows.

3. The Union of India, the Plaintiff herein, as the owner of natural resources including petroleum in the territorial waters of India, through the Ministry of Petroleum and Natural Gas, entered into a Production Sharing Contract (hereinafter referred to as "PSC") on October 28, 1994 at New Delhi. The said PSC was executed between the Union of India on the one hand and a consortium of four companies consisting of Oil and Natural Gas Corporation Limited (ONGC), Videocon Petroleum Limited, Command Petroleum (India) Private Limited and Ravva Oil (Singapore) Private Limited in terms of which the consortium was granted an exploration licence and mining lease to explore and produce hydro-carbon resources owned by the plaintiff underlying a Contract Area called 'Ravva Oil and Gas Field' in the Offshore of Andhra Coast owned by the Plaintiff. These companies, including ONGC, are collectively referred to as "the Contractor" in the PSC. Subsequently, Cairn Energy U.K. was substituted in place of Command Petroleum (India) Private Limited and the name of Videocon Petroleum Limited was changed to Petrocon India Limited, which merged with the Defendant herein, i.e., Videocon Industries Limited.

4. The aforesaid PSC was entered into for and on behalf of the President of India with the desire that the petroleum resources in the Contract Area be exploited with the utmost expedition in the overall interest of India. As per Article 35.2 of the PSC, it was stipulated that the contract shall not be amended, modified, varied or supplemented in any respect except by an instrument in writing signed by all the parties, which shall state the date upon which the amendment or modification shall become effective.

5. The PSC dated 28.10.1994 also contained a stipulation in Article 33.1 that the contract shall be governed and interpreted in accordance

with the Laws of India subject to Article 34.12, which, *inter alia,* provided that the seat of arbitration shall be Kuala Lumpur and the Arbitration Agreement as contained in Article 34 shall be governed by the Laws of England.

6. In the year 2000, disputes arose between the Plaintiff and the Defendant pertaining to the correctness of certain cost recoveries and profit, which along with a few other disputes was referred to an Arbitral Tribunal as contemplated in Article 34 of the PSC. The arbitration case relevant for the present purposes was registered on 19.08.2003 as Case No.3 of 2003 before the Tribunal at Kuala Lumpur, Malaysia and was fixed for hearing. However, before the hearing could take place, Malaysia was hit by the outbreak of the epidemic 'SARS'. Accordingly, after consultation and keeping in mind the convenience of all concerned and to ensure that proceedings were not delayed, the Tribunal held sittings at Amsterdam in the first instance and on 15.11.2003 the parties agreed to shift the seat of arbitration to London. This was done, according to the plaintiff, without affecting the contractual and jurisdictional venue of Kuala Lumpur and without amendment of the arbitration agreement as contemplated in the PSC. Therefore, the jurisdictional seat of the arbitration remained and continues to remain in Kuala Lumpur.

7. The Arbitral Tribunal passed a partial award dated 31.03.2005 in the above Arbitration Case No.3/2003. The Plaintiff on 10.05.2005 challenged this partial award before the Malaysian High Court at Kuala Lumpur by filing a petition for setting aside the award. In those proceedings, the Defendant herein on 20.05.2006 questioned the jurisdiction of the Malaysian High Court on the ground that seat had shifted to London.

8. Since further proceedings in the matter were to take place for the passing of the final award and the epidemic in Kuala Lumpur was over, the Plaintiff requested the Arbitral Tribunal to hold its further sittings at Kuala Lumpur, the jurisdictional seat of arbitration. This was opposed by the Defendant/Videocon. The Arbitral Tribunal by an order dated 20th April, 2006 decided that further sittings be held at London from 30th June, 2006 to 2nd July, 2006.

9. Aggrieved by the order dated 20.04.2006 of the Hon'ble Tribunal, the Plaintiff on 30.05.2006 filed **OMP No.255** of 2006 under Section 9 of the Arbitration and Conciliation Act, 1996, in this Court seeking a

declaration that the seat of arbitration is Kuala Lumpur. The Defendant raised objection to the maintainability of the petition on the ground of jurisdiction. The aforesaid objection was decided by a learned Single Judge of this Court by order dated 30.04.2008 in favour of the Plaintiff, rejecting the objection of the Defendant and proceeding to fix dates for hearing on the merits of OMP No.255 of 2006.

10. On 08.07.2008, the Defendant filed a Special Leave Petition, being SLP(C) No.16371/2008 before the Hon'ble Supreme Court of India impugning the judgment dated 30.04.2008, which was subsequently converted to a Civil Appeal No.4269 of 2011.

11. On 05.08.2009, while the Special Leave Petition before the Supreme Court of India was pending, the High Court of Malaysia dismissed the Plaintiff's challenge to the Partial Award on the ground that the seat of arbitration had been shifted to London. The Plaintiff filed a Notice of Appeal in Malaysia on 12.08.2009 and subsequently a Memorandum of Appeal was filed on 14.12.2010.

12. On 09.10.2009, the Defendant brought the decision of the Malaysian Court on the record of the Special Leave Petition pending before the Supreme Court. On 13.10.2009, while the matter was pending before the Supreme Court, the Defendant filed a Claim Petition No.2009, Folio 1382 before the High Court of Justice, Queen's Bench Division, Commercial Court, London. However, the Defendant did not disclose the above filing to the Supreme Court or to the Plaintiff, and, according to the Plaintiff, deliberately suppressed the same despite an order passed by the London Court on 20.10.2009 to serve the Plaintiff herein as soon as possible. On 11.11.2009, the judgment in Civil Appeal No.4269 of 2011 was reserved by the Supreme Court.

13. On 21st April, 2010, the Plaintiff was served with notice in the Claim Petition No.2009, Folio 1382 pending in the London Court. Thereafter, on 10th August, 2010, the Plaintiff moved the Supreme Court by filing IA No.4/2010 in Civil Appeal No.4269/2011 pleading, *inter alia,* that the Supreme Court was seized of the matter **including the question as to whether the seat of arbitration continued to be at Kuala lumpur or the same had shifted to London.** Simultaneously, on 12th August, 2010, an application was filed by the Plaintiff before the London Court stating that the juridical seat was not London and in any case the issue of juridical seat was being contested in proceedings elsewhere, i.e.,

in the Supreme Court of India. In the light of these facts, it was prayed that the London Court did not have the jurisdiction to hear the claim of juridical seat. On the same day, i.e., on 12.08.2010, the Plaintiff's solicitors also wrote to the Defendant's solicitors clearly stating:-

> **"For the avoidance of doubt, this letter and our client's application are not a submission to the jurisdiction of the Courts of England and Wales."**

14. On 06.09.2010, the Plaintiff's application IA No.4/2010 came up for hearing before the Supreme Court and after considering the matter, the Supreme Court by a consent order of the same date, i.e., 06.09.2010 disposed of the said application by recording that "subject to completion of pleadings in the proceedings pending in the Courts in England as well as in Malaysia, neither the petitioner nor the respondent will proceed/take any pro-active steps for hearing in the proceedings/applications pending in the Court in England as well as in the Court in Malaysia, till the disposal of the present SLP".

15. On 11.05.2011, the Supreme Court delivered its judgment in Civil Appeal No.4269/2011, wherein it was held that **"mere change in the physical venue of hearing from Kuala Lumpur to Amsterdam and London did not amount to change in the juridical seat of arbitration"** and negated the contention of the defendant that the seat of arbitration had shifted to London. It was further held by the Supreme Court that in view of the specific exclusion of Part I of the Arbitration and Conciliation Act, 1996, the Delhi High Court did not have the jurisdiction to entertain OMP No.255/2006 and the said petition was liable to be dismissed. Consequently, on 30.05.2011, OMP No.255/2006 was formally dismissed by the High Court in view of the judgment of the Supreme Court rendered on 11.05.2011.

16. Subsequent to the decision of the Supreme Court, the Plaintiff on 02.06.2011 requested the Defendant to withdraw the proceedings bearing Claim No.2009, Folio 1382 dated 13.10.2009 before the Queen's Bench Division, Commercial Court, London. By way of a reply the plaintiff through its solicitors at London received a letter dated 08.06.2011 from the Defendant's solicitors addressed to the Commercial Court Listing Office, the Royal Courts of Justice, London, seeking to recommence the proceedings before the London Commercial Court. The Plaintiff through its solicitors replied to the said letter on 14.06.2011 stating that the

Supreme Court of India had considered and finally decided that the juridical seat of arbitration (as opposed to the physical shift of sittings to London) remained at Kuala Lumpur. However, on 22.06.2011, the Defendant's solicitors wrote to the solicitors of the Plaintiff at London reiterating their position that the decision of the Supreme Court of India had not rendered the proceedings before the London Court unnecessary stating: **"Any legal issue arising from the judgment of the Indian Supreme Court are matters for the English Court to determine at the hearing....."**

17. The Plaintiff's solicitors responded to the above letter of the defendant by letter dated 29.06.2011 stating that the Hon'ble Supreme Court of India had finally and conclusively decided the relevant issue to the effect that the juridical seat of the arbitration was not changed to London but remained in Kuala Lumpur and the defendant was estopped from relitigating the point of juridical seat of arbitration before the English Courts. The plaintiff, however, **consented to the hearing without prejudice to the issue of *res judicata*.** The solicitors of the Defendant replied to the aforesaid letter on 01.07.2011, stating that they disagreed with the Plaintiff's position that the decision of the Hon'ble Supreme Court of India had "finally and conclusively" decided the relevant issue pending before the English Court.

18. Thereafter, on 29.08.2011, the witness statement of Ms. Pallavi Shroff was filed on behalf of the Defendant and on 14.10.2011, witness statements of Ms. Promila Jaspal and Ms. Simran Dhir were filed on behalf of the Plaintiff. The Plaintiff under the rules of practice in London also participated in the Case Management Conference held on 04.11.2011 without prejudice to its rights and contentions and without admitting, in any manner, that the London Court had jurisdiction to adjudicate on the question in issue. On 14.11.2011, pursuant to the Case Management Conference, the London Court issued orders fixing the dates for hearing and prior thereto dates for evidence by way of witness statements and expert evidence to be filed by both the parties on the status and effect in Indian law of the judgment of the Supreme Court of India dated 11th May, 2011 and in particular whether the decision of the Supreme Court of India as to the seat of the first and third arbitrations are *res judicata* or are otherwise binding on the parties.

19. Aggrieved therefrom, on 22.12.2011 the present suit has been

preferred by the Plaintiff seeking declaration and perpetual injunction to restrain the Defendant from pursuing the aforesaid claim in London predicated on its stand that the matter had already been finally adjudicated upon by the judgment of the Supreme Court rendered on 11.05.2011.

20. In the aforesaid factual backdrop, the learned Additional Solicitor General Mr. A.S. Chandiok made detailed submissions in support of his prayer for the grant of an injunction order, which, for the sake of convenience, are summarized below.

PLAINTIFF.S CONTENTIONS

21. The learned Additional Solicitor General contended that **the attempt on the part of the defendant to re-litigate the issue of juridical seat of arbitration before the English Court after having it settled/decided by the Supreme Court of India is in breach of the Production Sharing Contract (PSC) dated October 28, 1994** in particular, Article 33.2 of the PSC and barred by res judicata/issue estoppel. At the outset, he referred to the relevant clauses of the PSC, which, for the sake of facility of reference, are extracted below:-

> **"33.1 Indian Law to Govern**
>
> Subject to the provisions of Article 34.12, this Contract shall be governed and interpreted in accordance with the laws of India.
>
> **33.2 Laws of India Not to be Contravened**
>
> Subject to Article 17.1 nothing in this Contract shall entitle the Contractor to exercise the rights, privileges and powers conferred upon it by this Contract in a manner which will contravene the laws of India.
>
> **34.3 Unresolved Disputes**
>
> Subject to the provisions of this contract, the Parties agree that any matter, unresolved dispute, difference or claim which cannot be agreed or settled amicably within twenty one (21) days may be submitted to a sole expert (where Article 34.2 applies) or otherwise to an arbitral tribunal for final decision as hereinafter provided.

> **34.12 Venue and Law of Arbitration Agreement**
>
> The venue of sole expert, conciliation or arbitration proceedings pursuant to this Article, unless the Parties otherwise agree, shall be Kuala Lumpur, Malaysia, and shall be conducted in the English language. Insofar as practicable, the Parties shall continue to implement the terms of this Contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute. Notwithstanding the provisions of Article 33.1, the arbitration agreement contained in this Article 34 shall be governed by the laws of England.
>
> **35.2 Amendment**
>
> This Contract shall not be amended, modified, varied or supplemented in any respect except by an instrument in writing signed by all the Parties, which shall state the date upon which the amendment or modification shall become effective."

22. Learned Additional Solicitor General contended that as per Article 34.12 of the PSC, the seat of arbitration is Kuala Lumpur, and a bare glance at the relevant Articles of the PSC extracted hereinabove would suffice to show that Article 34.12 is an overriding provision qua Article 33.1 whereunder Indian Law is stated to be the governing law; however, Article 34.12 does not override Article 33.2 of the PSC, which provides that the Contractor shall not exercise the rights, privileges and powers conferred upon it by the contract in a manner which will contravene the laws of India. He further contended that the admitted position is that nothing which is inconsistent to Indian Laws can be claimed by any of the parties and this is evident from the written statement filed by the defendant, and in particular from Clause (xiii) of paragraph 16 of the written statement, wherein it is stated:-

> ".....The Defendant in filing the English Court Proceedings is not in any manner claiming anything inconsistent in Indian Law as alleged...."

23. He submitted that re-litigating the same issue, i.e., issue of juridical seat of arbitration by the Defendant is against Indian Laws and consequently the Defendant is in breach of Article 33.2 of the PSC as alleged in the plaint. The Defendant cannot be permitted to indulge in

forum shopping and to re-agitate the same issue before the English Court when the Supreme Court of India has already decided on the issue. This is opposed to the public policy of India embodied in the **doctrine** of **res judicata** and principles analogous thereto, intended to eliminate multiplicity of proceedings and potentially conflicting decisions and to preserve the integrity of the proceedings before the Supreme Court of India, which in the instant case culminated in the final judgment and order dated 11.05.2011 in the appeal filed by the defendant being Civil Appeal No.4269/2011.

24. Reference was also made by him in this regard to the decision of the Supreme Court in the case of **Venture Global Engineering vs. Satyam Computer Services Ltd. and Anr.,** (2008) 4 SCC 190. In the said case, the appellant, a company incorporated in USA entered into a Joint Venture Agreement with the Respondent, a company registered in India, to constitute a company named Satyam Venture Engineering Services, registered in India. A Shareholders Agreement (SHA) was also entered into between the parties. The SHA, which was governed by Michigan Law, provided for arbitration of disputes at the London Court of International Arbitration (LCIA). The SHA in Section 11.05 clause (c) further provided that:-

> "Notwithstanding anything to the contrary in this agreement, the shareholders shall at all times act in accordance with the Companies Act and other applicable Acts/Rules being in force, in India at any time."

The Supreme Court after considering the aforesaid provisions in the SHA opined:- (SCC, at page 211, paragraph 44)

> "……..Notwithstanding that the proper law or the governing law of the contract is the law of the State of Michigan, their shareholders shall at all times act in accordance with the Companies Act and other applicable Acts/Rules being in force in India at any time. Necessarily, enforcement has to be in India, as declared by this very section which overrides every other section in the Shareholders Agreement. **Respondent No.1, therefore, totally violated the agreement between the parties by seeking enforcement of the transfer of the shares in the Indian company by approaching the District Courts in the United States.**"

25. The learned Additional Solicitor General further contended that Order XXXIX Rule 2 of the CPC specifically empowers the Court to grant injunction restraining the defendant from committing a breach of contract or other injury of any kind. Thus, in the case of **Pioneer Publicity Corporation vs. Delhi Transport Corporation & Anr.,** 103 (2003) DLT 442, a learned Single Judge of this Court with reference to the scope and ambit of Order XXXIX Rule 2 CPC opined: (DLT, at page 449, para 8)

> "Keeping in view the provisions of Order XXXIX Rule 2 it is no longer possible to contend that the Court does not possess power to prohibit or prevent the breach of contract. If this is possible in the realm of private contracts, it is an obligation in the realm of pubic enterprises....."

26. The learned Additional Solicitor General next contended that the **proceedings re-initiated by the defendant before the English Court is barred by res judicata/issue estoppel.** The plaintiff had on 30.05.2006 moved a petition under Section 9 of the Arbitration and Conciliation Act, 1996 being OMP No.225 of 2006 before a learned Single Judge of this Court, inter alia, making the following prayers:-

> "(a) direct the parties and the Arbitral Tribunal consisting of Hon'ble Mr. Justice B.N. Kirpal, Hon'ble Mr. Justice G.T. Nanavati and Hon'ble Mr. Justice J.K Mehra to continue hearing at Kuala Lumpur, the contractual and jurisdictional venue of arbitration as contemplated in Article 34 of the PSC;
>
> (b) declare that the contractual venue, i.e., Kuala Lumpur was and is contractual and jurisdictional seat of arbitration;
>
> (c) stay of the further proceedings of the arbitration as informed vide letter dated 20th April, 2006 by the Tribunal."

27. A preliminary objection was raised to the maintainability of the said petition by the respondent (defendant herein) to the effect that the jurisdictional seat of arbitration had shifted to London and the petitioner was estopped from contending that the seat of arbitration continued to be at Kuala Lumpur. By his order dated 30th April, 2008, the learned Single Judge held that it had the jurisdiction to decide upon the petition. Aggrieved therefrom, the defendant approached the Supreme Court by

way of SLP (C) No.16371/2008 (which was later converted to Civil Appeal No.4269 of 2011). In the said SLP, the defendant herein again raised the issue of juridical seat and even filed detailed written submissions before the Supreme Court on the issue of 'juridical seat of arbitration'. The judgment was delivered by the Supreme Court on May 11, 2011, wherein it was held that change in 'the venue of hearing' to Amsterdam or London did not amount to change in the 'juridical seat of arbitration'; and the contention of the defendant that the juridical seat had been shifted to London was negated. As a matter of fact, the Supreme Court gave a categorical finding that Kuala Lumpur would remain the seat of arbitration (paras 12, 13 and 14 of the judgment of the Supreme Court).

28. The learned Additional Solicitor General contended that in view of the above the issue of juridical seat is no longer res integra after the judgment of the Supreme Court. The defendant cannot under the garb of the claim made by it in the London Court seek to set aside a binding judgment and finding of fact on the aforesaid issue decided by the Apex Court. The law laid down by the Supreme Court besides being binding between the parties, being a judgment in personam is in fact the law of the land, unless set aside in review. Admittedly, no review petition has been filed by the defendant and the judgment, therefore, acts as an estoppel against the defendant.

29. Reference was made by the learned Additional Solicitor General to a large number of precedents in support of his aforesaid contention, including the following:-

(i) **Satish Nambiar vs. Union of India & Anr.,** 150 (2008) DLT 312 (DB), wherein a Division Bench of this Court held as under:- (DLT, at page 318, para 13)

> ".....The principles of res judicata applicable to writ proceedings prevent parties to a judicial determination from agitating the same question over again. **That is true even when the earlier determination may be erroneous. A party aggrieved of any such decision can no doubt challenge the same in appeal, but cannot institute fresh proceedings on the same cause of action nor can a party agitate any such issue as it constituted an essential element of the decision earlier rendered**....."

(ii) **Ishwar Dutt vs. Land Acquisition Collector and Anr.,** (2005) 7 SCC 190, in which it was held as follows:- (SCC, at page 198, paras 18-19)

> "18. ..... The principle of res judicata is specie of the principle of estoppel. When a proceeding based **on a particular cause of action has attained finality,** the principle of res judicata shall fully apply.
>
> 19. Reference in this regard may be made to Wade and Forsyth on Administrative Law, 9th Edn., p. 243, wherein it is stated:
>
> > "One special variety of estoppel is res judicata. This results from the rule, which prevents the parties to a judicial determination from litigating the same question over again, **even though the determination is demonstrably wrong. Except in proceedings by way of appeal, the parties bound by the judgment are estopped from questioning it.** As between one another, they may neither pursue the same cause of action again, nor may they again litigate any issue which was an essential element in the decision. These two aspects are sometimes distinguished as **'cause of action estoppel' and 'issue estoppel'**."

(iii) **Swamy Atmananda and Ors. vs. Sri Ramakrishna Tapovanam and Ors.,** (2005) 10 SCC 51, wherein it was observed as follows:- (SCC, at page 61, para 26)

> "26. The object and purport of principle of res judicata as contended in Section 11 of the Code of Civil Procedure is to uphold the rule of conclusiveness of judgment, as to the points decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties. Once the matter which was the subject-matter of lis stood determined by a competent court, no party thereafter can be permitted to reopen it in a subsequent litigation. Such a rule was brought into the statute book with a view to bring the litigation to an end so that the other side may not be put to harassment."

(iv) **M. Nagabhushana vs. State of Karnataka and Others,** (2011) 3 SCC 408, wherein the principles of res judicata were delineated as under:- (SCC, at pages 415-416, paras 12 and 13)

"12. The principles of res judicata are of universal application as they are based on two age-old principles, namely, interest reipublicae ut sit finis litium which means that it is in the interest of the State that there should be an end to litigation and the other principle is nemo debet bis vexari, si constat curiae quod sit pro una et eademn causa **meaning thereby that no one ought to be vexed twice in a litigation if it appears to the Court that it is for one and the same cause.** This doctrine of res judicata is common to all civilized system of jurisprudence to the extent that a judgment after a proper trial by a Court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should for ever set the controversy at rest.

13. That principle of finality of litigation is based on high principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law in as much as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel the weaker party to relinquish his right. The doctrine of res judicata has been evolved to prevent such an anarchy. That is why it is perceived that the plea of res judicata is not a technical doctrine but a fundamental principle which sustains the rule of law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing Court for agitating on issues which have become final between the parties."

(v) **Hope Plantations Ltd. vs. Taluk Land Board, Peermade and Anr.,** (1999) 5 SCC 590, wherein the following apposite observations are set out:- (SCC, at page 607, para 26)

"26. It is settled law that principles of estoppel and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppel though these two doctrines differ in some essential particulars. Rule of res judicata prevents the parties to a judicial determination from litigating the same question over again **even though the determination may even be demonstratedly wrong. When**

the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation. These two aspects are "cause of action estoppel" and "issue estoppel". These two terms are of common law origin. Again, once an issue has been finally determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is to approach the higher forum if available....."

(vi) **D.S.V. Silo-Und Verwaltungs – Gesellschaft M.B.H. vs. Owners of the Sennar and 13 Other Ships,** (1985) 1 W.L.R. 490 (House of Lords), wherein the buyers of Sudanese groundnut expellers brought an action for damages in a Dutch Court, which was dismissed by the Dutch Court holding that it had no jurisdiction to entertain the claim by virtue of the exclusive jurisdiction clause. The buyers then brought an action in the Admiralty Court in England, which held that the buyers, claim did not fall within the exclusive jurisdiction clause in the Bill of Lading and that the plaintiffs were not estopped by the decision of the Dutch Court of Appeal from so asserting. The Court of Appeal allowed an appeal by the defendants holding that the plaintiffs were so estopped. On appeal by the plaintiffs the House of Lords dismissed the appeal. The law, in the words of Lord Brandon of Oakbrook, was as follows:-

"....a decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned. If the expression "on the merits" is interpreted in this way, as I am clearly of opinion that it should be, there can be no doubt whatever that the decision of the Dutch Court of Appeal in the present case was a decision on the merits for the purposes of the application of the doctrine of issue estoppel."

(vii) **Makhija Construction & Engg. (P) Ltd. vs. Indore Development Authority and ors,** (2005) 6 SCC 304, wherein a fine distinction between the principle of precedent and the principle of res judicata is drawn in the following words:-

> "They refer to the principle of precedent which is distinct from the principle of res judicata. A precedent operates to bind in similar situations in a distinct case. Res judicata operates to bind parties to proceedings for no other reason, but that there should be an end to litigation."

(viii) **S. Nagaraj (dead) by LRs and Ors. vs. B.R. Vasudeva Murthy & Ors.,** (2010) 3 SCC 353, wherein the Supreme Court again reiterated the distinction between the doctrine of res judicata and the doctrine of precedent and held that the principle of per incurium and other principles related to the doctrine of precedent have no relevance to the doctrine of res judicata whereunder whether a decision is correct or erroneous has no bearing upon the question whether it operates or does not operate as res judicata. The following apposite observations were made in the said case:-

> **"The High Court has failed to appreciate that the principle of per incurium has relevance to the doctrine of precedents but has no application to the doctrine of res judicata.** To quote Rankin, C.J. of the Calcutta High Court in **Tarini Charan Bhattacharjee v. Kedar Nath Haldar** AIR 1928 Cal 777: (AIR p.781)
>
> "(1) **The question whether decision is correct or erroneous has no bearing upon the question whether it operates or does not operate as res judicata.** The doctrine is that in certain circumstances the Court shall not try a suit or issue but shall deal with the matter on the footing that it is a matter no longer open to contest by reason of a previous decision. In these circumstances it must necessarily be wrong for a court to try the suit or issue, come to its own conclusion thereon, consider whether the previous decision is right and give effect to it or not according as it conceives the previous decision to be right or wrong. To say, as a result of such disorderly procedure, that the previous decision was wrong and that it was wrong on a point of law, or on a pure point of law, and that therefore it may be

> disregarded, is an indefensible form of reasoning. For this purpose, it is not true that a point of law is always open to a party."

(ix) **K.K. Modi vs. K.N. Modi and Ors.,** (1998) 3 SCC 573, wherein the Court has termed re-litigation as one of the examples of an abuse of the process of the Court as follows:- (SCC, at page 592, para 44)

> "44. **One of the examples cited as an abuse of the process of the court is relitigation. It is an abuse of the process of the court and contrary to justice and public policy for a party to re-litigate the same issue which has already been tried and decided earlier against him.** The re-agitation may or may not be barred as res judicata. But if the same issue is sought to be reagitated, it also amounts to an abuse of the process of the court. A proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amount to an abuse of the process of the court. **Frivolous or vexatious proceedings may also amount to an abuse of the process of court especially where the proceedings are absolutely groundless. The court then has the power to stop such proceedings summarily and prevent the time of the public and the court from being wasted**....."

30. On the basis of the aforesaid decisions, the learned Additional Solicitor General contended that the principles of Section 11 of the Code of Civil Procedure would squarely apply in the present case. Therefore, a second round of litigation is barred by the principles of res judicata and the public policy of India, and by seeking to re-initiate the proceedings before the London Court, the defendant is not only trying to breach the PSC between the parties, but is following a course of conduct which is vexatious and oppressive, besides being in breach of Article 33 of the PSC whereunder the parties had agreed that the laws of India were not to be contravened.

31. Relying upon the decision of the Court of Appeal (Civil Division) rendered in **Munib Masri vs. Consolidated Contractors International Company SAL, Consolidated Contractors (Oil & Gas) Company SAL** [2008] EWCA Civ 625, the learned Additional Solicitor General, further contended that re-litigation in a foreign jurisdiction of matters which are already res judicata between the parties by reason of a prior

judgment can be a sufficient ground for grant of anti-suit injunction. The following apposite observations are set out:

> "82. I do not accept the judgment debtors' argument that there is a principle (whether it is expressed as a condition for the exercise of the jurisdiction, or as an aspect of comity, or as an element in exercise of the discretion) that the English court will not restrain re-litigation abroad of a claim which has already been the subject matter of an English judgment adverse to the person seeking to re-litigate abroad. **It has been established since at least 1837 that the fact that the respondent is seeking to re-litigate in foreign jurisdiction matters which are already re judicata between himself and the applicant by the reason of an English judgment can be a sufficient ground for the grant of an anti-suit injunction."**

32. Next, adverting to the binding nature of the findings rendered by the Supreme Court, the learned Additional Solicitor General contended that a five-Judge Bench of the Supreme Court in the case of **Rupa Ashok Hurra vs. Ashok Hurra and Anr.,** (2002) 4 SCC 388 has placed matters beyond the pale of controversy by laying down in no uncertain terms that a judgment rendered by the highest court of the land is sacrosanct and is a precedent for itself and for all Courts/Tribunals and authorities in India. The relevant part of the judgment reads as under:- (SCC, at pages 406-407, 412 and 417)

> "24. There is no gainsaying that the Supreme Court is the Court of last resort - the final Court on questions both of fact and of law including constitutional law. The law declared by this Court is the law of the land; it is precedent for itself and for all the courts/tribunals and authorities in India. In a judgment there will be declaration of law and its application to the facts of the case to render a decision on the dispute between the parties to the lis. **It is necessary to bear in mind that the principles in regard to the highest Court departing from its binding precedent are different from the grounds on which a final judgment between the parties, can be reconsidered**....."

> "25. In **Hoystead vs. Commissioner of Taxation, Lord Shaw observed:** (All ER p.62 B-C)

> "Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result..... If this were permitted litigation would have no end, except when legal ingenuity is exhausted."

> "40. .....**In a State like India, governed by rule of law, certainty of law declared and the final decision rendered on merits in a lis between the parties by the highest court in the country is of paramount importance.** The principle of finality is insisted upon not on the ground that a judgment given by the apex Court is impeccable but on the maxim interest reipublicae ut sit finis litium."

> "57. .....There cannot possibly be any manner of doubt that the **matter once dealt with by this Court attains a state of finality and no further grievance can be had in regard thereto.** The founding fathers of the Constitution decidedly provided that the decision of this Court was final, conclusive and binding – **final and conclusive inter partes** and binding on all. But the makers have also conferred a power of review of the judgment of this Court and the perusal of the provisions of Articles 137 and 145 makes it abundantly clear."

33. The learned Additional Solicitor General further contended relying upon the decision of a three-Judge Bench of the Supreme Court in **Kunhayammed and Ors. vs. State of Kerala and Anr.,** (2000) 6 SCC 359, that the nature and scope of the power of the Supreme Court under Articles 136 and 141 is such that even when a petition for leave to appeal is dismissed by a speaking or reasoned order, Article 141 of the Constitution would be attracted and if there is a law declared by the Supreme Court, the said law would be binding on all Courts and Tribunals in India and certainly the parties thereto. The relevant extract of the judgment is reproduced hereunder:- (SCC, at pages 377-378, para 27)

> "27. .....If the order of dismissal be supported by reasons then also the doctrine of merger would not be attracted because the jurisdiction exercised was not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to

appeal. We have already dealt with this aspect earlier. Still the reasons stated by the Court would attract applicability of Article 141 of the Constitution if there is a law declared by the Supreme Court which obviously would be binding on all the courts and tribunals in India **and certainly the parties thereto. The statement contained in the order other than on points of law would be binding on the parties and the court or tribunal, whose order was under challenge on the principle of judicial discipline, this Court being the apex court of the country. No court or tribunal or parties would have the liberty of taking or canvassing any view contrary to the one expressed by this Court**....."

34. The learned Additional Solicitor General highlighted that the present case stands on a higher footing, in that leave to appeal has been granted in the instant case, and the appeal disposed of by a detailed order passed by the Supreme Court dealing with every aspect of the matter. Therefore, the judgment of the Supreme Court in the instant case is final, binding and conclusive between the parties and the only remedy available to the defendant is to file a review petition under Article 137 of the Constitution. The judgment of the Supreme Court even if it is contended to be erroneous or alleged to be passed without jurisdiction, the same can be corrected by the Supreme Court itself and cannot be dealt with collaterally by any other Court.

35. Elaborating on the aforesaid, he referred to the Constitution Bench decision of the Supreme Court in the case of **A.R. Antulay vs. R.S. Nayak and Anr.,** (1988) 2 SCC 602, wherein the Court with great lucidity and with utmost precision laid down:- (SCC, at page 651, para 40)

"40. The question of validity, however, **is important in that the want of jurisdiction can be established solely by a superior court and that, in practice, no decision can be impeached collaterally by any inferior court. But the superior court can always correct its own error**....."

36. Referring to a recent decision delineating the wide powers of the Supreme Court of India under Article 136 of Constitution of India rendered in the matter of **A. Subash Babu vs. State of Andhra Pradesh and Anr.,** (2011) 7 SCC 616, learned ASG contended that by virtue of

the special jurisdiction vested in the Supreme Court by Article 136, the argument of the defendant that the Supreme Court did not have the jurisdiction to rule on the juridical seat of arbitration loses all tenability. The following extract from the judgment deserves to be noted:- (SCC, at page 638, para 65)

"65. As held in **Ramakant Rai v. Madan Rai following Arunachalam v. P.S.R. Sadhanantham and P.S.R. Sadhanantham v. Arunachalam,** the appellate power vested in the Supreme Court under Article 136 is not to be confused with the ordinary appellate power exercised by appellate Courts and appellate tribunals under specific statutes. It is plenary power exercisable outside the purview of ordinary law to meet the demand of justice. Article 136 is a special jurisdiction. It is residuary power. It is extraordinary in its amplitude. **The limits of Supreme Court when it chases injustice, is the sky itself.**"

37. In the context of the wide amplitude of the powers of the Supreme Court as a superior Court of record constituted by the Constitution, he also placed reliance upon the judgment of the Supreme Court rendered in the case of **Delhi Judicial Service Association, Tis Hazari Court, Delhi vs. State of Gujarat and Ors.,** (1991) 4 SCC 406, wherein it was observed by the Supreme Court as under:- (SCC, at page 453, para 38)

".....It is true that courts constituted under a law enacted by the Parliament or the State Legislature have limited jurisdiction and they cannot assume jurisdiction in a matter, not expressly assigned to them, **but that is not so in the case of a superior court of record constituted by the Constitution. Such a court does not have a limited jurisdiction instead it has power to determine its own jurisdiction. No matter is beyond the jurisdiction of a superior court of record unless it is expressly shown to be so, under the provisions of the Constitution. In the absence of any express provision in the Constitution the Apex court being a court of record has jurisdiction in every matter and if there be any doubt, the Court has power to determine its jurisdiction.** If such determination is made by High Court, the same would be subject to appeal to this Court, **but if the jurisdiction is determined**

by this Court it would be final."

38. He also relied upon the case of **Ravi S. Naik vs. Union of India and Ors.,** 1994 Supp (2) SCC 641 to urge that even in the case of a High Court which is a superior Court of record, it is for the Court to consider whether any matter falls within its jurisdiction or not. The relevant portion of the judgment is extracted hereinbelow:- (Supp SCC, at page 662, para 40)

> "It is settled law that an order, even though interim in nature, is binding till it is set aside by a competent could and it cannot be ignored on the ground that the Court which passed the order had no jurisdiction to pass the same. Moreover the stay order was passed by the High Court which is a Superior Court of Record and **"in the case of a superior Court of Record, it is for the court to consider whether any matter falls within its jurisdiction or not. Unlike a court of limited jurisdiction, the superior Court is entitled to determine for itself questions about its own jurisdiction.**"

39. The learned Additional Solicitor General on the basis of the aforesaid decisions contended that firstly, no matter or issue is beyond the jurisdiction of the Supreme Court which is the highest Court of the land and secondly, even if there is any doubt as to the jurisdiction of the Supreme Court, the Supreme Court alone can decide upon the same. Therefore, the judgment of the Supreme Court is binding on the parties unless and until the Supreme Court itself holds that it did not have jurisdiction.

40. Without prejudice to his aforesaid contentions, learned ASG submitted that as per the amended provisions of Explanation VIII of Section 11 of the Code of Civil Procedure, an issue decided by even a Court of limited or special jurisdiction is binding between the parties [See **Sulochana Amma vs. Narayanan Nair,** (1994) 2 SCC 14]. For the facility of reference, the aforesaid provision is reproduced hereunder:-

> "Explanation VIII.– An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised."

41. Learned Additional Solicitor General next contended that in any case, it is fundamental law that parties cannot vest a Court with jurisdiction it does not otherwise have. Thus, the London Court which does not have jurisdiction to go into the issue of 'juridical seat' cannot assume jurisdiction. In contrast, the plaintiff at all times possessed the right at common law to institute a suit before this Court and the said right cannot be extinguished on some mistaken notion that only London Courts can decide the issue raised in the present suit. The case of **Oil and Natural Gas Commission vs. Western Company of North America,** (1987) 1 SCC 496 is a case in point. In the said case, the appellant ONGC entered into a drilling contract with the respondent Western Company of USA. The contract provided for reference to arbitration in case of any dispute arising out of the contract. The arbitration proceedings were to be governed by the Indian Arbitration Act, 1940 read with the relevant rules. A dispute having arisen between the parties, the matter was referred to arbitration. The agreed venue under the contract was in London. An award rendered by the umpire in London was sought to be enforced by the American company in New York. The appellant ONGC filed arbitration petition before the Bombay High Court under Sections 30 and 33 for setting aside the award, seeking ex parte interim order restraining the American company from enforcing the award in New York. The Supreme Court after considering the rival contentions of the parties opined that to oblige the Indian company to contest proceedings before the American Court would be oppressive to the Indian company given the situation which had been created by the American company of seeking enforcement of the award in New York while a petition to set aside the award was instituted and pending in the Indian Court at the time of the institution of the action in the US Court. This was enough to entitle the Indian company to a restraint order. It held:- (SCC, at page 510, para 15)

> "15. We are of the opinion that the appellant, ONGC, should not be obliged to face such a situation as would arise in the light of the aforesaid discussion in the facts and circumstances of the present case. To drive the appellant in a tight corner and oblige it to be placed in such an inextricable situation as would arise if the Western Company is permitted to go ahead with the proceedings in the American Court would be oppressive to the

ONGC. It would be neither just nor fair on the part of the Indian Court to deny relief to the ONGC when it is likely to be placed in such an awkward situation if the relief is refused. It would be difficult to conceive of a more appropriate case for granting such relief. The reasons which have been just now articulated are good and sufficient for granting the relief and accordingly it appears unnecessary to examine the meaning and content of the relevant articles of the New York Convention for the purposes of the present appeal."

42. Significantly, in the aforesaid case, the High Court which at the first instance granted interim restraint order to the ONGC subsequently vacated the interim order granted by it earlier inter alia on the ground that it was open to the ONGC to contend before the US Court that the petition for setting aside the award which was sought to be enforced in the US Court was already pending in the Indian Court. Disagreeing with the aforesaid view of the High Court, the Supreme Court observed:- (SCC, at pages503-504, para 7)

"7. The High Court has examined the question as to whether the action instituted by the Western Company against ONGC was maintainable in the context of the New York Convention in the light of the relevant Articles of the Convention and has come to the conclusion that an action to enforce the award in question as a foreign award in the US Court was quite in order. The view is expressed that the mere fact that a petition to set aside the award had already been instituted in the Indian Court and was pending in the Indian Court at the time of the institution of the action in the US Court was a matter of no consequence, for the purposes of consideration of the question as to whether or not Western Company should be restrained from proceeding further with the action in the US Court. Now, there cannot be any doubt that the Western Company can institute an action in the US Court for the enforcement of the award in question notwithstanding the fact that the application for setting aside the award had already been instituted and was already pending before the Indian Court. So also there would not be any doubt or dispute about the proposition that the ONGC can approach the US Court for seeking a stay of the proceedings initiated by the Western Company for procuring a judgment in terms of the

award in question. **But merely on this ground the relief claimed by ONGC cannot be refused. To say that the Court in America has the jurisdiction to entertain the action and to say that the American Court can be approached for staying the action is tantamount to virtually cold-shouldering the substantial questions raised by ONGC and seeking an escapist over-simplification of the matter. The points urged by the ONGC are of considerable importance and deserve to be accorded serious consideration.**"

43. Learned ASG argued that the jurisdiction exercised by the Indian Supreme Court was well within its competence in view of the fact that the parties are Indian, domiciled in India, properties and assets under the contract which has been executed in Delhi are within the territory of India and the performance of the contract is also in Indian territory and the same is governed by the laws of India with an overriding stipulation that: "nothing in this Contract shall entitle the Contractor to exercise the rights, privileges and powers conferred upon it by this Contract in a manner which will contravene the laws of India." The Indian Supreme Court is thus the natural forum i.e the forum with which the parties and the contract has the most real and substantial connection. Thus, Indian Courts have not only personal jurisdiction but also subject matter and territorial jurisdiction. When the award is to be enforced either against the assets or the person of the award debtor, only the Indian Court can enforce the same. Therefore, its determination on the seat issue, which was squarely raised and which was required to be determined for the purpose of deciding the applicability of or otherwise of Part I of the Act, was within the competence of the Apex Court of India. It has been held by the Hon'ble Supreme Court of India in the matter of **Man Roland Druckimachinen Ag vs. Multicolur Offset Ltd and Anr.,** (2004) 7 SCC 447 as under:-

"Undoubtedly, when the parties have agreed on a particular forum, the courts will enforce such agreement. This is not because of a lack or ouster of its own jurisdiction by reason of consensual conferment of jurisdiction on another court, but because the court will not be party to a breach of an agreement...."

44. The Supreme Court was required to enter a finding as to where is the juridical seat of arbitration and what is the curial law governing the

arbitration to rule upon the applicability or otherwise of Part I of the 1996 Act. Sub-section (2) of Section 2 of the 1996 Act requires the Court to decide where is the juridical seat of arbitration. That is what the Supreme Court has done and the relief was granted to the defendant on that basis alone. The defendant cannot and should not be permitted to pick and choose from a judgment it has won. On this basis alone, it was argued, there was no merit in the contention of the defendant that the Indian Supreme Court did not possess the competence to decide the seat issue.

45. Learned ASG next contended that without prejudice to his contentions with regard to the width and amplitude of the powers of the Supreme Court and that it was not open to the defendant to contend that the High Court of Justice, Queen's Bench Division, Commercial Court, London is the Court which can render a finding on the juridical seat of arbitration, **it was open to the parties to invoke the jurisdiction of the Supreme Court to render a finding on the juridical seat of arbitration.** It was so laid down in the case of **A.P. State Financial Corporation vs. M/s. Gar Re-Rolling Mills and Anr.,** (1994) 2 SCC 647, wherein while dealing with the right vested in the Corporation under Section 29 of the State Financial Corporations Act, 1951, the Supreme Court opined that the right vested in the Corporation under the aforesaid Section is besides the right already possessed at common law to institute a suit or the right available to it under Section 31 of the Act. The following pertinent observations were made by it:- (SCC, at page 660, para 15)

> "15. The Doctrine of Election clearly suggests that when two remedies are available for the same relief, the party to whom the said remedies are available has the option to elect either of them but that doctrine would not apply to cases where the ambit and scope of the two remedies is essentially different. To hold otherwise may lead to injustice and inconsistent results."

46. Learned Additional Solicitor General pointedly drew the attention of this Court to the conduct of the defendant throughout, highlighting that the defendant at every given point of time has suppressed material facts from the Court including the Supreme Court and its malicious conduct was evident from the following:-

(i) The defendant did not disclose before the Hon'ble Supreme Court that it had filed proceedings before the London Court on the same subject matter.

(ii) Despite a clear order dated 20.10.2009 from the London Court for service of the plaintiff, the defendant did not get the service effected on the plaintiff till April, 2010, i.e., after the Supreme Court had reserved judgment in the case.

(iii) In the written statement filed on behalf of the defendant on 09.01.2012 before the Malaysian High Court, the defendant did not disclose:-

a. The Supreme Court proceedings.

b. The London proceedings.

c. The proceedings relating to the present suit.

47. To sum up, the learned Additional Solicitor General contended that the mere initiation of a proceeding in breach of the principle of *res judicata* is abuse of the process which makes the foreign proceedings vexatious and oppressive. It is this re-commencement of proceedings by the defendant in the English Court which is sought to be injuncted by filing the present suit. If the contention of the defendant is accepted that only the foreign court before whom the proceedings are pending can decide the said issue, then in that case the entire concept and purpose of anti-suit injunction would be lost and defeated. In the present case, there is a judgment in favour of the plaintiff from the highest court, i.e., the Supreme Court of India, and, therefore, the proceedings initiated before the London Court are highly oppressive and vexatious. The contention of the defendant based on comity of courts is also misplaced for the reason that the Hon'ble Supreme Court by its order dated 06.09.2010 had earlier directed the parties not to proceed with the London proceedings. At that time, no such contention of comity of courts as raised and, therefore, this argument is only an after-thought and witho t any basis. Even otherwise, the reliance placed by the defendant on the principle of comity of courts loses sight of the fact that the grant of an injunction is not towards any foreign court but only against the parties who are amenable to the jurisdiction of this Court.

48. In view of the aforesaid, the learned Additional Solicitor General submitted that the plaintiff has made out a *prima facie* case in its favour justifying the grant of an injunction against the defendant. The balance

of convenience is also tilted in favour of the plaintiff and irreparable injury is likely to be caused to the plaintiff if the plaintiff is forced to join the London proceedings, in which event the entire suit will be rendered infructuous whereas, on the other hand, proceedings can be re-commenced before the London Court if ultimately the present suit is dismissed by this Court.

DEFENDANT'S CONTENTIONS

49. Responding to the arguments advanced by the learned Additional Solicitor General, Mr. Amit Sibal, the learned counsel for the defendant contended that the issue before this Court is not whether the observations in paragraphs 12 and 13 of the Supreme Court judgment operate as res judicata so as to bar the English claim. **The issue before this Court is whether:-**

(a) The English Court deciding whether the defendant's English claim is barred by res judicata pursuant to the plaintiff's application is so abusive, oppressive and vexatious as to defeat the ends of justice and to perpetuate injustice; and/ or

(b) The principle of Comity of Nations does not come in the way of barring this Court from exercising its jurisdiction to decide whether the English claim is barred by res judicata pursuant to the plaintiff's application.

It is submitted that only if the answer to both the above is in the affirmative, can an anti-suit injunction be granted. It is further submitted that **the plaintiff has failed to make out a prima facie case on either of the abovementioned conditions and hence no relief ought to be granted to the plaintiff.**

50. For substantiating the aforesaid contention, the learned counsel for the defendant referred to the tests laid down by the Supreme Court in the case of **Modi Entertainment Network and Anr. vs. W.S.G. Cricket Pvt. Ltd.** (2003) 4 SCC 341 in the following terms:- (SCC, at page 360, paragraph 24)

"24. From the above discussion the following principles emerge:

(1) In exercising discretion to grant an anti-suit injunction the court must be satisfied of the following aspects:-

(a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;

(b) **if the injunction is declined, the ends of justice will be defeated and injustice will be perpetuated; and**

(c) the principle of comity – respect for the court in which the commencement or continuance of action/ proceeding is sought to be restrained – must be borne in mind."

(2) In a case where more forums than one are available, the Court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (Forum conveniens) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexations or in a forum non-conveniens;

(3) Where jurisdiction of a court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or non-exclusive jurisdiction of the court of choice of the parties are not determinative but are relevant factors and when a question arises as to the nature of jurisdiction agreed to between the parties the court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case;

(4) A court of natural jurisdiction will not normally grant anti-suit injunction against a defendant before it where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court, a forum of their choice in regard to the commencement or continuance of proceedings in the court of choice, save in an exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be relieved of the burden of the contract; or since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist or because of a vis

major or force majeure and the like;

(5) Where parties have agreed, under a non- exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily no anti- suit injunction will be granted in regard to proceedings in such a forum conveniens and favoured forum as it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to non-exclusive jurisdiction of the court of their choice which cannot be treated just an alternative forum;

(6) A party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or non-exclusive jurisdiction is created, the proceedings in that court cannot per se be treated as vexatious or oppressive nor can the court be said to be forum non-conveniens; and

(7) The burden of establishing that the forum of the choice is a forum non- conveniens or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same.

51. Reliance was also placed by the learned counsel for the defendant on a decision rendered by the High Court of Justice, Queen's Bench Division, Admiralty Court in **Seismic Shipping Inc., Westerngeco Ltd. vs. Total E&P UK Plc, The Western Regent** (2005) EWHC 460 (Admlty) [as upheld by the Court of Appeal], and in particular on the following dictum laid down in the said case:-

> ".....the function of an anti suit injunction is to prevent unconscionable conduct and not, in effect, to ensure recognition of an English judgment in a friendly foreign jurisdiction."

52. In support of his contention that **the tests for the grant of an anti-suit injunction as laid down in the aforesaid two decisions have not been met in the instant case,** the learned counsel for the defendant

vehemently contended that the proceedings before the English Court cannot be termed as abusive, oppressive and/or vexatious. He emphasized that the purpose of anti-suit injunctions is to prevent abusive proceedings and not to ensure enforcement of judgments in a "foreign friendly jurisdiction".

53. The next plank of the contentions of the learned counsel for the defendant is that even otherwise, the English Court is the appropriate Court to decide whether or not the defendant's claim in England is barred by res judicata. He contended that the bar of res judicata is a procedural bar that can only be raised as a defence to a claim in the forum where the claim is filed. Thus, the issue of whether or not a subsequent proceeding is barred by res judicata needs to be determined by the Court where the subsequent proceeding has been filed, in this case the English Court. To buttress his said contention, he referred to the four conditions required under Indian Law for the application of principle of res judicata as summarized by the Supreme Court in the case of **Syed Mohd. Salie Labbai (Dead) by LRs and Ors. vs. Mohd. Hanifa (Dead) by LRs and Ors.** (1976) 4 SCC 780, which, he stated, were similar to the conditions applicable under the English Law. The said conditions are as set out below:- (SCC, at page 790, para 7)

> "(1) that the litigating parties must be the same;
>
> (2) that the subject-matter of the suit also must be identical;
>
> (3) that the matter must be finally decided between the parties; and
>
> (4) that the suit must be decided by a court of competent jurisdiction."

54. Relying upon the aforesaid principles laid down in **Syed Mohd. Salie Labbai** (supra), Mr. Sibal urged that Section 11 of the Code of Civil procedure, 1908 stipulates that no Court shall try any suit or issue which has been decided in a former suit between the same parties. Therefore, **the bar operates in the forum where the issue alleged to have been decided is being re-agitated** and *res judicata* does not arise in the abstract or prior to the subsequent suit. Thus, there is no occasion for this Court to decide whether the claim before the English Court is barred by res judicata.

55. Alternatively, he contended on behalf of the defendant that

the Court of the country whose law governs the arbitration agreement has the exclusive jurisdiction to decide all disputes relating to the arbitration clause. Differently put, the contention is that where Part I of the Act has been excluded, the only role to be played by the Indian Courts is under Part II of the Act at the stage of enforcement of the Foreign Award, if and only if the successful party chooses to enforce the award in India under Part II of the Act. Any and all other proceedings must be filed in the Courts of the country whose laws apply to arbitration agreement. Since the issue of 'seat of arbitration' is contained in the arbitration clause, only the English Courts have jurisdiction to decide the said issue. Referring to the judgment of the Supreme Court in **National Thermal Power Corporation vs. Singer Company and Ors.** (1992) 3 SCC 551, the learned counsel for the defendant contended that the law in this context was lucidly laid down in paragraph 26 of the said judgment as follows:- (SCC, at page 564, para 26)

> "Whereas, as stated above, the proper law of arbitration (i.e., the substantive law governing arbitration) determines the validity, effect and interpretation of the arbitration agreement, the arbitration proceedings are conducted, in the absence of any agreement to the contrary, in accordance with the law of the country in which the arbitration is held. On the other hand, if the parties have specifically chosen the law governing the conduct and procedure of arbitration, the arbitration proceedings will be conducted in accordance with that law so long as it is not contrary to the public policy or the mandatory requirements of the law of the country in which the arbitration is held. If no such choice has been made by the parties, expressly or by necessary implication, the procedural aspect of the conduct of arbitration (as distinguished from the substantive agreement to arbitrate) will be determined by the law of the place or seat of arbitration. Where, however, the parties have, as in the instant case, stipulated that the arbitration between them will be conducted in accordance with the ICC Rules, those rules, being in many respects self-contained or self-regulating and constituting a contractual code of procedure, will govern the conduct of the arbitration, except insofar as they conflict with the mandatory requirements of the proper law of arbitration, or of the procedural law of the seat of arbitration. [See the observation of Kerr, LJ. in **Bank Mellat v. Helliniki Techniki** SA (1983) 3 All E.R. 428 (CA). See also Craig, **Park and Paulsson, International Chamber of Commerce Arbitration, 2nd edn. (1990)**]. To such an extent the appropriate courts of the seat of arbitration, which in the present case are the competent English courts, will have jurisdiction in respect of procedural matters concerning the conduct of arbitration. But the overriding principle is that the courts of the country whose substantive laws govern the arbitration agreement are the competent courts in respect of all matters arising under the arbitration agreement, and the jurisdiction exercised by the courts of the seat of arbitration is merely concurrent and not exclusive and strictly limited to matters of procedure. All other matters in respect of the arbitration agreement fall within the exclusive competence of the courts of the country whose laws govern the arbitration agreement. [See Mustil & Boyd, Commercial Arbitration, 2nd edn.; Allen Redfern and Martin Hunter, Law & Practice of International Commercial Arbitration, 1986; Russel on Arbitration, 20th edn. (1982); Cheshire & North's Private International Law, 11th edn. (1987)].

56. A recent judgment of the Supreme Court rendered in the case of **Yograj Infrastructure Ltd. vs. Ssang Yong Engineering and Construction Co. Ltd.,** 2011 (9) SCALE 567 was also referred to by Mr. Sibal to fortify his contention that once the parties had specifically agreed that the arbitration proceedings would be conducted in accordance with the English Law, it was no longer open to the plaintiff to contend that Indian Courts have jurisdiction to entertain the plaintiff's defence of *res judicata*. In the case of **Yograj Infrastructure** (supra), an appeal under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 for setting aside the interim order passed by the learned arbitrator was filed before the District Judge, Narsinghpur on behalf of the appellant. The learned District Judge dismissed the appeal accepting the submissions advanced on behalf of the respondent that the said appeal was not maintainable since the seat of the arbitration proceedings was in Singapore and the said proceedings were governed by the laws of Singapore. The Civil Revision filed against the order of District Judge was also dismissed by the High Court, against which a Special Leave Petition was filed. The Supreme Court noting that there was no ambiguity that the curial law with regard to the arbitration proceedings was the SIAC Rules and the

seat of arbitration was Singapore, held that the question which arose was whether in such a case the provisions of Section 2(2) of the Arbitration and Conciliation Act, 1996, which indicate that Part I of the Act would apply where the place of arbitration is in India, would be a bar to the invocation of the provisions of Sections 34 and 37 of the Act, as far as the arbitral proceedings in the case before the Supreme Court were concerned. After considering the judgment in **Bhatia International vs. Bulk Trading S.A.,** (2002) 4 SCC 105 and noting that the decision therein had been subsequently applied in the case of **Venture Global Engg.** (supra) and **Citation Infowares Ltd. vs. Equinox Corporation,** (2009) 7 SCC 220, the Court held that once the parties had specifically agreed that the arbitration proceedings would be conducted in Singapore in accordance with the SIAC Rules, which includes Rule 32 whereunder the International Arbitration Act is made applicable, the decision in **Bhatia International** (supra) and the subsequent decisions on the same lines would no longer apply, the parties having willfully agreed to be governed by the SIAC Rules.

57. The third contention of the learned counsel for the defendant is predicated on the principle of Comity of Nations as recognized by the Indian Courts, including the Supreme Court of India. **The principle of Comity of Nations,** Mr. Sibal urges, **precludes the grant of anti-suit injunctions barring the rarest of rare cases.** Such injunctions, in particular, cannot be granted where a party has already challenged a foreign Court's jurisdiction until such party has failed in such challenge. This principle, Mr. Sibal contends, has been recognized by a Division Bench of this Court in the case of **Horlicks Ltd. and Anr. vs. Heinz India (Pvt.) Ltd.,** 2010 (42) PTC 156 (Del.) (DB) where a judgment of the Canadian Supreme Court was quoted with approval as follows:- (PTC, at pages 192-193)ı"In this respect the anti-suit injunction is uniqu in that the applicant does not have to establish that the assumption of urisdiction by the foreign court will amount to an actionable wrong

> Moreover, although the application is heard summarily and based on affidavit evidence, the order results in a permanent injunction which ordinarily is granted only after trial. In order to resort to this special remedy consonant with the principles of comity, it is preferable that the decision of the foreign court not be pre-empted until a proceeding has been launched in that court and the applicant for an injunction in the domestic court has sought

> from the foreign court a stay or other termination of the foreign proceedings and failed."

58. It was emphasized that the English Court is respecting the principle of Comity, as the English Court has not proceeded with hearing the defendant's claim on merits. Instead, the English Court is only completing the pleadings so that the plaintiff's application contesting the jurisdiction of the English Court can be heard on the dates fixed, i.e., on 5th and 6th March, 2012. In such circumstances, in the event the English proceedings are injuncted by this Court prior to the English Court even examining its own jurisdiction, it would amount to an irreparable affront to the Comity of Nations, which has been recorded as one of the guiding principles to be kept in mind by Courts in deciding whether or not to grant anti-suit injunctions. In any event, keeping in mind the principles laid down by the Supreme Court of India in **Modi Entertainment Network** (supra), this Court would have to apply a much higher standard of proof in considering whether the English proceedings in London are so abusive as to defeat the ends of justice and to perpetuate injustice.

59. The fourth contention of the learned counsel for the defendant is two pronged. The first prong is that **in the event anti-suit injunction is not granted by this Court, there would be no loss of legitimate juridical advantage to the plaintiff,** who would be then required to further pursue its application before the English Court. The second prong is that if, on the other hand, an anti-suit injunction is granted by this Court, the arbitration proceedings would end in a stalemate.

60. Dealing first with the first limb of his argument that there would be no loss of legitimate juridical advantage to the plaintiff in case anti-suit injunction is not granted by this Court, Mr. Sibal urged the following points:-

(i) The plaintiff has been actively pursuing its application before the English Court challenging the jurisdiction of the English Court since June, 2011 and the expenditure already incurred by the plaintiff in the pursuit of its application before the English Court would also be wasted if the English proceedings are injuncted. It is the plaintiff's own case that the pleas raised by the plaintiff before this Court and the English Court are identical. There is no reason to pre-suppose that the plaintiff will not be given a full and

complete hearing of its application before the English Court.

(ii) The principles of res judicata in India and England are substantially the same. In fact, the jurisprudence on the issue of res judicata as cited by the Supreme Court of India from time to time is largely quoted from an English authority, viz., Dicey, Morris & Collins on the Conflict of Laws, 14th Edn., Vol.I, Page 579 at para 14-027. The relevant extract for the facility of reference is reproduced hereunder:-

"Clause (2) of the Rule. A foreign judgment may be relied on in English proceedings otherwise than for the purpose of its enforcement. A claimant who has brought proceedings abroad and lost may seek to bring a similar claim in England; or in proceedings on a different claim an issue may be raised which has been decided abroad. In such cases a foreign judgment entitled to recognition may give rise to res judicata, i.e., to a cause of action estoppel, which prevents a party to proceedings from asserting or denying, as against the other party, the existence of a cause of action, the nonexistence or existence of which has been determined by the foreign court, or to an issue estoppel, which will prevent a matter of fact or law necessarily decided by a foreign court from being re-litigated in England."

(iii) Since the year 1953, there has been a reciprocity between India and England in enforcing judgments which continues till today. In India, foreign judgments are being enforced under Section 44-A of the Code of Civil Procedure, 1908 provided the judgment is made in a reciprocating territory. United Kingdom and Northern Ireland have been notified as reciprocating territories by the plaintiff/Union of India vide Notification No.SRO 399 dated 01.03.1953. Likewise, the United Kingdom recognizes judgments from reciprocating territories as per the Foreign Judgments (Reciprocal Enforcement) Act, 1933 (Section 8). Pursuant to this Act, India was notified as a reciprocating territory in 1953, which was amended in 1958 by way of Reciprocal Enforcement of Judgments (India) Order, 1958 (Sections

3 and 4).

(iv) In view of the above, the proceedings pending before the English Courts are not oppressive or vexatious in any manner whatsoever. It is also not understood how the plaintiff contends that it will suffer irreparable injury when there has been no change in circumstances or trigger between May 11, 2011 when the judgment of the Supreme Court was rendered and the filing of the instant suit.

(v) The plaintiff itself having invoked the jurisdiction of the English Court to decide the issue of res judicata, during the pendency of the plaintiff's application before the English Court there is no cause of action for filing the present suit. In this regard, the correspondence exchanged between the parties as also the record of the English Court amply demonstrates that the plaintiff has not only invoked the jurisdiction of the English Court but is actively pursuing its application before the English Court and cannot now be heard to say that it was compelled to submit to the jurisdiction of the English Court to decide the issue of res judicata.

61. On the second limb of his argument that if an anti-suit injunction was to be granted, the arbitration would be left in stalemate, Mr. Sibal submitted that:

(i) The Malaysian Court by its judgment dated 05.08.2009 has refused to exercise jurisdiction, inter alia, on the ground that the seat of the arbitration was permanently shifted to London.

(ii) The Supreme Court has held that Indian Courts do not have the jurisdiction to decide whether the seat is London or Kuala Lumpur.

(iii) The defendant has always maintained that only the English Courts have jurisdiction to decide the issue of the seat of arbitration. On this conspectus, if this Court were to hold that the English Courts cannot decide the issue of seat, the arbitration would remain in a stalemate indefinitely. For this reason alone, the interpretation of the Supreme Court judgment as submitted by the plaintiff ought not to

be accepted.

62. The fifth contention put forth by the learned counsel for the defendant is that the defendant is eventually likely to succeed in showing that the observations made in paras 12 and 13 of the Supreme Court judgment would not operate as res judicata and, therefore, the defendant's plea that the English claim is not barred is not unconscionable. A four-fold argument is raised in support of this contention:-

(A) **Observations by the Supreme Court on the seat of arbitration were not necessary** for the decision of the case before the Supreme Court which related to whether or not the Indian Courts had no jurisdiction, **and were thus in the nature of obiter.**

(B) Observations of the Supreme Court in paras 12 and 13 of its judgment are in relation to the Indian Arbitration Act, 1996, which stands excluded in the latter part of the judgment of the Supreme Court.

(C) Even as per Indian Law, the observations in paras 12 and 13 of the Supreme Court would not operate as res judicata.

(D) The fact that OMP No.255/2006 stood dismissed and the appeal was allowed indicates that the Supreme Court never considered the question of juridical seat of arbitration.

63. Elaborating the aforesaid, the learned counsel for the defendant contended that OMP No.255 of 2006 was filed by the plaintiff, *inter alia,* seeking a declaration that the seat of arbitration remained at Kuala Lumpur. The High Court by its order dated 30th April, 2008 did not decide the issue of seat of arbitration nor entered into the merits of the case of the plaintiff. The High Court only held that it had jurisdiction to hear OMP No.255 of 2006. It was against this order that an appeal was preferred by the defendant to the Supreme Court. The thrust of the submissions before the Supreme Court was that the Indian Courts have no jurisdiction, since Part I of the Act has been excluded in view of the fact that the seat of arbitration is outside India and the law governing the arbitration agreement was chosen by the parties to be English law. Thus the issue regarding seat of arbitration was not before the Supreme Court and the Supreme Court was not called upon to decide which foreign court has jurisdiction to decide the seat of arbitration. In fact, the Supreme Court

in para 2 of its judgment identified the question which arose for consideration before the Supreme Court as follows:-

> **"2. Whether the Delhi High Court could entertain the petition filed by the Respondents under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, "the Act") for grant of a declaration that Kuala Lumpur (Malaysia) is contractual and juridical seat of arbitration and for issue of a direction to the arbitral tribunal to continue the hearing at Kuala Lumpur in terms of clause 34 of Production Sharing Contract (PSC) is the question which arises for consideration in this appeal."**

64. Mr. Sibal urged that the Supreme Court judgment is the best indicator of what was argued by the respective counsel and the reliance placed by Mr. Chandiok, the learned ASG on the written submissions of the defendant to contend that the defendant had invoked the jurisdiction of the Supreme Court to rule on whether the seat of arbitration is Kuala Lumpur or London is misconceived. The then learned Solicitor General Mr. Gopal Subramaiam had made arguments on the merits of which is the seat of arbitration (See para 10 of the Supreme Court judgment). It is for this reason alone that the written submissions of the defendant clearly state that the submissions on the issue of seat of arbitration are being made without prejudice to the defendant's contention that the issue whether the seat is London or Kuala Lumpur is not relevant for the determination of the SLP and are only being made to respond to the submissions of the plaintiff in this regard. Thus, **it cannot be said that the defendant invited a decision from the Supreme Court on the issue of the seat of arbitration.** The defendant in fact has consistently contended that the English Courts are the Courts competent to decide the issue of seat. Without prejudice to this contention, even if it is said that the defendant invited a decision on the seat of arbitration, the Hon'ble Supreme Court subsequently held that Indian Courts would not have jurisdiction to decide the issue.

65. According to Mr. Sibal a close reading of paras 15 to 19 of the judgment of the Supreme Court which resulted in the dismissal of OMP No.255 of 2006 in para 20, shows that the conclusion of the Supreme Court was based on the fact that the seat of arbitration was outside India and the law of the Arbitration Agreement was English Law. This is also

clear from the fact that the Supreme Court relied upon para 21 of **Bhatia International** (supra) which refers to the seat of arbitration being outside India as the relevant criteria to determine exclusion of Part I of the Act. Significantly also, he states, the Supreme Court did not dispose of the OMP No.255 of 2006 but dismissed the same in its entirety as not maintainable on the ground of lack of jurisdiction. This conclusion arrived at by the Supreme Court was based on the seat of arbitration being outside India and the arbitration agreement between the plaintiff and the defendant being governed by English law and no part of the reasoning depended on whether the seat of arbitration was at London or Kuala Lumpur. Mr. Sibal also pointed out that the plaintiff, in the review petition filed by it before the Supreme Court, accepts that the issue as to whether the observations in paras 12 and 13 of the judgment are binding or not was an arguable one. In fact, it is expressly stated by the plaintiff as follows:-

> "Because law as declared by this Hon'ble Court is binding under Article 141 of the Constitution of India, however, in the present case the order dismissing the petition under Section 9 of the Arbitration and Conciliation Act could lead to arguments about the binding nature of law declared by this Hon'ble Court."

66. Next, adverting to his contention that the observations in paras 12 and 13 of the Supreme Court judgment are in relation to the Indian Arbitration Act, 1996 which stands excluded, Mr. Sibal, the learned counsel for the defendant, contended that what the Supreme Court in fact observed was that while the English Arbitration Act, 1996 allowed parties to alter the seat of arbitration, the Indian Act did not, as was evident from the following observations in paragraph 13:-

> "A reading of the above reproduced provision shows that under the English law the seat of arbitration means juridical seat of arbitration, which can be designated by the parties to the arbitration agreement or by any arbitral or other institution or person empowered by the parties to do so or by the arbitral tribunal, if so authorised by the parties. **In contrast,** there is no provision in the Act under which the arbitral tribunal could change the juridical seat of arbitration which, as per the agreement of the parties, was Kuala Lumpur."

67. Without prejudice to the aforesaid, Mr. Sibal contended that **even if the Supreme Court had made observations with regard to the seat of arbitration, the same would not operate as res judicata in view of the fact that the Supreme Court ultimately held that this Court had no jurisdiction to entertain OMP No.255 of 2006** filed by the plaintiff and pursuant to the Supreme Court judgment, this Court was pleased to dismiss the said OMP. In support of his contention that the observations in paras 12 and 13 of the Supreme Court judgment would not operate as res judicata even as per Indian Law, reference was made by Mr. Sibal to the decision rendered by the Supreme Court in **Pawan Kumar Gupta vs. Rochiram Nagdeo,** (1999) 4 SCC 243, wherein it was observed as under:- (SCC, at page 250, para 19)

> "19. Thus the sound legal position is this: if dismissal of the prior suit was on a ground affecting the maintainability of the suit any finding in the judgment adverse to the defendant would not operate as res judicata in a subsequent suit."

68. On the basis of the aforesaid observations made in the case of **Pawan Kumar Gupta** (supra), it was argued that the observations made by the Supreme Court in paras 12 and 13 of its judgment are of no consequence in view of the decision contained in para 20 by which the OMP pending before the High Court was dismissed as not maintainable for want of jurisdiction.

69. Referring to the reliance placed by the plaintiff on Explanation (viii) of Section 11 CPC and the judgment of the Supreme Court reported in **Sulochana Amma** (supra), Mr. Sibal, the learned counsel for the defendant, submitted that the defendant has no quarrel with the submission of the plaintiff that even if there be a proceeding in a forum of limited jurisdiction or special jurisdiction, the final decision on the merits of an issue in that proceeding will be *res judicata* in a subsequent proceeding between the same parties, even if the said forum does not have jurisdiction to entertain the subsequent proceeding. This proposition, however, has no bearing on the present case since indubitably the Supreme Court is not a Court of limited or special jurisdiction.

70. Referring to the consent order dated 06.09.2010 passed in IA No.4/2010, Mr. Sibal argued that it was open to the Supreme Court to decide that Indian Courts had jurisdiction to decide the seat and remand

the matter back to the High Court for a decision on which is the seat of arbitration. It was for this reason that the defendant gave its consent and for no other. The contention of the learned ASG that the order on 06.09.2010 pursuant to IA No.4/2010 constitutes an agreement by the parties that the Supreme Court will decide the issue of 'seat of arbitration' is, therefore, wholly fallacious.

71. It was also contended that even otherwise any decision of a Court passed without jurisdiction is a nullity and such a decision would not give rise to the bar of res judicata. [**Sri Athmanathaswami Devasthanam vs. K. Gopalaswami Ayyangar,** (1964) 3 SCR 763 at para 14; **Hasham Abbas Sayyad vs. Usman Abbas Sayyad and Others,** (2007) 2 SCC 355 at para 22; **Muthavalli of Sha Madhari Diwan Wakf, S.J. Syed Zakrudeen and Anr. vs. Syed Zindasha and Ors.,** (2009) 12 SCC 280 at para 19; **Syed Mohd. Salie Labbai (Dead) by L.R's and Ors. vs. Mohd. Hanifa (Dead) by L.R's and Ors.,** (1976) 4 SCC 780 at para 7.]

72. It was also contended that since an appeal is a continuation of the original proceeding, the Supreme Court could not have and in fact did not decide an issue which this Court did not have the jurisdiction to decide. Emphasis was laid on the following observations made by the Supreme Court in the case of **Rachakonda Narayana vs. Ponthala Parvathamma & Anr.,** (2001) 8 SCC 173: (SCC, at page 178, para 10)

> ".....An appeal is a continuation of the suit. When an appellate Court hears an appeal, the whole matter is at large. The appellate Court can go into any question relating to rights of the parties **which a trial Court was entitled to dispose of** provided the plaintiff possesses that right on the date of filing of the suit."

73. Rebutting the contentions of the learned Additional Solicitor General, Mr. Sibal urged that in the instant case **it was not open to the plaintiff to rely either upon 'issue estoppel' or upon 'cause of action estoppel'**. The defendant had succeeded on the issue submitted to the Supreme Court that this Court did not have jurisdiction to entertain OMP No.255 of 2006. Therefore, it was not open to the plaintiff to plead *issue estoppel* against the defendant and in fact ***issue estoppel* was wholly inapplicable** to the present case, more so, in view of the fact that the Supreme Court did not apply the observations made by it in paras 12 and

13 to arrive at its conclusion at paras 19 and 20. Insofar as cause of action estoppel is concerned, he contended that the same was rightly not even pleaded by the plaintiff.

74. Mr. Sibal urged that it is trite that **parties by consent, waiver or acquiescence cannot confer jurisdiction upon a Court which it does not possess. A decision made by such a Court is non est.** It was so held in **Harshad Chiman Lal Modi vs. DLF Universal Ltd. and Anr.,** (2005) 7 SCC 791, wherein the Supreme Court while classifying the jurisdiction of a Court into three categories, viz., (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject-matter, opined that jurisdiction as to subject-matter is totally distinct and stands on a different footing, observing: (SCC, at pages 803-804, paras 30 and 32)

> "30. .....Where a court has no jurisdiction over the subject-matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is a nullity.
>
> 31. .....
>
> 32. In **Bahrein Petroleum Co.,** this Court also held that neither consent nor waiver nor acquiescence can confer jurisdiction upon a court, otherwise incompetent to try the suit. It is well-settled and needs no authority that "where a court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing." A decree passed by a court having no jurisdiction is non est and its invalidity can be set up whenever it is sought to be enforced as a foundation for a right, even at the stage of execution or in collateral proceedings. A decree passed by a court without jurisdiction is a coram non judice."

75. The sixth contention of the learned counsel for the defendant is that **the present suit is oppressive, abusive, vexatious and malafide as it is the worst imaginable case of forum shopping by the plaintiff.** In this context, it is submitted that the plaintiff at its own instance is blatantly forum shopping before three separate jurisdictions, viz., before the English Court, before the Court at Malaysia and before this Court. And as a matter of fact, the plaintiff has all along been forum shopping since the passing of the Partial Award on 31.03.2005 by challenging the

Partial Award in different fora and has also been forum shopping on the seat of arbitration. It has been categorically admitted by the plaintiff that the pleas raised by the plaintiff before this Court and before the English Court are identical. This form of blatant forum shopping, Mr. Sibal contends, has invited the disapproval of this Court in the judgment rendered by a Division Bench of this Court in the case of **Essel Sports Pvt. Ltd. vs. BCCI and Ors.,** 178 (2011) DLT 465 (DB) in the following words: (DLT, at page 488, para 27)

> "27. Having concurred with the learned Single Judge that the UK action is a two or multiple forum lis, we shall venture forward to assess whether the UK action is oppressive or vexatious. Mr. Salve's contention in this regard has already been noted by us above. We agree that in a commercial dispute, the compulsion to defend an action in a foreign jurisdiction may not invariably lead to the conclusion that the foreign proceedings are oppressive; however, **having to defend the same allegations by the same party in two different jurisdiction is unquestionably oppressive.**"

76. Mr. Sibal next contended that **the plaintiff is not entitled to seek any relief by invoking the equitable jurisdiction of this Court** in view of the blatant concealment and mis-statements made by the plaintiff before this Court including suppression of documents having significance to the lis between the parties, such as application for clarification filed by the plaintiff; plaintiff's Notice of Motion and Memorandum of Appeal filed before the Court of Appeal, Malaysia; Written Submissions filed by the defendant before the Supreme Court; plaintiff's application dated 12th August, 2010 filed in the English Court along with affidavit of Mr. David Richard Brynmor Thomas; affidavits of Ms. Pomila Jaspal, Mr. Partha Sarathi Das and Ms. Simran Dhir; Case Management Information Sheet of the plaintiff before the English Court; correspondence between the plaintiff's English counsel and the defendant's English counsel including letters dated 3rd November, 2011, 7th November, 2011, 12th December, 2011 and 15th December, 2011; order dated 14th November, 2011 which was a consent order passed by the English Court fixing the time schedule for the exchange of expert evidence and the order dated 15th December, 2011 which was also a consent order passed by the English Court extending the time line to 6th January, 2012 for the

plaintiff to file its expert evidence.

77. Besides the aforesaid suppression of material documents by the plaintiff, Mr. Sibal contended that **it is malafide and abusive for the plaintiff to contend that the Supreme Court has conclusively decided the issue of seat of arbitration despite the fact that the Special Leave petition was allowed in favour of the defendant and OMP No.255 of 2006 was dismissed.** He contended that the malafide conduct of the plaintiff was clearly evidenced by the fact that the plaintiff during the pendency of the present suit filed an amendment to its Memorandum of Appeal filed in Malaysia contending that the issue of seat of arbitration is res judicata in view of the Supreme Court judgment, while there is not a whisper in the affidavit of the Indian Counsel filed in Malaysia about the actions of the plaintiff either before the English Court or about the present suit that has been initiated by the plaintiff against the defendant. Then again, the malafide conduct of the plaintiff is clearly visible from the fact that the plaintiff, on one hand, on 12.12.2011 sought an extension of time from the English Court for filing its expert evidence on the specific ground of inability to identify such an expert; whereas, on the other hand, on 13.12.2011 the present suit and application were verified and affirmed by the plaintiff's authorised representative. The defendant's English counsel acting under a bonafide belief and completely unaware of the filing of the instant suit wrote to the plaintiff's English counsel on 14.12.2011 agreeing to the plaintiff's request for extension of time and the same was recorded in the consent order dated 15.12.2011. Before this Court, at the hearing on 03.01.2012, the counsel for the plaintiff sought time to file a rejoinder to the reply filed by the defendant on the ground that although the rejoinder had been prepared, the same was awaiting comments from the Union of India. When the said rejoinder was served upon the counsel for the defendant on 04.01.2012, the defendant's counsel found to his utter shock and surprise that the said rejoinder had been verified and affirmed by the deponent therein on 02.01.2012.

78. On the aspect of irreparable injury and balance of convenience, it was contended on behalf of the defendant that **the plaintiff cannot be heard to say that it would suffer irreparable injury or that the balance of convenience is in its favour to justify an injunction to prevent hearing of its own application.** In contrast, unless and until the plaintiff's application is heard and disposed of by the English Court,

the defendant's claim will not be adjudicated. Dates before the English Court have been fixed with the plaintiff's consent and with great difficulty. There is no reason for the plaintiff to contend that it would suffer irreparable injury if the hearing takes place on the dates fixed. In contrast, the defendant would suffer irreparable injury in the event the dates granted by the English Court were to be lost as the proceedings would be further delayed indefinitely. Moreover, till date, all steps in the English proceedings have been taken with the consent of the plaintiff. Even today, until the order of 23.12.2011, there has not been a single letter by the plaintiff to the English Court protesting against the jurisdiction of the English Court to determine its own jurisdiction, including the issue of *res judicata*.

79. Mr. Sibal, the learned counsel for the defendant, also contended that the judgments cited on behalf of the plaintiff have no application to the facts of the present case as is clear from the following:-

(i) The decision in **Venture Global Engineering** (supra) is distinguishable on the ground that the law of the arbitration agreement had not been specified in the said case whereas in the present Arbitration Agreement, English Law has been specified as the governing law.

(ii) The decision in **Pioneer Publicity Corporation** (supra) dealt with the validity of termination of a contract by DTC without any justification. The facts of this case are entirely disconnected and irrelevant to the issue in the present case.

(iii) The judgments relating to res judicata, viz., **Satish Nambiar** (supra), **Ishwar Dutt** (supra), **Swamy Atmananda** (supra), **M. Nagabhushana** (supra), **Hope Plantation Ltd.** (supra), **Makhija Construction and Engineering Private Limited** (supra) and **S. Nagaraj** (supra) have no application because the appropriate Court to decide whether the claim filed in the English Court is barred by res judicata is the English Court. The judgment in **Swamy Atmananda** (supra), which lays down that "if a Court lacks inherent jurisdiction, its judgment would be a nullity and thus principles of res judicata which is in the domain of procedure will have no application", supports the defendant's case that the observations in paras 12 and

13 of the Supreme Court judgment do not bar the English claim on grounds of res judicata.

(iv) The judgment in **K.K. Modi** (supra), which lays down that it is an abuse of the process of the Court and contrary to justice and public policy for a party to re-litigate the same issue which has already been tried and decided earlier against him, has no application. In the present case, the issue of 'seat of arbitration' has not been tried and decided against the defendant in the judgment of the Supreme Court.

(v) In **Munib Masri's** case (supra), the Judgment Debtor having suffered a judgment on merits in England, intentionally filed parallel proceedings in other countries, including in Yemen in an attempt to obtain a decision in conflict with the English judgment. The Decree Holder did not have the protection of reciprocal arrangements for enforcing the English judgment and thus the Judgment Debtor sought to take illegitimate advantage of this fact. The Court of Appeal in the Munib Masri's case (supra) in fact declined to grant anti-suit injunction in respect of countries which were parties to the Lugano Convention.

(vi) The decision in **Rupa Ashok Hurra** (supra) is irrelevant as the said case relates to the powers of the Supreme Court under Article 142 of the Constitution of India and no reliance has been placed on Article 142 on behalf of the Union of India in the present suit.

(vii) The judgment in **Kunhayammed** (supra), on which the plaintiff relies, in paragraph 13 contains an exposition of the scope of Article 136 which is not relevant to the present case, where the matter was heard as a Civil Appeal after granting leave to appeal under Article 136.

(viii) The judgment in **Oil and Natural Gas Commission** (supra) relating to stay of foreign proceedings supports the case of the defendant rather than the plaintiff. The arbitration clause in ONGC was governed by Indian Law specifically the Arbitration Act, 1940 and, therefore, the Court held that the appropriate Courts to decide any dispute

relating to the arbitration clause were Indian Courts, and the filing of an action for confirming the award in a US Court was contrary to the contract and hence abusive. In the present case, the arbitration clause is governed by English Law and on the reasoning of ONGC, the present plaint which seeks to restrain approach to the English Court to resolve disputes relating to the arbitration clause is abusive.

(ix) The decision in **A.P. State Financial Corporation** (supra) relating to the 'Doctrine of Election' does not help the plaintiff in view of the fact that the plaintiff had earlier elected to pursue the remedy in the English Court and cannot be permitted to pursue the same remedy in parallel proceedings before this Court in the present suit.

FINDINGS

80. Before I venture to render my findings on the rival contentions of the parties, a few glaring facts and the inferences to be drawn therefrom deserve to be highlighted:-

(i) In the present case, the defendant has admitted that the Supreme Court has decided the issue of 'juridical seat of arbitration' but the contention of the defendant is that the said decision would not be binding because it is merely by way of obiter. This is clear from the following extract from paragraph 15 of the written statement:-

".....Therefore, in the respectful submission of the Defendant, as the observations on seat of arbitration were not necessary to arrive at a final decision of exclusion of Part-I of the Arbitration and Conciliation Act, 1996, **the aforesaid judgment of the Hon'ble Supreme Court of India on the aspect of seat of arbitration, is by way of obiter.**"

(ii) The defendant in paragraph 7 of its written statement filed in the present suit has stated:-

"..... as of today, the Plaintiff is also bound by the said decision of High Court of Malaya at Kuala Lumpur. Accordingly, granting any interim reliefs as

prayed for by the Plaintiff qua the English Court proceedings would not curtail the likelihood of conflicting judgment as suggested by the Plaintiff. For the reasons that the conflict if any is already in existence between the judgment dated 5th August, 2009 of the High Court of Malaya at Kuala Lumpur and the judgment dated 11.05.2011 of the Hon'ble Supreme Court which, in the contention of the Plaintiff operates as res judicata on the issue of seat of arbitration....."

(iii) In the Special Leave Petition filed by the defendant before the Supreme Court, the defendant explicitly submitted that the learned Single Judge who decided OMP No.255/2006 had committed an error in law in that he had failed to appreciate that it was incumbent upon him to have first determined the seat of arbitration before determining the question as to whether this Court had jurisdiction (the seat of arbitration having shifted to London). The following extracts from the grounds taken in the Special Leave Petition filed by the defendant before the Supreme Court may be referred to in this context:-

GROUND E(iii)

"That assuming that the Arbitration Agreement was silent on the choice of curial law, it is not the law governing the contract that will govern the arbitration proceedings, but it is the law of the seat of the arbitration that will govern the conduct of the arbitration proceedings."

GROUND N

".....Moreover, the learned Single Judge has been unable to appreciate that in determining jurisdiction, the first issue to be determined is where the seat of the arbitration lies. Upon such determination, it is mandatory for the courts of that country to exercise jurisdiction over the Arbitration Agreement and the proceedings....."

GROUND X

"FOR THAT the learned Single Judge has recorded submissions of the Petitioner but failed to deal with such submissions or has

erroneously rejected the same. In this regard, it is submitted as follows:

i. That the Respondents willfully suppressed the material fact that the Arbitral Tribunal had shifted the seat of the arbitration with consent of both parties vide order dated 15.11.2003. The said order was neither pleaded nor annexed with O.M.P. No.255 of 2006 and accordingly, the Respondent No.1 had willfully suppressed the said document on which ground O.M.P. No.255 of 2006 was liable to be dismissed. It is submitted that though the aforementioned submission as well as the response of the Respondent No.1 to the same has been recorded, the learned Single Judge has not made any finding on whether there had been willful suppression by the Respondent No.1. The gravity of such an omission cannot be over stated as the Petitioner had submitted that such suppression rendered O.M.P. No.255 of 2006 liable to be dismissed on that ground alone.

ii. **That Respondent No.1 was estopped from contending that the seat of the arbitration continues to be at Kuala Lumpur as the Respondent No.1 had consented to the shift of the seat of arbitration to London and had participated in all arbitration proceedings at London till 31.03.2005. No hearings were ever held at Kuala Lumpur. These aspects were not dealt with in the Order."**

GROUND AA

"FOR THAT the learned Single Judge has erroneously recorded in paragraph 2.6 of the impugned Order that as Kuala Lumpur was reportedly struck by the epidemic SARS, the arbitral tribunal shifted the venue of arbitration from Kuala Lumpur to Amsterdam and later to London. It is respectfully submitted that the shift from Kuala Lumpur to Amsterdam was not on the same footing as the shift to London. The correct position as has been submitted is as follows:

i. The first arbitration hearing was fixed to be held at Kuala Lumpur but due to outbreak of the SARS epidemic in South East Asia, the venue was changed to Amsterdam vide Order dated 24.04.2003. The seat of the arbitration continued to remain at Kuala Lumpur, however, for convenience, the next hearing was to take place at Amsterdam.

ii. The next date of hearing at Amsterdam was fixed as 30.06.2003 vide Order dated 13.05.2003. This was the first hearing of the arbitration and thus, no hearing ever took place at Kuala Lumpur and this remains the position even today.

iii. Thereafter, vide Order dated 04.08.2003, the next hearing was fixed for London.

iv. Vide Order dated 15.11.2003, it was recorded that by consent of parties, the seat of the arbitration was shifted to London.

It is submitted that the errors stated above go to the root of the impugned Order as the manner in which the facts with regard to the shift of the seat of the arbitration to London have been recorded clearly reflects that the Learned Single Judge has been unable to appreciate the consequences of the Order dated 15.11.2003 of the Arbitral Tribunal. It is further submitted that if the sitting at London was merely for convenience, then the Order of 04.08.2003 was sufficient. There was no need for a separate order recording consent of the parties to shift the arbitral seat to London which was in accordance with Article 34.12 of the PSC and Section 3 of the English Act. These relevant facts have been completely ignored and omitted by the Learned Single Judge which is self evident from the manner in which facts have been recorded."

GROUND FF

".....The petitioner had challenged the maintainability of the petition on the following grounds:-

i. That Section 5 of the Act does not contemplate judicial

intervention of the nature as prayed for.

ii. The Respondent No.1 has suppressed material facts from this Court.

iii. That reliefs prayed for were beyond the scope of Section 9 of the Act.

iv. The reliefs sought were permanent in nature which was beyond the scope of Section 9 of the Act.

v. That the Respondent No.1 is estopped from contending that the seat of the arbitration continues to be at Kuala Lumpur.

It is submitted that the learned Single Judge has demonstrated complete non-application of mind by failing to consider the submissions of the Petitioner, which were not limited only to jurisdiction, as stated above. It is submitted that this non-application of mind goes to the root of the decision and renders the impugned Order liable to be set aside on this ground alone....."

(iv) It was while the Special Leave Petition was pending in the Supreme Court that the defendant in October, 2009 moved the High Court of Justice, Queen's Bench Division, Commercial Court, London seeking a declaration that 'The seat of the first and third arbitration is in London'. The order dated 20.10.2009 of the London Court directed the defendant to serve Union of India as soon as possible and practicable. However, the service of notice in the said Claim Petition No.2009, Folio No.1382 was got effected by the defendant on the plaintiff about six months later in the month of April, 2010.

(v) The plaintiff thereupon on 10th August, 2010 moved the Supreme Court by way of IA No.4/2010 in the pending appeal and almost simultaneously, i.e., on 12th August, 2010 filed an application before the London Court stating that the issue of juridical seat is being contested in proceedings elsewhere, i.e., in the Supreme Court of India. It was specifically stated therein as under:-

"I understand that the Government of India will separately be taking up this issue with the Supreme Court in India."

(vi) Simultaneously, the plaintiff's solicitors also wrote to the defendant's solicitors vide letter dated 12th August, 2010 clearly stating:-

"For the avoidance of doubt, this letter and our client's application are not a submission to the jurisdiction of the Courts of England and Wales."

(vii) On 11.05.2011, the judgment of the Supreme Court was pronounced and soon thereafter, i.e., on 02.06.2011, a letter was written on behalf of the plaintiff requesting the defendant to withdraw the proceedings initiated before the London Court in view of the Supreme Court judgment.

(viii) On 8th June, 2011, a draft letter addressed to the Commercial Court Listing Office, The Royal Courts of Justice was sent by the defendant with a copy to the plaintiff's solicitors seeking to re-commence the proceedings before the English Court, to which the plaintiff replied by letter dated 14.06.2011 asking the defendant's solicitors **to indicate the basis on which the defendant proposed to continue their proceedings before the London Court after the final judgment of the Supreme Court that the juridical seat of the arbitration (as opposed to the physical change to London) remained Kuala Lumpur.**

(ix) In reply to the letter dated 14.06.2011, the defendant's solicitors by letter dated 22.06.2011 specifically wrote to state that any **legal issue arising from the judgment of the Indian Supreme Court were matters for the English Court to determine.** Since this letter is significant, the relevant portion is reproduced hereunder for the sake of ready reference:-

"Accordingly, we do not see any reason for the present proceedings to be held in abeyance. Alternatively, if you are suggesting that the decision of the Supreme Court is simply another matter to which the Court should have regard, then we agree that a copy of the decision should be included in the hearing bundle....."

"Under instructions, we further inform you that our client

will proceed to serve the Court with a communication for the stay of the proceedings to be lifted in the event that your client continues to insist that the present proceedings have become unnecessary. Any legal issue arising from the judgment of the Indian Supreme Court are matters for the English Court to determine....."

(x) The order dated 14.11.2011 passed by the English Court clearly recorded as under:-

"For the avoidance of any doubt, neither this Order nor anything done pursuant to or in accordance with it shall constitute or give rise to any submission by the Defendant to the jurisdiction of the English Court or prejudice in any way the Defendant's challenge to that jurisdiction."

(xi) Significantly, the draft order circulated in the first instance by the defendant's counsel did not include the above clause which was put in the English Court's order at the specific request of the plaintiff's solicitor.

81. From the aforesaid conspectus of facts, in my considered opinion, it is amply clear that the consistent stand of the plaintiff has been that the English Court does not have jurisdiction to go into the issue of 'juridical seat of arbitration' and cannot assume jurisdiction which it does not otherwise possess. It is also borne out from the record that all the proceedings on behalf of the plaintiff (defendant before the London Court) were **without prejudice** to its aforementioned stand and there is no question of the plaintiff's submission to the English Court for seeking adjudication on the issue of res judicata as suggested by the defendant. This is also borne out by the letter dated 29.06.2011 written by the plaintiff's solicitors to the defendant, wherein it is clearly stated as under:-

"On that basis **and without prejudice** to the res judicata point, we consent to a hearing being listed for a mutually convenient date....."

82. Merely because the plaintiff participated in the Case Management Conference and filed witness statements would not, in my view, preclude the plaintiff from filing the present suit. More so, when the English Court itself recorded: **"For the avoidance of any doubt, neither this Order nor anything done pursuant to or in accordance with it shall**

constitute or give rise to any submission by the Defendant to the jurisdiction of the English Court or prejudice in any way the Defendant's challenge to that jurisdiction". In such circumstances, for the defendant to contend that the plaintiff voluntarily submitted to the jurisdiction of the English Court would be against the record of the English Court.

83. The Special Leave Petition filed by the defendant before the Supreme Court also bears out the contention of the plaintiff that the defendant invoked the jurisdiction of the Supreme Court to rule on the juridical seat of arbitration, which issue it claimed went to the root of the matter. That there was a tacit understanding that with the consent of the parties the Supreme Court would rule on the juridical seat of arbitration is also borne out by the order dated 06.09.2010 passed by the Hon'ble Supreme Court on the plaintiff's application, being IA No.4/2010, which reads as under:-

"Learned senior counsel appearing on behalf of the parties agreed that subject to completion of pleadings in the proceedings pending in both the courts in England as well as in Malaysia, neither the petitioner nor the respondent will proceed/take any proactive steps for hearing in the proceedings/applications pending in the Court in England as well as in the Court in Malaysia, till the disposal of the present SLP.

In view of the aforesaid submission, I.A. No.4 is disposed of recording the same."

84. Thus, while on the one hand the plaintiff submitted to the jurisdiction of the English Court without prejudice to its contention that by reason of the judgment of the Supreme Court the issue of juridical seat of arbitration was no longer open for examination, the defendant invoked the jurisdiction of the Supreme Court of India to decide upon the issue of the juridical seat of arbitration, which it stated went to the root of the matter. Faced with a finding from the Supreme Court that London was not the agreed juridical seat of arbitration, the defendant took a somersault and adopted the stand that any legal issue arising from the judgment of the Indian Supreme Court was a matter for the English Court to determine. It is worth mentioning, at the risk of repetition, that although the defendant in October, 2009 had moved the High Court of

Justice, Queen's Bench Division, Commercial Court, London seeking a declaration that **"The seat of the First and Third Arbitrations is in London",** apparently it deliberately chose not to serve notice of the said Claim Petition upon the plaintiff until April, 2010, despite the order of the London Court to serve the Union of India as soon as practicable. This is clearly reflective of the fact that the defendant had sought the aforesaid declaration from the English Court only by way of abundant precaution. It was on 11.11.2009 that submissions were made by the parties before the Hon'ble Supreme Court on the issue of juridical seat and the judgment was reserved by the Supreme Court and it was not until 21st April, 2010 that the plaintiff was served with notice of the filing of the Claim Petition No.2009, Folio No.1382 pending in the London Court.

85. Even thereafter, it is noteworthy that the defendant consented to the Supreme Court ruling on the issue of juridical seat of arbitration as is evident from the order dated 06.09.2010, whereby the defendant consented not to take any proactive steps for the hearing of its claim petition pending in the Court in England till the disposal of the SLP. However, finding that the decision in the SLP rendered on 11.05.2011 was in favour of the plaintiff, the defendant immediately re-commenced proceedings at London and adopted the stand that it disagreed with the plaintiff's position that the decision of the Supreme Court of India had "finally and conclusively" decided the issue pending before the English Court. The very fact that the defendant consented before the Supreme Court not to pursue its Claim Petition in London for declaration of the seat of arbitration, in my view, speaks volumes of the hope and expectation entertained by the defendant that the Supreme Court would eventually rule that the juridical seat of arbitration had shifted from Kuala Lumpur to London in view of the order of the Arbitral Tribunal dated 15th November, 2003. The said hope and expectation having been dashed, the defendant adopted the stance that the legal issues determined by the Indian Supreme Court were matters for the English Court to determine.

86. A look at the judgment of the Supreme Court would suffice to show that the issue of seat of arbitration stood adjudicated by the judgment of the Supreme Court and the Supreme Court intended the said adjudication to be final and binding between the parties. Further, the said issue was addressed before the Supreme Court by both the parties and decided upon by the Supreme Court **as the first question raised before it.** In para 9 of its judgment, the Supreme Court noted that Shri Nariman had

argued that after having expressly consented to the shifting of the seat of arbitration from Kuala Lumpur to Amsterdam in the first instance and effectively taken part in the proceedings held at London till 31.03.2005, the respondent No.1 (Union of India) was estopped from claiming that the seat of arbitration continued to be at Kuala Lumpur. In para 10 of its judgment, the Supreme Court noted the counter argument of the learned Solicitor General as follows:-

> "10. Shri Gopal Subramaniam, learned Solicitor General submitted that as per the arbitration agreement which is binding on all the parties to the contract, a conscious decision was taken by them that Kuala Lumpur will be the seat of any intended arbitration, Indian law as the law of contract and English law as the law of arbitration and the mere fact that the arbitration was held outside Kuala Lumpur due to the outbreak of epidemic SARS, the venue of arbitration cannot be said to have been changed from Kuala Lumpur to London. Learned Solicitor General emphasised that once Kuala Lumpur was decided as the venue of arbitration by written agreement, the same could not have been changed except by amending the written agreement as provided in Clause 35.2 of the PSC. He then argued that the arbitral tribunal was not entitled to determine the seat of arbitration and the record of proceedings held on 15.11.2003 at London cannot be construed as an agreement between the parties for change in the juridical seat of arbitration. He further argued that the PSC was between the Government of India and ONGC Ltd., Videocon Petroleum Ltd., Command Petroleum (India) Pvt. Ltd. and Ravva Oil (Singapore) Pvt. Ltd. and, therefore, the venue of arbitration cannot be treated to have been changed merely on the basis of the so called agreement between the appellant and the respondents. Learned Solicitor General submitted that any change in the PSC requires the concurrence by all the parties to the contract and the consent, if any, given by two of the parties cannot have the effect of changing the same. He then argued that every written agreement on behalf of respondent No. 1 is required to be expressed in the name of the President and in the absence of any written agreement having been reached between the parties to the PSC to amend the same, the consent given for shifting the physical seat of arbitration to London did not result in change of

juridical seat of the arbitration which continues to be Kuala Lumpur....."

In paragraph 12 of its judgment, the Supreme Court significantly observed:-

"We shall first consider the question whether Kuala Lumpur was the designated seat or juridical seat of arbitration and the same had been shifted to London."

The Supreme Court then went on to observe as follows:-

"In terms of Clause 34.12 of the PSC entered into by 5 parties, the seat of arbitration was Kuala Lumpur, Malaysia. However, due to outbreak of epidemic SARS, the arbitral tribunal decided to hold its sittings first at Amsterdam and then at London and the parties did not object to this. In the proceedings held on 14th and 15th October, 2003 at London, the arbitral tribunal recorded the consent of the parties for shifting the juridical seat of arbitration to London. Whether this amounted to shifting of the physical or juridical seat of arbitration from Kuala Lumpur to London? **The decision of this would depend on a holistic consideration of the relevant clauses of the PSC. Though, it may appear repetitive, we deem it necessary to mention that as per the terms of agreement, the seat of arbitration was Kuala Lumpur. If the parties wanted to amend Clause 34.12, they could have done so only by written instrument which was required to be signed by all of them.** Admittedly, neither there was any agreement between the parties to the PSC to shift the juridical seat of arbitration from Kuala Lumpur to London nor any written instrument was signed by them for amending clause 34.12. **Therefore, the mere fact that the parties to the particular arbitration had agreed for shifting of the seat of arbitration to London cannot be interpreted as anything except physical change of the venue of arbitration from Kuala Lumpur to London**....."

87. Thereafter, the Supreme Court proceeded to examine the provisions of the English Arbitration Act in juxtaposition to the provisions of the Arbitration and Conciliation Act, 1996. In paragraph 13, it held that under the English law the seat of arbitration means juridical seat of

arbitration, which can be designated by the parties to the arbitration agreement or by any arbitral or other institution or person empowered by the parties to do so or by the arbitral tribunal, if so authorised by the parties. **In contrast, it was held, there is no provision in the Act (Arbitration and Conciliation Act, 1996) under which the Arbitral Tribunal could change the juridical seat of arbitration which, as per the agreement of the parties, was Kuala Lumpur.**

It concluded:-

"Therefore, mere change in the physical venue of the hearing from Kuala Lumpur to Amsterdam and London did not amount to change in the juridical seat of arbitration."

88. In the very next paragraph, i.e., paragraph 14, the Supreme Court referred to the following passage from **Redfern v. Hunter**:-

"The preceding discussion has been on the basis that there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other way as the place or "seat" of the arbitration. This does not mean, however, that the arbitral tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an arbitral tribunal to hold meetings - or even hearings - in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses....

It may be more convenient for an arbitral tribunal sitting in one country to conduct a hearing in another country - for instance, for the purpose of taking evidence.... In such circumstances, each move of the arbitral tribunal does not of itself mean that the seat of the arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties."

89. From paragraph 15 onwards, the Supreme Court considered **the next issue** as to "whether the Delhi High Court could entertain the petition filed by the respondents under Section 9 of the Act" and held that the three-judge Bench in **Bhatia International** (supra) and the two-

judge Bench in **Venture Global Engineering** (supra) would not apply on account of the fact that in the present case the parties had expressly agreed to exclude the provisions of Part I of the Act by providing that the Arbitration Agreement contained in Article 34 shall be governed by the laws of England notwithstanding Article 33.1. As a corollary, it was held, the Delhi High Court did not have jurisdiction to entertain the petition filed by the respondents under Section 9 of the Act.

90. Thus, in effect, what the Supreme Court held in the former part of its judgment was that the governing law of the arbitration would be Indian Law, as is clear from its finding that the Production Sharing Contract would be governed by Indian Law and it could not be varied to amend Clause 34.12 of the contract, which provided for the juridical seat to be at Kuala Lumpur, **except by written instrument to be signed by all the parties.** In the latter part of its judgment, it held that the Arbitration Agreement contained in Article 34 would be governed by the laws of England, thereby excluding the applicability of Part I of the Arbitration and Conciliation Act, 1996 and the jurisdiction of the Indian Courts to rule upon matters relating to the conduct of arbitration proceedings. It also clarified that regardless of the venue of arbitral sittings, the arbitral seat would remain at Kuala Lumpur; that the English Law was different in this regard from Indian Law inasmuch as under the English Law the parties to the arbitration, the arbitral tribunal or any other person or institution vested with the power to do so could change the seat of arbitration. In contrast, a provision made in a contract governed by Indian Law for the juridical seat of arbitration could not be changed under the Arbitration and Conciliation Act, 1996, except by amendment of the contract itself. In Indian Law, there was no provision parallel to Section 3 of the English Arbitration Act.

91. It is thus clear that the Supreme Court in its aforesaid judgment clarified beyond an iota of doubt the governing law of the contract, the curial law and the distinction between the seat of arbitration and the venue of arbitration with a view to ensure that the arbitral proceedings were not stultified, delayed or abandoned. This the Court did at the behest and with the consent of the parties as is evident from the whole tone and tenor of the judgment. To render such a judgment susceptible to examination by a Court of foreign jurisdiction with the attendant risk of its overturning the judgment would, in my opinion, be against all settled principles of legal jurisprudence relating to international commercial

arbitration, including principles governing the comity of nations, and would render otiose the judgment of the highest Court of this land. To be noted at this juncture that the English Court has required the parties to tender *"expert evidence"* on the Supreme Court judgment, which concept itself is repugnant to Indian Law under which the sky is the limit of the powers of the Supreme Court and any law laid down by it is final and conclusive.

92. The plaintiff has instituted the present suit predicated on the doctrine of *res judicata,* which has been clearly enunciated and reiterated by the Supreme Court, time and again, and is based on the twin principles (i) that there should be an end to litigation, and (ii) that no person should be vexed twice for the same cause. Both the said principles, in my view, will be wholly negated if the defendant is permitted to drag the Union of India to the English Court for the re-determination of the question of issue of the juridical seat and it is this re-commencement of the proceedings which is sought to be injuncted by filing the present suit.

93. The plaintiff contends, and I think rightly so, that re-agitation of the question of seat of arbitration authoritatively pronounced upon by the Supreme Court would constitute abuse of the process of law and undoubtedly render the foreign proceedings vexatious and oppressive due to the attendant consequences. One consequence as noted above is that the English Court may come to the conclusion that the principle of *res judicata* has no application. It would then be open to the English Court to re-examine the issue of juridical seat and quite obviously come to a conclusion contrary to that arrived at by the Supreme Court of India. This would undoubtedly result in a stalemate of the arbitration proceedings with the plaintiff insisting that the juridical seat of arbitration remains in Kuala Lumpur and the defendant proceeding with the matter in the English Court. Such a situation would lead to a virtual impassT in the arbitral proceedings and possibly an abrupt end to the arbitration, thereby placing the whole claim of the Union of India in jeopardy.

94. It is important to note at this juncture, at the risk of repetition, that the Hon'ble Supreme Court observed that under the Production Sharing Contract between the parties, the Indian Law has been given primacy and it has been specifically laid down in Article 33.2 that nothing in the contract shall entitle the defendant/contractor to exercise the rights, privileges and powers conferred upon it by this contract in a manner

which will contravene the laws of India. It was also noted by the Supreme Court that Article 33.1 also emphasizes that the contract shall be governed and interpreted in accordance with the laws of India, and that Article 34.12 which pertains to the law governing the Arbitration Agreement and the seat of arbitration is an overriding provision *qua* Article 33.1; however, the said Article 34.12 does not override Article 33.2. Thus, the contract clearly lays down that contravention of the laws of India is wholly impermissible. *Res judicata* which encompasses within its fold the principle of *issue estoppel* is an intrinsic part of the laws of India and its public policy. Conversely, the underlying object behind the doctrine of *res judicata* and *issue estoppel* is the public policy of India. Due regard to the laws of India and its public policy must, therefore, in my view, be held to be of paramount importance.

95. The defendant's reliance on the judgment of **National Thermal Power Corporation** (supra) is also misplaced as the governing law in the present case is Indian Law under Article 33 and by virtue of Article 34.12, Article 33.2 which provides that the Laws of India shall not be contravened is the overriding provision. The defendant in its written statement itself admits that it is not in any manner claiming anything inconsistent with Indian Law. In any event, the present suit is based on breach of contract and vexatious and oppressive proceedings. The plaintiff in the present suit is not seeking adjudication with respect to the seat of arbitration or the applicability of law. That part stands adjudicated by the judgment of the Supreme Court.

96. Significantly, the Supreme Court in the case of **Laxman Prasad vs. Prodigy Electronics Ltd.,** (2008) 1 SCC 618 after considering the National Thermal Power Corporation judgment held as under:- (SCC, at page 625, para 30)

> "30. We find considerable force in the submission of the learned counsel for the respondent Company. In our view, "cause of action" and "applicability of law" are two distinct, different and independent things and one cannot be confused with the other."

97. Further, as regards the contention of the defendant that an order of anti-suit injunction ought not to be granted as it would transgress the norms of judicial comity, indubitably the settled position in law is that an anti-suit injunction should be granted only if there is an impending risk of conflicting judgments and, if and only if the proceedings in the Court

of foreign jurisdiction would perpetuate injustice. This Court is not oblivious to the fact that while granting anti-suit injunction it must tread cautiously having regard to all the facts and circumstances of the case, but this Court is also mindful of the fact that an anti-suit injunction operates against the party concerned and not against the court of foreign jurisdiction. Moreover, this Court cannot turn a blind eye to the vexation and oppression which would be caused to the plaintiff by compelling it to re-litigate on an issue upon which the Supreme Court has given its final and conclusive determination. To compel it to do so would constitute the worst imaginable case of abuse of the process of the Court, besides giving a complete go-by to the principle of *res judicata* and *issue estoppel* which govern the public policy of India.

98. Reference may be made to the decision of Supreme Court rendered in **M/s. V.O. Tractoroexport, Moscow vs. M/s. Tarapore and Company and Anr.** 1969 (3) SCC 562, wherein it was observed as follows:

> "The rule as stated in Halsbury's Laws of England, Vol. 21, at page 407, is that with regard to foreign proceedings, the court will restrain a person within its jurisdiction from instituting or prosecuting suits in a foreign court whenever the circumstances of the case make such an interposition necessary or, proper. **This jurisdiction will be exercised whenever there is vexation or oppression.** In England, Courts have been very cautious and have largely refrained from granting stay of proceedings in foreign Courts (Cheshire's Private Industrial Law, 7th Ed. pages 108-110). **The injunction is, however, issued against a party and not a foreign court.**"

99. Then again, while there can be no quibble with the proposition that the principle of Comity of Nations must always remain in the forefront of the judicial mind while ruling upon a matter relating to international commercial arbitration and England being a reciprocating territory, the English Courts must be given due deference, it cannot also be lost sight of that issue estoppel will operate in a case where the highest court of this country has rendered its findings on a particular issue. To render the said findings open to re-examination and a re-look by a Court of foreign jurisdiction, even if it be a friendly foreign court, with the obvious intent from the side of the defendant to have the said findings reversed by the

foreign court would be against all principles of Comity of Nations. In my view, the Supreme Court of India having rendered a decision on an issue, the Comity of Nations requires that due regard be given to the said decision and it must be held that the said decision ought not to be rendered susceptible to being declared non est by a Court of foreign jurisdiction. This would be undermining the significance of the judgment rendered by the highest Court of the country and the authoritative nature thereof, and that too at the behest of the defendant for its own limited ends.

100. A distinction deserves to be noted at this juncture between *res judicata* and precedent in view of the defendant's plea that though the Supreme Court has decided the issue of juridical seat of arbitration, the said decision would not be binding because it was merely by way of obiter. Placing the principle of *res judicata* on a higher pedestal than precedent, the Supreme Court in **Makhija Construction and Engineering Private Limited** (supra) held that a precedent operates to bind in similar situations in a distinct case, whereas res judicata operates to bind parties to proceedings for no other reason but that there should be an end to litigation. Further, in the case of **S. Nagaraj** (supra), the Supreme Court pertinently noted that the question whether the decision is correct or erroneous has no bearing upon the question whether it operates or does not operate as *res judicata*. The Court also noted that the High Court had failed to appreciate that the principle of per incurium has relevance to the doctrine of precedent but has no application to the doctrine of res judicata. Thus, quite clearly **the principles relating to precedent, per incurium, obiter and the like have no application to the doctrine of *res judicata*,** which is governed by *cause of action estoppel* and *issue estoppel* in order to ensure the attainment of finality, which is the ultimate object of all civilized systems of jurisprudence, for, otherwise legal ingenuity would ensure the unending and vexatious pursuit of a claim even if it is wholly spurious. Litigation would then become equivalent to an open and festering wound, rendering every decision open to being impeached collaterally, turning judicial discipline into a dead letter.

101. Further, the reliance placed by the learned counsel for the defendant on the case of **Pawan Kumar Gupta** (supra) is also wholly misplaced. The observation of the Supreme Court in the said case that *"if dismissal of the prior suit was on a ground affecting the maintainability*

of the suit any finding in the judgment adverse to the defendant would not operate as res judicata in a subsequent suit" cannot be read in isolation and the judgment must be read in its entirety. In the very same judgment the Supreme Court held that there was *"no hurdle in law for the defendant to file an appeal against the judgment and decree in that first suit as he still disputed the decisions on such contested issues."* Admittedly, the defendant in the present case did not file any review against the judgment dated 11.05.2011 of the Supreme Court. The second and important point of distinction is that in the said case the Court was not dealing with an order passed by the Supreme Court.

102. The defendant's reliance on the judgment in **Sri Athmanathaswami Devasthanam** (supra) is also inapt for the same reason, namely, in view of the all-encompassing jurisdiction of the Supreme Court to decide any issue raised before it. Likewise, the reliance placed by the defendant upon the judgments of **Hasham Abbas Sayyad** (supra) and **Muthavalli of Sha Madhari Diwan Wakf** (supra) is misplaced, as in the present case the order was passed by the Supreme Court itself and it cannot be said that the Supreme Court lacked jurisdiction. In any case, the question whether the judgment of the Supreme Court is without jurisdiction can only be gone into by the Supreme Court itself and cannot be raised in collateral proceedings. Reliance on the judgment of **Rachakonda Narayana** (supra) is also of no avail to the defendant as in the said case it was laid down that the appellate court can go into any question relating to the rights of parties which a trial court was entitled to dispose of, an appeal being a continuation of a suit. To be noted that the said decision is not on the issue of *res judicata* and the aforesaid observations were made by the Supreme Court in the context of powers of appellate courts and not with reference to its own powers.

103. The judgment in **Syed Mohd. Salie Labbai** (supra) relied upon by the defendant is in fact in favour of the plaintiff. It categorically lays down that before a plea of res judicata can be given effect to, the following conditions must be fulfilled:-

"(1) that the litigating parties must be the same;

(2) that the subject-matter of the suit also must be identical;

(3) that the matter must be finally decided between the parties; and

(4) that the suit must be decided by a court of competent jurisdiction."

All the above four conditions necessary for the applicability of res judicata stand satisfied in the present case.

104. The observation in **Essel Sports Pvt. Ltd.** (supra) relied upon by the defendant to the effect that **"having to defend the same allegations by the same party in two different jurisdiction is unquestionably oppressive"** also entirely supports the case of the plaintiff rather than the case of the defendant.

105. The defendant has cited **Seismic Shipping Inc.** (supra) as adjudicated by the High Court of Justice, Queen's Bench Division Admiralty Court and by the Court of Appeal for the proposition that anti-suit injunction cannot be granted solely in aid of a judgment. The said case stands adequately distinguished by the case of **Munib Masri** (supra), wherein to protect the jurisdiction of English Court, it was held that the English Court may injunct a foreign defendant against whom there is an English judgment (in proceedings to which the foreign defendant has submitted) from seeking to re-litigate the same issues abroad.

106. The defendant's reliance upon the judgment in **Horlicks Ltd.** (supra) is also misplaced as the said case was intrinsically not one of anti-suit injunction but was of applicability of 'forum non convenience' amongst domestic fora. The reliance placed upon page 193 of the said judgment wherein reference is made to a Canadian judgment noted by the Division Bench of this Court is also of no avail to the defendant as the same was neither the view of the Division Bench nor it endorsed the Canadian view. The question was only whether the principle of 'forum non convenience' would apply to domestic fora. In fact, the proposition of law as sought to be advanced on behalf of the defendant based on the **Horlicks** case (supra) is neither followed in the said case nor in any other judgment of any Indian Court, namely, that the decision of the foreign Court cannot be pre-empted until a proceeding has been launched in that Court and the applicant for an injunction in the domestic Court has sought from the foreign court a termination of the foreign proceeding and failed. It merits recalling that in the **ONGC** case (supra), the Supreme Court specifically held that merely because the same relief can be obtained from the foreign court is no ground to refuse anti-suit injunction. The Division Bench of this Court in the case of Essel Sports Pvt. Ltd. (supra)

also granted anti-suit injunction without asking the plaintiff to first approach the London Court.

107. The recent decision of the Supreme Court in **Yograj Infrastructure Ltd.** (supra) cited by the defendant is wholly inapplicable to the facts of the present case. In the said case, an appeal was filed under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 for setting aside an interim order. After noting that there was no ambiguity that the Singapore International Arbitration Centre Rules (for short "SIAC Rules") would be the curial law of the arbitration proceedings and the seat of arbitration was at Singapore, the Court observed that the immediate question which arose was "Whether in such a case the provisions of Section 2(2), which indicates that Part I of the above Act would apply, where the place of arbitration is in India, would be a bar to the invocation of the provisions of Sections 34 and 37 of the Act, as far as the present arbitral proceedings, which are being conducted in Singapore, are concerned." On consideration of the decision in **Bhatia International** (supra), **Venture Global Engineering** (supra) and **Citation Infowares Ltd.** (supra) , the Court held that the said decisions would have no application once the parties agreed by virtue of Clause 27.1 of the agreement that the arbitration proceedings would be conducted in Singapore, i.e., the seat of arbitration would be in Singapore, in accordance with the SIAC Rules as in force at the time of the signing of the agreement. This effectively shut out the applicability of Part I of the 1996 Act, including the right of appeal under Section 37 thereof. It is beyond cavil that this is precisely what has been held by the Supreme Court in paras 15 to 20 of its judgment in the present case.

108. As regards the test laid down by the Supreme Court in the case of **Modi Entertainment Network** (supra), there is no denying the fact that the same have been squarely met in the following manner:-

(a) It is not denied that the plaintiff and the defendant are amenable to the personal jurisdiction of this court.

(b) If the injunction is denied, ends of justice will be defeated as the plaintiff will be required to re-litigate on the aspect of 'seat of arbitration' before the English Court.

(c) In view of the clear finding of the Supreme Court that Kuala Lumpur was the seat of arbitration, it cannot be said that restraining the defendant from pursuing its claim

before the English Court is against the principle of comity of nations.

109. While it is well established that an injunction is granted as an ancillary to the main relief and flows out of a cause of action which has accrued to the plaintiff and even *quia timet* injunctions are granted by Courts on the plaintiff's establishing to the satisfaction of the Court that some threatened action by the defendant will constitute an actionable civil wrong, in contrast in an anti-suit injunction action the plaintiff does not have to establish either accrual of a cause of action or apprehension of an actionable wrong. In that sense, an anti-suit injunction is unique in its conception and there is no denying that the equitable power to grant an anti-suit injunction in restraint of a litigation in foreign soil exists only to serve equity and shut out unconscionability. The grant or non-grant of such an injunction wholly depends upon whether the assumption of jurisdiction by a foreign court in the facts and circumstances of a particular case, taken in their entirety and viewed holistically, would be oppressive or vexatious or an abuse of the process or would amount to the loss of juridical or other advantage, in the context of all other factors, to one or the other party or an injustice would be perpetuated thereby.

110. Viewed from any angle, the present case *prima facie* appears to this Court to be one which could justify the passing of such an injunction order. On the other hand, if the injunction is declined, the plaintiff would be vexed twice over(that is, once in the natural forum and once in the foreign forum) for establishing its plea that Kuala Lumpur is the designated seat of arbitration which cannot be changed without altering the contract itself. It would be neither fair nor equitable to compel the plaintiff to re-commence pursuit of a matter in a foreign country when the highest court of this land has held in favour of the plaintiff, that too, on the defendant invoking its jurisdiction. This would amount to perpetuating injustice and possibly result in conflicting judgments of two courts causing significant harm to the arbitration proceedings and delaying the same for an indefinite period of time, possibly resulting in their abrupt termination.

111. In conclusion, it may be stated that judged by the tri-partite test of *prima facie* case, balance of convenience and irreparable injury, the present case is a proper case for the grant of an injunction in favour of the plaintiff. *Prima facie* the initiation of proceedings by the defendant

at London during the pendency of the Special Leave Petition before the Supreme Court of India was unconscionable, vexatious and oppressive and an abuse of the process of law. It would be unduly harsh on the plaintiff to put the plaintiff through the inconvenience and uncertainty of litigating more than once on the same issue at a prohibitively high cost in a foreign land. The balance of convenience also tilts in favour of the plaintiff, as a necessary outcome of multiplicity of proceedings could be potentially conflicting decisions. Most importantly, the preservation of the integrity of the proceedings before the Hon'ble Supreme Court of India, which culminated in the final judgment and order dated 11.05.2011, must necessarily be protected. The plaintiff has a high degree of probability of obtaining the relief sought for in the plaint, and as noticed hereinabove, the plaintiff, as is clear from the order of the English Court dated 14.11.2011, has made it expressly clear that its participation in the proceedings before the English Court is without prejudice to its challenge to the jurisdiction of the English Court. Hence, the same cannot be an inhibiting factor in the grant of injunction based on comity of nations. The relief sought for in the application, if not granted, will cause irreversible loss and damage to the plaintiff without any juridical advantage enuring to the defendant.

112. Resultantly, this Court hereby passes an order of temporary injunction restraining the defendant from pursuing Claim No.2009, Folio 1382 filed in the High Court of Justice, Queen's Bench Division, Commercial Court, London against the plaintiff.

113. IA No.21069/2011 is allowed accordingly.

CS(OS) 3314/2011

List on 16th April, 2012 for laying down the time frame for the disposal of the above suit.

ILR (2012) III DELHI 247
IA

INSTITUTE OF HUMAN BEHAVIOUR & ALLIED SCIENCES **....PLAINTIFF**

VERSUS

GOVT. OF NCT OF DELHI & ORS. **....DEFENDANTS**

(GITA MITTAL, J.)

IA NO. : 4518/2006 & 8011/2006 IN CS (OS) NO. : 670/2006 **DATE OF DECISION: 05.03.2012**

(A) Code of Civil Procedure, 1908—Suit relates to land, being subject matter of litigation in various suits for long—Plaintiff, a registered society, came into existence for conversion of erstwhile Hospital of Mental Diseases to a an institute to look after all aspects of mental health of citizens—A gazette notification was published in the official gazette on 30th December, 1993 issued by the Lieutenant Governor of Delhi transferring the management of the existing Hospital for Mental Diseases, Shahdara, Delhi from the Govt. of NCT of Delhi to the plaintiff.

The plaintiff is stated to be a society registered on 30th July, 1991 under the Societies Registration Act, 1860. The Society came into existence by virtue of an order passed by the Supreme Court of India in Writ Petition No. 2848/1983 **People's Union for Civil Liberties vs. UOI and Ors.,** directing that the erstwhile Hospital for Mental Diseases, Shahdara be converted into a premier institute looking after all aspects of mental health of the citizens. The order dated 12th November, 1991 passed by the Supreme Court of India placed before this court shows that in this writ petition the court was concerned with the issue of the facilities available

for the mentally challenged persons. The court has observed that land had been allocated and on principle, shifting of the existing hospital had been found to be indispensable.

(Para 9)

A gazette notification was further published in the official gazette on 30th December, 1993 issued by the Lieutenant Governor of Delhi transferring the management of the existing Hospital for Mental Diseases, Shahdara, Delhi-95 from the Govt. of NCT of Delhi-defendant no. 1 herein to the plaintiff. As a result, all land, construction, equipment, etc. of the erstwhile hospital stood vested with the plaintiff.

(Para 10)

(B) Parties to the suit—Suit filed by Institute of Human Behaviour & Allied Sciences (IHBAS) against the Government of NCT of Delhi—Delhi Development Authority and Land & Development Department, Office of the Ministry of Works & Housing as defendant nos. 1, 2 and 3 respectively other defendants in respect of land being Khasra nos. 317/17 and 318/17 min admeasuring 16.98 acres in Village Tahrpur, which has been the subject matter of various litigation and claims by Het Ram (defendant no.4 herein); deceased Kewal Ram @ Kewal (represented by legal heirs defendant nos. 5 (i) to (iii); Ganga Sahai ad Inderraj. Complaint was made by the Medical Superintendent, Hospital for Mental Diseases, Shahdara against Sh. Het Ram, Sh. Kewal; Sh. Ganga Ram Sahai and Sh. Inder Raj. Consequently notice dated 16th September, 1972 under section 4 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971—Estate Officer passed a detailed order of eviction dated 19th November, 1973 arriving at a conclusion that there was no valid lease in favour of the notices including Het Ram the defendant no. 4 as well as Kewal Ram; and therefore they had no right to occupy the disputed land and their possession was unauthorized. The order

of eviction was jointly assailed by the four notices Het Ram; deceased Kewal; Inder Raj and Ganga Sahai by way of an appeal bearing PPA No. 88/1973 before the learned Add. District Judge. This appeal was rejected by a detailed judgment dated 28th March, 1974 passed by Justice G.R. Luthra, granting time up to 30th April, 1974 to the appellants to vacate the land and to deliver possession. Het Ram, Kewal, Inder Raj and Ganga Sahai carried a joint challenge against the order of the Estate Officer on the plea of tenancy and the judgment of the learned ADJ to Hon'ble High Court by way of Civil Writ No. 550/1972, which was dismissed. LPA was dismissed vide order dated 10th April, 1980. Petition under Order 21 Rule 32(5) of the CPC was filed by Shri Het Ram on 15th September, 1982 seeking execution of the aforesaid judgment. FAO. No. 391/2000: Order dated 16th February, 2004 was passed with the agreement of both parties that the trial Court should expedite disposal of the pending suit proceedings within a period of six months.

The present plaintiff assailed the order dated 12th of August, 2000 by way of FAO No. 391/2000 before this court which remained pending for a considerable period. Finally, an order dated 16th February, 2004 was passed with the agreement of both parties that the trial court should expedite disposal of the pending suit proceedings within a period of six months. Extension of the period for disposal of the suit has been necessitated and applications to this effect stand granted. It was also agreed on 13th October, 2004 that the interim order of 12th of August, 2000 shall continue till disposal of the suit. **(Para 64)**

(C) Plaintiff prayed for interim orders against the defendants from causing any further wrongful interference in the peaceful possession of the suit property and also for restraining them from creating third party interest by sale, loss or damage, trespassing, demolishing, additions, alterations,

construction and eviction on the suit property. Also prayer made for restraining defendant nos. 1 to 3 from executing any deed or documents creating right, title or interest in the suit property in favour of defendant no. 4 and legal heirs of defendant no.5 or any other third party.

(D) Contention of the Plaintiff—That the favourable orders were procured by defendants 4 and 5 (i.e. Het Ram and Kewal Ram) by committing fraud on the Court and utilising the shield there of to occupy public land—Plaintiff also argued that it was not party to previous litigations initiated by the defendant no. 4 and 5, and was not bound by any adjudication therein. It was also contended that defendant 4 and 5 set up plea of tenancy in the initial cases against the government—Also the aforesaid defendants concealed this plea and judgments of Courts thereof—Re-agitated the matter again on plea of adverse possession—Present defendants despite the knowledge of the true owner of the property did not impead it—They set up false claim of cultivator possession.

(E) Contention of the Defendants—That the possession of the suit property was derived from forefathers of the defendants and hence acquired title by adverse possession—Also argued that any objection to the previous judgements were barred by limitation as plaintiff was not a statutory authority and window of 30 years vide Art. 65 of Limitation Act is inapplicable—Also the plaintiff had indulged in forum shopping by virtue of several remedies invoked by it.

(F) It is well settled that a judgment in a civil suit is inter partes and is not a judgment in rem. Given the claim of Het Ram and Kewal Ram against the defendants in Suit No. 293/1998, the claim of ownership by adverse possession can bind only the defendants in the said

suit. The judgment dated 8th April, 1999 thus has to bind only the Union of India and the Land and Development Office who were the defendants in the suit (CS 298/1998). The judgment cannot bind IHBAS which was not a party to those proceedings. Het Ram-defendant nos. 4 also states this legal position in their written submissions dated 21st April, 2010 filed in the present case. The facts placed before this court also do not render it possible for this Court to hold these proceedings that Het Ram and Kewal Ram (or his successors) were in settled, exclusive, continuous, open and hostile possession of the suit land or any portion thereof or had ever asserted title of the property to support a finding that they had acquired title by adverse possession. Plaintiff has made out a prima facie case for grant of ad interim injuction. Balance of convenience is in favour of the plaintiff. Grave and irreparable loss and damage shall enure not only to the plaintiff but to the wider public at large which would be utilising the services available in the mental hospital which are certainly in short supply in the suit. Balance of convenience and interests of justice are also in favour of the plaintiff and against the defendants. Interim injunction granted. Since the land claimed by Het Ram in Suit No. 47/2000 is the subject matter of the present suit wherein Het Ram is also a party—The issues in the previous suits are directly and substantially in issue in the first suit. It also appears that the parties would be relying on the same evidence in support of their contentions in both the suits and relying on the case of *Chitivalasa Jute Mills vs. Jaypee Rewa Cement,* consolidated both the suits.

It is accordingly directed as follows :-

(i) CS No.18/2005 (earlier Suit No.47/00) Het Ram vs. Institute of Human Behavior And Allied Sciences shall stand withdrawn from the trial court and transferred for adjudication

with the present case. The trial court shall transmit the records of the case to this court.

(ii). Upon receipt of the record of the case, the same shall be placed alongwith the present suit before the court for appropriate orders regarding consolidation if required.

(iii) This application is allowed in the above terms.

(Para 383)

Important Issue Involved: (A) Possession is flexible term and is not necessarily restricted to mere actual possession of the property. The legal conception of possession may be in various forms. The two elements of possession are the corpus and the animus. A person though in physical possession may not be in possession in the eye of law, if the animus be lacking.

(B) No one, including the true owner, has a right to dispossess the trespasser by force if the trespasser is in settled possession of the land and in such a case unless he is evicted in the due course of law, he is, entitled to defend his possession even against the rightful owner.

(C) Tests which may be adopted as a working rule for determining the attributes of 'settled possession':

(i) That the trespasser must be in actual physical possession of the property over a sufficiently long period;

(ii) That the possession must be to the knowledge (either express or implied) of the owner or without any attempt at concealment by the trespasser and which contains an element of ***animus possidendi***. The nature of possession of the trespasser would, however, be a matter to be decided on the facts and circumstances of each case;

(iii) The process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced to by the true owner; and

(iv) That one of the usual tests to determine the quality of settled possession, in the case of cultivable land would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession.

(D) Law draws a distinction between possession and occupation. Mere occupation of another's property is not by itself construed as "possession" in the eyes of law.

(E) The Doctrine of Election suggests that when two remedies are available for the same relief, the party to whom the said remedies are available has the option to elect either of them but that doctrine would not apply to cases where the ambit and scope of the two remedies is essentially different.

(F) The doctrine of election is based on the rule of estoppels, the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel) which is a rule in equity. By that rule, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he othewise would have had.

(G) The principle of waiver although is akin to the principle of estoppels; the difference between the two is that whereas estoppels is not a cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration.

(H) High Court has the requisite jurisdiction to even suo motto withdraw a suit to its file and adjudicate itself all or any of the issues involved therein.

[Sa Gh]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Sultan Singh and Mr. N.N. Sarvaria, Advocates.

FOR THE DEFENDANTS : Mr. Sanjay Poddar and Mr. Mohit Auluck, Advocate for defendant nos. 1 and 3 Mr. P.S. Patwalia, Sr. Advocate and Mr. Arvind Nayar, Advocate Mr. Sushant Kumar and Mr. Devendra Nautiyal, Advocate for defendant no. 4.

CASES REFERRED TO:

1. *Khatri Hotels P. Ltd. & Anr.* vs. *UOI & Anr.* 182 (2011) DLT 597 (SC).
2. *Competition Commission Of India* vs. *Steel Authority of India Ltd.,* (2010) 10 SCC 744.
3. *Girjesh Shrivastava & Ors.* vs. *State of Madhya Pradesh & Ors.* (2010) 10 SCC 707.
4. *Mahesh Yadav and Ors.* vs. *Rajeshwar Singh Ors.,* (2009) 2 SCC 205.
5. *T. Vijendradas and Anr.* vs. *M. Subramanian and Ors.,* AIR2008SC563.
6. *Babulal Badriprasad Varma* vs. *Surat Municipal Corporation & Ors.,* (2008) 12 SCC 401 : AIR 2008 SC 2919.

7. *Ganpatibhai Mahijibhai Solanki* vs. *State of Gujarat and Ors.* (G-XII) 2008 (3) SCALE 556.
8. *A.V. Papayya Sastry & Ors.* vs. *Govt. of AP and Ors.* (G-III) (2007) 4 SCC 221.
9. *P.T. Munichikkanna Reddy & Ors.* vs. *Revamma & Ors.,* (2007) 6 SCC 59.
10. *N. Khosla* vs. *Rajya Lakshmi* (2006) 3 SCC 605.
11. *Smith* vs. *Kvaerner Cementation Foundations Ltd (Bar Council intervening)* 2006 3 All ER 593.
12. *T. Anjanappa and Ors.* vs. *Somalingappa and Anr.* : 2006(8)SCALE624.
13. *Sh. Shahabuddin* vs. *State of U.P. & Ors.,* MANU/DE/0546/2005.
14. *Saroop Singh* vs. *Banto* (2005) 8 SCC 330.
15. *Bishna alias Bhiswadeb Mahato & Ors.* vs. *State of West Bengal* (2005) 12 SCC 657.
16. *Bhaurao Dagdu Paralkar* vs. *State of Maharashtra & Ors.(G-V),* (2005) 7 SCC 605.
17. *Shahabuddin* vs. *State of U.P.* MANU/DE/0546/2005.
18. *Devasahayam (Dead) By LRs* vs. *P. Savithramma & Ors.,* (2005) 7 SCC 653.
19. *State of A.P. and Anr.* vs. *T. Suryachandra Rao* : AIR2005SC3110.
20. *Bhaurao Dagdu Paralkar* vs. *State of Maharashtra and Ors.:* AIR 2005 SC 3330.
21. *Bhanu Kumar Jain* vs. *Arcbana Kumar and Anr.* MANU/SC/1079/2004 : AIR2005SC626.
22. *Rame Gowda (D) by Lrs.* vs. *M. Varadappa Naidu (D) by Lrs and Anr.* (2004) 1 SCC 769.
23. *Chitivalasa Jute Mills* vs. *Jaypee Rewa Cement)* (2004) 3 SCC 85.
24. *Commissioner of Customs Kandla* vs. *Essar Oil Ltd. & Ors.* (2004) 11 SCC 364.

25. *Dattatreya & Ors.* vs. *Mahaveer & Ors. (G-X)* 2004) 10 SCC 665.
26. *Ramrao* vs. *All India Backward Class Bank Employees Welfare Assn.* (2004) 2 SCC 76 at para 27.
27. *Khetrabasi Biswal* vs. *Ajay Kumar Baral & Ors.* (2004) 1 SCC 317.
28. *Army Welfare Housing Organisation* vs. *Sumangal Services (P) Ltd.* (2004) 9 SCC 619 MD.
29. *Md. Mohammed Ali (dead) by LRs* vs. *Sri Jagdish Kalita and Ors.* (2004)1SCC271.
30. *Krishan Bahadur* vs. *Poorna Theatre* (2004) 8 SCC 229.
31. *Karnataka Board of Wakf* vs. *Govt. of India :* (2004) 10 SCC 779.
32. *Md. Mohammad Ali (Dead) by LRs.* vs. *Jagdish Kalita and Ors.* : (2004)1SCC271.
33. *A. Umarani* vs. *Registrar, Cooperative societies and Ors.* : (2004)IIILLJ780SC.
34. *Sopan Sukhdeo Sable and Ors.* vs. *Assistant Charity Commissioner* AIR 2004 SC 1801.
35. *Ramaiar* vs. *N. Narayan Reddy [Dead] by LRs.,* (2004) 7 SCC 541.
36. *Abdul Rahman* vs. *Prasony Bai & Anr.,* (2003) 1 SCC 488.
37. *Ram Chandra Singh* vs. *Savitri Devi* (2003) 8 SCC 319.
38. *Ram Preeti Yadav* vs. *U.P. Board of High School and Intermediate Education and Ors.* : AIR2003SC4268.
39. *Nagin Chand Godha* vs. *Union of India and others* 2003(70) DRJ 721.
40. *Kendriya Vidyalaya Sangathan and Ors.* vs. *Ajay Kumar Das and Ors.* : (2002)IILLJ1057SC.
41. *Sheela and Ors.* vs. *Firm Prahlad Rai Prem Prakash* : [2002]2SCR17.
42. *Darshan Singh and Ors.* vs. *Gujjar Singh (dead) by LRs and Anr.* [2002]1SCR91.

43. *Madho Prasad* vs. *Ram Krishan,* 94 (2001) DLT 254.
44. *Pallav Seth* vs. *Custodian Ors.* (2001) 7 SCC 749.
45. *State of Rajasthan* vs. *Harphool Singh (dead)* MANU/SC/0348/2000 : (2000)5SCC652.
46. *United India Insurance Co. Ltd.* vs. *Rajendra Singh and Ors.,* [2000] 2 SCR 264.
47. *Roop Singh (Dead) Through Lrs.* vs. *Ram Singh (Dead) Through Lrs.* (2000) 3 SCC 708.
48. *United India Insurance Co. Ltd.* vs. *Rajendra Singh and Ors.,* [2000] 2 SCR 264.
49. *State of Rajasthan* vs. *Harphool Singh (Dead) through His LRs,* 2000 (5) SCC 562.
50. *Raunaq International Limited* vs. *IVR Constructions Limited and others,* 1999 (1) SCC 492.
51. *Kewal* vs. *Estate Officer,* IHBAS PPA No.21/1999.
52. *Prabhat Bhai Shankar Bhai Parmar* vs. *Mahinbhai Nanabhai Panwar & Ors.* 1 (1999) CLT 569.
53. *K.K. Modi* vs. *K.N. Modi* 1998(3) SCC 573.
54. *P.R. Deshpande* vs. *Maruti Balaram Haibatti* [(1998) 6 SCC 507].
55. *Navalram Laxmidas Devmurari* vs. *Vijayaben Jayvantbhai Chavda* AIR 1998 Gujarat 17.
56. *Govt. of Gujarat* vs. *Patel Chhotabhai Bhaijibha* (relied upon in AIR 1998 Guj 17.
57. *Navalram Laxmidas Devmurari* vs. *Vijayaben Jayvantbhai Chavda,* AIR 1998.
58. *Bengal Waterproof Ltd.* vs. *Bombay Waterproof Manufactuirng* (1997) 1 SCC 99.
59. *Madhvakrishna & Anr.* vs. *Chandra Bhaga & Ors.,* (1997) 2 SCC 203.
60. *S.C. Jain* vs. *Bindeshwari Devi* 67 (1997) DLT 189.
61. *D.L. D.N. Venkatarayappa and Anr.* vs. *State of Karnataka and Ors.* MANU/SC/0766/1997 : AIR1997SC2930.

62. *Ramniklal N. Bhutta and another* vs. *State of Maharashtra and others,* (1997) 1 SCC 134.
63. *D.N. Venkatarayappa and Anr.* vs. *State of Karnataka and Ors.,* AIR 1997 SC 2930.
64. *Hemaji Waghaji Jat* vs. *Bhikhabhai Khengarbhai Harijan & Ors.(AP-V)* Civil Appeal No. 1196/1997.
65. *Dr. Mahesh Chand Sharma* vs. *Smt. Raj Kumari Sharma* AIR1996SC869.
66. *Kewal* vs. *Estate Officer,* IHBAS RCA No.19/1996 (PPA No.4/2008).
67. *Prashant Ramachandra Deshpande* vs. *Maruti Balaram Haibatti,* 1995 Supp (2) SCC 539.
68. *R. Chandevarappa & Ors.* vs. *State of Karnataka & Ors.,* (1995) 6 SCC 309.
69. *Anu Sahed Bala Sahed* vs. *Balwant @ Bala Saheb* [1995] 1 SCR 88.
70. *R. Changevarappa* vs. *State of Karnataka* MANU/SC/0805/1995 : (1995)6SCC309.
71. *Vidaya Devi @ Vidya Vati* vs. *Prem Parkash* AIR 1995 SC 1789.
72. *R. Chandevarappa & Ors.* vs. *State of Karnataka & Ors.,* (1995) 6 SCC 309.
73. *Mahadeo Savlaram Shelke* vs. *Pune Municipal Corp* (1995) 3 SCC 33.
74. *Harbans Kaur and Ors.* vs. *Bhola Nath and Anr.* 57(1995)DLT101.
75. *A.P. State Financial Corpn.* vs. *M/s Gar Re-Rolling Mills & Anr.,* (1994) 2 SCC 647.
76. *Premji Ratan Shah* vs. *UOI* (1994) 5 SCC 54.
77. *Sham Lal* vs. *Rajinder Kr. & Ors.* 1994 (30) DRJ 596 : 1994 III AD(Delhi) 1035.
78. *S.P. Chengalvaraya Naidu (Dead) By Lrs.* vs. *Jagannath (Dead) By LRs and Ors.* (1994) 1 SCC 1.

79. *Thakur Kishan Singh* vs. *Arvind Kumar* (1994) 6 SCC 591.
80. *Rajender Kakkar* vs. *DDA* 54 (1994) DLT 484.
81. *Premji Ratansey Shah and others* vs. *Union of India and others* JT 1994(6) SC 585.
82. *Shrishti Dhawan* vs. *Shaw Brothers* (1992) 1 SCC 534.
83. *Mohd. Yusuf* vs. *Ahmad Miya & Ors.* AIR 1987 Allahabad 335.
84. *Assistant Collector of Central Excise, Chandan Nagar, West Bengal* vs. *Dunlop India Ltd. and Ors.,* MANU/SC/0169/1984 : 1985ECR4(SC).
85. *Prabodh Verma* vs. *State of U.P.* (1984) 4 SCC 251.
86. *Jay Rubber India (P) Ltd.* vs. *State Chemicals & Pharmaceuticals Corpn* (21) 1982 DLT 11.
87. *Bharat Nidhi Ltd., Delhi* vs. *Shital prsad Jain* AIR 1981 Delhi 251.
88. *Karbalai Begum* vs. *Mohd. Sayeed and Anr;* [1981] 1 SCR 863.
89. *Jai Dutt* vs. *State of Uttar Pradesh and Ors.,* AIR 1979 SC 1303.
90. *Chandu Lal* vs. *Municipal Corporation of Delhi* AIR 1978 Delhi 174.
91. *Ram Rattan and Ors.* vs. *State of Uttar Pradesh* 1977CriLJ433.
92. *Basanti Dei* vs. *Bijayakrushna Patnaik and Ors.* AIR1976Ori218.
93. *Puran Singh and Ors.* vs. *The State of Punjab* AIR1975SC1674.
94. *The Director of Inspection of Income Tax (Investigation), New Delhi & Anr.* vs. *Pooran Mal & Sons and Anr.* (1974) 96 ITYR 390 (SC).
95. *Baldev Raj* vs. *Delhi Development Authority* 1971 RLR 84.

96. *Mohan Lal* vs. *State of Punjab & Ors.* 1970 All India Rent Control Journal 95.
97. *Kewal Ram* vs. *UOI* Suit No.693/1969.
98. *Het Ram* vs. *UOI* Suit No.703/1969.
99. *Munshi Ram and Ors.* vs. *Delhi Administration* 1968CriLJ806.
100. *C. Beepathuma and others* vs. *Velasari Shankaranarayana Kadambolithaya and others* [AIR 1965 SC 241].
101. *S.M. Karim* vs. *Mst. Bibi Sakina* : [1964]6SCR780.
102. *S.M. Karim* vs. *Bibi Sakina* AIR 1964 SC 1254.
103. *Dhirendra Nath Gorai* vs. *Sudhir Chandra* AIR 1964 SC 1300.
104. *Bishan Dass* vs. *State of Punjab* AIR 1961 SC 1570.
105. *District Collector Kozhikode* vs. *Karela Verma Civil Thampuran* AIR 1960 Ker 199.
106. *P.P. Gupta* vs. *East Asiatic Co. Bombay,* AIR 1960 Allahabad 184.
107. *P. Lakshmi Reddy* vs. *L. Lakshmi Reddy* : [1957]1SCR195.
108. *Nagubai Ammal and Others* vs. *B. Shama Rao and Others* [AIR 1956 SC 593].
109. *Lazarus Estates Ltd.* vs. *Beasley* (1956) 1 All ER 341.
110. *Nagubai Ammal & Ors.* vs. *B. Shama Rao & Ors.,* AIR 1956 SC 593.
111. *Kiran Singh* vs. *Chaman Paswan* AIR 1955 SC 340.
112. *Ejas Ali Qidwai and Ors.* vs. *Special Manager,* MANU/PR/0014/1934.
113. *Suraj Bali* vs. *Lala Mahadev Parsad* AIR 1932 Oudh 46.
114. *Gajadhar Prasad and Ors. vs. Musamad Dulhin Gulab Kuer and Ors.* AIR 1921 Pat 234.
115. *Kinch* vs. *Walcott* 1929 AC 482.
116. *Patch* vs. *Ward* 1867 (3) L.R. Chancery Appeals 203.
117. *Vyuyan* vs. *Vyuyan* (1861) 30 Beav. 65, 74: 54 E.R. 813, 817).

118. *The Laxmi Commercial Bank Ltd.* vs. *M/s Interade Advertising (P) Ltd.* Suit No.722 and 723/81.

RESULT: Appeal allowed.

GITA MITTAL, J.

"Salus Populi Est Suprema Lex" (Regard for public welfare is the highest law)

1. The present case reinforces the principle that adjudication on a factual situation by strict application of law would maximise public welfare.

2. By this order I propose to dispose of IA No. 4518/2006 under Order XXXIX Rule 1 & 2 and IA No.8011/2006 (under Section 151 of the CPC) filed by the plaintiff. Identical questions of fact would arise for the consideration of both applications. Similar legal objections have been urged by the private defendant to these applications. The same are accordingly being taken up together for the purpose of consideration and disposal.

3. The present suit has been filed by IHBAS against the Government of NCT of Delhi (Secretary-Land & Building Deptt.); Delhi Development Authority and Land & Development Department, Office of the Ministry of Works & Housing, Nirman Bhawan, New Delhi as defendant nos. 1, 2 and 3 respectively. The plaintiff has also impleaded Het Ram S/o Late Sh. Hukmi as the defendant no.4 and Kewal Ram @ Kewal (deceased) S/o Late Shri Mohan Singh through his legal heirs Kiran Chand; Sarbati and Jag Roshni as defendant nos. 5(i) to (iii).

4. One written statement dated 21st November, 2006 signed and verified only by Sh. Het Ram-defendant no.4 and Sh. Kiran Chand impleaded as defendant no.5 (i) has been filed on record. Shri Kiran Chand has not filed the affidavit required by law with the written statement. Therefore, strictly speaking, there is no written statement by the heirs of Kewal Ram (@Kewal) on record.

5. A vakalatnama signed by Shri Kiran Chand-defendant no.5 (i) in favour of Shri M.C. Dhingra, Advocate, is on record. This learned counsel has not appeared in the matter. No other vakalatnama of defendant no.5(i) is on record. Shri Kiran Chand is therefore not being represented before the court.

6. Shri Kiran Chand is only one of the three children of Late Shri Kewal (also described as Kewal Ram in some litigation). The other children of Kewal Ram namely Smt. Sarbati and Smt. Jag Roshni impleaded as defendant nos. 5(ii) and (iii) and the official defendants have not filed any written statement on record. The other defendants thus do not oppose or contest the plaintiff's claim. The plaintiff may therefore be entitled to a decree on admissions against these persons.

7. It is clarified that the reference to 'Kewal' or Kewal Ram in this judgment refers to the same person, in as much as he has interchangeably used these names in different places.

8. The suit relates to land being Khasra nos. 317/17 and 318/17 min admeasuring 16.98 acres in Village Tahrpur. The same has been the subject matter of litigation and claims by Het Ram (defendant no.4 herein); deceased Kewal Ram @ Kewal (represented by legal heirs defendant nos.5(i) to (iii); Ganga Sahai and Inderraj.

I. **Factual Narration**

9. The plaintiff is stated to be a society registered on 30th July, 1991 under the Societies Registration Act, 1860. The Society came into existence by virtue of an order passed by the Supreme Court of India in Writ Petition No. 2848/1983 **People's Union for Civil Liberties vs. UOI and Ors.,** directing that the erstwhile Hospital for Mental Diseases, Shahdara be converted into a premier institute looking after all aspects of mental health of the citizens. The order dated 12th November, 1991 passed by the Supreme Court of India placed before this court shows that in this writ petition the court was concerned with the issue of the facilities available for the mentally challenged persons. The court has observed that land had been allocated and on principle, shifting of the existing hospital had been found to be indispensable.

10. A gazette notification was further published in the official gazette on 30th December, 1993 issued by the Lieutenant Governor of Delhi transferring the management of the existing Hospital for Mental Diseases, Shahdara, Delhi-95 from the Govt. of NCT of Delhi-defendant no. 1 herein to the plaintiff. As a result, all land, construction, equipment, etc. of the erstwhile hospital stood vested with the plaintiff.

11. The plaintiff has placed before this court copy of a report dated

7th May, 1965 bearing no. T-2(66) 601 (ii) recording that physical possession of the Nazul land comprising khasra no. 317/17 min, 317/17 min, 318/17 min measuring 81 bighas 10 biswas (16.98 acres) of Jhilmil Tahirpur Estate, for extension of the said mental hospital had been handed over by the Delhi Development Authority-defendant no. 2 to the L&DO-defendant no.3. This report records that the land was free of cultivation at the site. The report is signed by a senior engineer of the Government as well as by a kanungo of the DDA.

12. The notification under Section 22(4) of the Delhi Development Act bearing no. L-2 (66) 60 PT-2 dated 10th August, 1965 was issued by the Delhi Development Authority formally placing land measuring 16.98 acres (approximately 81 bighas 10 biswas) bearing khasra no. 317/17 min 318/17 min situated in the Jhilmil Tahirpur Estate at the disposal of the Land & Development Office, Ministry of Works and Housing, Government of India, New Delhi for further transfer to the Delhi Administration/CPWD for construction of a hospital for Mental Diseases at Shahdara. So far as the bounding of this land is concerned, to the extent legible, the notification placed on record, describes the same as follows :-

"North: Private land Mundali Village under D.C. Delhi

South: Kaoha Road Dilshad Colony

East: 318/17min.D.D.A. LAND

West: Boundary of the Mental Hospital"

It is thus evident that this land was in addition to and adjacent to the land over which the said hospital existed. The copy of this notification, as forwarded to various authorities by the DDA also notes that on 7th May, 1965 the possession of the land has already been handed over to the Land & Development Officer, Scindia House, New Delhi.

On 17th November, 1965 this land had been formally allotted to the erstwhile Hospital for the Mental Diseases, Shahdara as well.

13. The present suit is one in a chain of litigation in respect of the same immoveable property. It is essential to notice the details of the parties, their claims as well as the outcome of the other legal proceedings and litigation at the instance of one or the other party (ies) with regard

to the subject land or portions thereof.

II. Judicial History between 1965 and 1982

(i) Civil Suit on 7th August, 1965

14. It appears that Kewal Ram, Ganga Sahai and Het Ram jointly filed a civil suit on 7th August, 1965 along with an application under Order 39 Rule 1 & 2 of the CPC. Initially, an order of restraint was passed against the defendants in that suit on 13th September, 1966. However, the application of these persons under Order 39 of the CPC was dismissed by an order dated 25th November, 1967 of the court of the Sub-Judge. The suit was however permitted to be withdrawn on 25th November, 1967 by the court on the plea that the notice under section 80 of CPC was not served on the defendants. It is noteworthy that the defendant nos. 4, Kewal or and 5 (i) to (iii) have not disclosed any detail of this suit. The above few particulars are revealed from the judgment dated 4th April, 2009 passed in PPA No. 4/2008 (earlier RCA 19/1996) Kewal Vs. Estate Officer, IHBAS placed by the plaintiff before this court. The pleadings and claim in the suit, array of parties and the order dated 25th November, 1967 would be material.

(ii) CS 693/69 Kewal + CS 703/69 Het Ram

15. In the year 1969, **Suit No. 693/1969** was filed by **Kewal Ram.** Kewal Ram hereby sought a decree for permanent injunction restraining the defendants from interfering with the land bearing khasra no. 317/17 min 16/20, 21, 10, 11 measuring 21 bighas 10 biswas in Village Tahirpur. Kewal Ram claimed that he was the tenant of this land (which is part of the land in the present suit) who was in cultivatory possession of the same for the last 20 years. It was averred that he was paying the necessary lease money or rent against proper receipts and that the defendants had no right to interfere with the lawful possession unless the tenancy was terminated by legal means.

16. It appears that identical suits for injunction being **Suit No. 700/1969 ; 702/1969** were filed by Inder Raj, Ganga Sahai; and Suit No. 703/1969 by **Het Ram (defendant no. 4 herein)** respectively in respect of Khasra Nos.317/17 min 15/12, 13, 18, 19 22 (measuring 21 bighas 8 biswas).

17. It is important to note that it was the categorical plea of Kewal

Ram in Suit No. 693/1969 and Het Ram in Suit No. 703/1969 that they were tenants on the subject lands who were in cultivatory possession against payment of necessary lease money or rent to the real owners.

18. The defendants have not placed before this court the pleadings of these cases, the documents relied upon by Het Ram or Kewal Ram or the 'orders' therein. The plaintiff, however, has placed a copy of the final judgment passed on 17th December, 1971 in Suit No.693/1969 (illegible at several places) on record.

The array of parties in this barely legible photocopy of the judgment dated 17th December, 1971 shows that Union of India was the defendant no. 1 in the suit. Details of the other defendants are not discernible. From the narration in the judgment, it is quite clear that the Hospital for Mental Diseases, Shahdara (predecessor in interest of the plaintiff) was not a party in these suits. It is also evident that the suit related to part of the land which is the subject matter of this case.

19. The judgment dated 17th December, 1971 in the said Suit No. 693/1969, notices that, on the pleas of the parties, issues were framed. Issue no. 1 relevant for the present suit, reads as follows:-

> "1. Whether the plaintiff* is a tenant in respect of the suit land, if so under whom?"
>
> (*Kewal Ram)

20. This issue was discussed in and answered by judgment dated 17th December, 1971 (Suit No. 693/1969) in the following terms :-

> "5. The **plaintiff* has deposed** that he has been **cultivating**, the suit **land** for the last 20 or 25 .... and he has been marking **rent.... receipts**. He has **filed the rent** (..) P.1 to P.5.... 6. .....a contract of lease could be effected only by a written instrument under article 299 of the Constitution of India. Prior to the commencement of the constitution a similar provision existed in Section 175 of the Government of India Act, 1935. .....I am the opinion that the argument of the learned counsel for the contesting defendants is not without substance. It was essential for a valid contract of lease that the document of lease should have been extended in terms of Section 175 of Constitution of India. No such document having been executed, I hold that the plaintiff is not a tenant in respect of the suit land. This issue is decided accordingly."
>
> (*Kewal Ram)
> (Emphasis supplied)

21. It is noteworthy that in para 13 of the judgment, the court had specifically returned the following finding based whereon the decree was passed:-

> "13. .....Inspite of the fact that the plaintiff had no right to occupy the disputed land and his possession was unauthorised, still under the law of this land, he had the right to the effect that he must not be dispossessed except through due process of law."
>
> (Emphasis supplied)

The suit was decreed against defendant nos. 1 and 3 by a permanent injunction restraining them from interfering with the possession of the plaintiff over the suit land except by due process of law.

22. Identical pleas are stated to have been taken in Suit No.703/1969 filed by Het Ram (defendant no.4); Suit No.700/1969, 702/1969 and same issues raised therein which were also disposed of by identical judgments.

(iii) PP Act proceedings

Proceedings under the Public Premises (Eviction of Unauthorised Occupants) Act, 1972 ('PP Act' for brevity)

23. In view of the observations made by the learned court in the judgment dated 17th December, 1971, a complaint was made by the Medical Superintendent, Hospital for Mental Diseases, Shahdara against Sh. Het Ram (defendant no. 4 herein); Sh. Kewal; Sh. Ganga Ram Sahai and Sh. Inder Raj. Consequently notice dated 16th September, 1972 under section 4 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 ('PP Act' hereafter) was issued by the Estate Officer to them in respect of the following lands:-

> "Khasra no. 317/17 min, 15/7, 8, 9, and 14 measuring 23 bighas 3 biswas, Khasra No. 317/17 Min, 15/6, 14/1 2, 10, 318/17 min, 16/20, 21, 10, 11, measuring 20 bighas 4 biswas and khasra no.

317/17 min, 15/20, 13, 18, 19, 22 measuring 21 bighas 8 biswas respectively situated in Village Taharpur, Shahdara, Delhi."

These persons were thereby required to show cause as to why they should not be evicted.

24. It is noteworthy that Kewal Ram (a noticee under section 4 of the PP Act) filed individual objections dated 19th September, 1972 before Sh. S.L. Malhotra, the Estate Officer. In these objections, the following stand was taken:-

> "2. That the land bearing khasra no.317/17 min, 16/20, 21, 10 and 11 measuring 21 bighas 10 biswas is in possession of the Objector, since last more than 20 years as lessee. The possession of the objector is neither unauthorized nor against any provisions of law. The notice under Section 4(1) of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 are not applicable to the facts and circumstances of the present case.
>
> 3. That prior to the objector, his forefathers were in occupation of the said land as **Lessee** and after them the **objector** continued in possession of the concerned land as **lessee**. The amount of lease was duly paid to concerned authority by against issue of valid receipts and there is **ample evidence** in support of this contention of the objector that he is the **authorized possession** of the said land since last more than 20 years."
>
> (Emphasis furnished)

25. Het Ram had filed identical objections on same claims in respect of Khasra No. 317/17 min 15/20, 13, 18, 19, 22 measuring 21 bighas 8 biswas before the Estate Officer. The two other noticees also filed the same objections.

26. This identical stand of the four noticees (referred to as 'respondents. in his order) was noticed by Sh. S.L. Malhotra, Estate Officer, Delhi in case no. 15/E/C/72 in the order dated 19th November, 1973 in the following terms :-

> "the respondents filed the respective objections alleging that they were in continuous possession of the land for about 25 to 30 years as lease and that they had been paying regular rent to the

> DDA and as such were not in unauthorised occupation of the same. Further they contended that the provisions of P.P. Act were not applicable to those lands under the circumstances explained by their contention and also filed documents. The petitioner has mainly relied on the Civil Court decision in Suit No. 702 of 1969, 693 of 1969 and 703 of 1969 respectively filed by the respondents in the Civil Court against the petitioner for permanent injunction on the basis that they were the leases of the Union of India."
>
> (Underlining by me)

27. On a consideration of the rival contentions, the **Estate Officer** has passed a detailed order of eviction dated **19th November, 1973** arriving at a conclusion that there was no valid lease in favour of the noticees including Het Ram-the defendant no. 4 as well as Kewal Ram; and that they had no right to occupy the disputed land and their possession was unauthorized.

(iv) Joint Appeal being PPA No.88/1973

28. The order of eviction was jointly assailed by the four noticees-Het Ram (defendant no.4); deceased Kewal; Inder Raj and Ganga Sahai by way of an appeal bearing **PPA No. 88/1973** before the learned Add. District Judge. This appeal was rejected by a detailed judgment dated **28th March, 1974 passed by Justice G.R. Luthra,** (then Additional District Judge) granting time up to 30th April, 1974 to the appellants to vacate the land and to deliver possession.

29. The same pleas and claims of these four persons were discussed in detail and the finding that all four appellants (including Het Ram and Kewal Ram) were unauthorized occupants on the land was confirmed.

(v) CW No. 550/1972

30. The matter did not stop here. Het Ram, Kewal, Inder Raj and Ganga Sahai carried a joint challenge against the order of the Estate Officer on the plea of tenancy and the judgment of the learned ADJ to this court by way of **Civil Writ No. 550/1972.** This writ petition was rejected by **H.L. Anand, J** by a judgment dated **31st March, 1975**. The writ petitioners had yet again set up a claim of possession of the land in dispute for over 20 years as tenants under the Delhi Development Authority

and its predecessor in office i.e. the Delhi Improvement Trust before this court.

(vi) LPA No.113/1975

31. The judgment dated 31st of March, 1975 in the writ petition was further jointly assailed by the four writ petitioners (including Het Ram-defendant nos. 4 and Kewal Ram) by way of **LPA No.113/1975** before the Division Bench of this court. In para 4 of the grounds of appeal, drafted on 29th May, 1975 it was again asserted that the appellants could prove that **"they are in possession of the concerned land as tenants"**. This letters patent appeal was dismissed by the Division Bench comprising of Justice V.S. Deshpande and Justice B.N. Kirpal, by a detailed judgment **dated 10th April, 1980**. The Division Bench rejected the contention of the appellants that the findings on the issue of the tenancy in the decree dated 17th December, 1971 were not res judicata.

32. These judgments were not assailed further and have attained finality.

(vii) Execution case of 1982

33. Alongwith IA No. 7562/2007 filed by Het Ram in the present case under section 10 of the CPC. Het Ram has annexed a copy of the Local Commissioner's report dated 10th May, 1991 in an execution case against UOI and he has withheld all details of this case including the petition. My attention has been drawn by Mr. Arvind Nayar, learned counsel for defendant no.4, to this report which appears to have been submitted pursuant to an order dated 6th May, 1991 in the case then pending in the court of Sh. P.D. Gupta, Sub-Judge, Delhi.

34. From this report, it appears that a petition under Order 21 Rule 32(5) of the CPC was filed by Shri Het Ram on 15th September, 1982 seeking execution of the aforesaid judgment dated 17th December, 1971. The execution case was decided by Sh. Y.S. Jonwal, Sub-Judge, First Class on 5th May, 1989. From the memo with the report, it appears that this execution was filed against the following persons:-

"1. Union of India through Secretary, Ministry of Housing Works, New Delhi.

2. Delhi Development Authority, Delhi Through Housing Commissioner, Delhi.

3. C.P.W.D. through Secretary, CPWD Delhi Admn. Division No. III, Delhi.

4. Shri Tarsem Lal, Assistant Engineer-III P.W.D. Division No. 23, Delhi Admn., New Delhi."

Again, the Hospital for Mental Diseases was not a party to these proceedings.

35. The execution petitioner (Het Ram) alleges that on 28th April, 1982, the CPWD, Delhi-respondent no. 3 therein had started interfering with the possession of the 'agricultural land of the petitioner' and that it was continuing work including throwing earth and digging the land at certain places with an intention of placing wire therein, blocking the way of the decree holder to cultivate or to plough the land covered by the said decree. Reference was made to khasra no. 15 in the petition.

36. The respondents in the execution petition appear to have disputed digging the earth claimed by the decree holder or putting of fence on his land and had stated that work was being done on another land not relating to Het Ram.

III. Correspondence October 1987 to 1991 1987

37. It appears that some efforts to trespass were made thereafter. The plaintiff has placed before this court the communication issued on 27th October, 1987 by the court of Sh. B.L. Anand, the Estate Officer authorising the Medical Superintendent, Hospital of Mental Diseases, GT, Shahdara to take possession of the following land :-

"Khasra no. 317/17 min., 15/7min., 8, 9/1, 2, 10, 318/17 min, 15 measuirng 20 bigha 4 biswa, khasra no. 315/17min,16/20, 21, 10, 11 measuring 21 bigha 10 biswa and khasra no. 317/17min, 15/12, 13/18, 19, 22"

The SHO of the police station concerned was also directed by the Estate Officer to facilitate handing over possession. The land detailed above includes the land which was claimed by Het Ram and Kewal to be in their possession.

38. A copy of the proceedings recorded on 28th October, 1987 with regard to taking over of possession of the land has been placed on record. These proceedings bear the event recorded by Dr. R.C. Jindal,

Medical Superintendent of the hospital who was executing the said order of the Estate Officer and record that the order was read to Sh. Kewal who was present on the site but he refused to sign the document. The proceedings were recorded in the presence of Sh. J.P. Mittal, Executive Engineer GTB, PWD and Sh. Ram Chander, a local resident who have appended their signatures thereon as well as in the presence of police officials and two witnesses. A site plan was enclosed.

1991

39. The plaintiff has placed reliance on a communication dated 26th April, 1991 intimating apprehensions of the attempt by some persons to encroach upon the subject land.

1996

40. In the case in hand, IHBAS has contended that Sh. Kewal Ram made an effort in the year 1996 to encroach upon the subject land despite having lost upto the Division Bench of this court and the other proceedings.

41. In this regard, a notice dated 20th December, 1996 was sent by Sh. Narendra Kumar, the Estate Officer informing Kewal Ram that he was illegally occupying the land belonging to the present plaintiff measuring about 21 bighas 10 biswas in khasra no. 317/17, min16/20, 21, 10, 11 at Village Tahirpur, Shahdara and was required to vacate the land with his belongings forthwith failing which the land would be taken over by the Institute on 23rd December, 1996 after removing his belongings.

IV. Judicial History (from 1996 till date)

(viii) RCA No.19/1996

42. It appears that the aforesaid notice dated 20th December, 1996 was challenged by Kewal Ram by way of an appeal being **RCA No. 19/96** under section 9 of the PP Act. This appeal appears to have been filed on 23rd December, 1996. The appeal (subsequently registered as **PPA No. 4/2008) was titled Kewal Ram vs. Estate Officer, Institute of Human Behaviour and Applied Sciences** (plaintiff herein).

43. Sh. Kewal Ram had challenged the authority of the Estate Officer who had issued the communication dated 20th December, 1996 on the ground that the same was in violation of the PP Act as well as for violation of principles of natural justice.

44. Sh. Kewal Ram was therefore aware in 1996 of the fact that the present plaintiff (IHBAS) was asserting right, title and ownership over the land.

45. In this appeal, on 11th February, 2000, the court of the learned ADJ noted that though the respondent was present, the appellant did not appear to be interested in the appeal which was therefore dismissed for default of appearance.

46. The contesting defendants would be possessed of the grounds of appeal; the order impugned in this case and the nature of the dispute. No disclosure of even the filing of this appeal or of any of these documents has been made by them.

47. However, Mr. Sultan Singh, learned counsel has placed a certified copy of a judgment dated **4th April, 2009** by Dr. R.K. Yadav, Distt. Judge VII dismissing PPA No.4/2008 on merits. The said judgment has noticed the entire litigation between the parties including the judgment dated 31st March, 1975 of Anand, J and the dismissal of the LPA No. 113/1975 on 10th April, 1980 by the Division Bench.

(ix) Suit No.293/1998

48. Despite the above, the efforts by Het Ram and Kewal Ram to somehow or the other perfect a claim over the land continued. **Suit No. 293/1998** was jointly filed by Sh. Kewal Ram and Sh. Het Ram against (i) the **Union of India, Ministry of Urban Development, Nirman Bhawan, New Delhi** and (ii) **the Land & Development Officer, Nirman Bhawan, Maulana Azad Road, New Delhi**. For the first time, the following claim was made by them in this suit:-

> "(A) pass a decree of **declaration** in favour of the plaintiffs and against the defendant and their servants thereby declaring the **plaintiffs were owners by way of their adverse possession** in respect of the land admeasuring about 39 bighas within **khasra no. 317/17/15/12/ 14/22 min** and 317/17/21/10/11 situated in Village Jhilmil Taharpur, Shahdara, Delhi.
>
> (B) Direct the defendants and their officials to affect **substitution of the names of the plaintiffs** in respect of the above lands admeasuring about bighas at this khasra no. 317/17/15/12/13/18/ 14/22 min and 317/17/21/10/11 situated in Village Jhilmil Taharpur,

Shahdara, Delhi instead of the names of the defendants on account of acquiring the right to ownership by the plaintiffs."

(Emphasis supplied)

49. So far as the cause of action for filing Suit no. 293/1998 is concerned, Kewal and Het Ram in para 9 of the plaint, state that the same accrued when they had approached the defendant (Union of India and the Land and Development Officer) to declare them as owners of the suit property and when they lastly refused to do so on 26th December, 1998.

50. In para 11 of the plaint, interestingly, very carefully restricting the jurisdiction to less than the pecuniary jurisdiction of this court, it was averred t*hat "for the purposes of jurisdiction, the suit was valued at Rs.19.4 lakhs and for the relief of declaration of the value is Rs.6248/- on which the requisite court fee has been paid. The value of the suit for the purport of mandatory injunction relief, in Rs.130/- on which also the requisite court fee has been paid." For the purposes of cou*rt fee, it was stated by these persons that being agricultural land, the same cannot be more than Rs.400/-.

51. Suit No. 293/1998 was decreed by Sh.B.S. Choudhary, ADJ of Delhi by a judgment dated **8th April, 1999.** It was held that the *"plaintiffs (Kewal Ram and Het Ram) have become the owners of the suit land by way of adverse possession which has been well established as that of more than 50 years".*

52. The court has given a further direction in the judgment dated 8th of April, 1999 to the effect that "on the application of the plaintiff, the defendants/their revenue authority will incorporate the name of the plaintiff as in the column of the ownership as per the decree by this court and the incorporation may also be made effect by substituting the name of the plaintiff in their records as per rules".

53. Het Ram and the legal heirs of Kewal Ram have concealed the pleadings of the parties and documents in this case as well.

(x) Applications by IHBAS in decided Suit No. 293/98

54. In the above decided Suit No.293/98 an application dated 8th April, 1999 under Order 1 Rule 10 of the CPC was filed by IHBAS for its impleadment as a party in the disposed of Suit No. 293/98. In this

application, IHBAS pointed out that on 26th December, 1996, fencing of the subject land was carried out by its officials; that the appeal under Section 9 of the PP Act being RCA No. 19/1996 was being pursued by Kewal Ram even in 1998 but the proceedings therein were not revealed before the trial court. IHBAS also referred to the disclosure by the present defendant no. 2 in Suit No.293/1998 that possession of the land was with Delhi Admn Div III on behalf of the Superintendent (Medical Services), Delhi Admn., for construction of the Hospital for Mental Diseases which fact was not considered.

Detailed averments with regard to principles governing the perfection of title by adverse possession were also made; reference was made to the possession proceedings in 1987 and the efforts of Het Ram and Kewal to reoccupy the subject land in 1991. In this background, a prayer was made for impleadment of IHBAS in the said decided suit.

55. It appears that on 7th May, 1999, IHBAS also filed an application under Section 114 of the CPC seeking review of the judgment and decree dated 8th April, 1999 contending that Sh. Het Ram and Kewal had played fraud upon the court and obtained the decree dated 8th April, 1999 by impleading wrong parties in an effort to grab land worth crores of rupees belonging to the government.

56. At the same time, the present plaintiff also filed an application under section 340 of the CrPC stating that Het Ram and Kewal Ram had made false averments and false statements on oath before the court regarding ownership by adverse possession and committed contempt by misusing the process of law and polluting the stream of justice. A prayer was made for making a preliminary inquiry into the several offences committed by them and also a reference to this court for initiating proceedings for criminal contempt of court against the plaintiffs.

57. It is stated before me that the application under Order 1 Rule 10 CPC stands dismissed by the court on the ground that it was functus officio. A submission was made by both parties that the matter in the High Court was reserved for orders and consequently the applications be consigned sine die. An order was accordingly recorded on 22nd November, 2002 on the other applications, by the learned ADJ directing that the other applications be consigned sine die with liberty to revive as and when necessary.

(xi) Suit No. 47/2000 (renumbered CS No.18/2005)

58. Sh. Het Ram (the present defendant no. 4) filed the Suit No. 47/2000 as the sole plaintiff for the first time arraying IHBAS (the present plaintiff), as a defendant in any case. Het Ram claimed that he had become owner of the suit property by adverse possession. In this case, an interim order of status quo was passed on 8th April, 2000. The present plaintiff (arrayed as the sole defendant) was restrained from interfering in the claimed possession of Het Ram in the suit land and obstructing Het Ram's claimed ingress and egress over the land.

59. The present plaintiff has contested the plea set up by Het Ram. Reference was again made to the afore-detailed proceedings under the PP Act and the several judgments in the cases. IHBAS also disputed the possession of and the cultivation claimed by Het Ram on the subject land urging that the same may be wild growth and was not crop cultivated by him.

60. Sh. Het Ram complained that despite the order dated 8th April, 2000, he was being obstructed and filed an application under section 151 of the CPC wherein a prayer was been made for directions to the local police to give requisite aid to him for ingress and egress to the suit property for the purposes of irrigation of the suit land. The trial court however deferred decision on the plaintiff's application under order 39 rule 2(a) of the CPC by its order on 1st May, 2000 and passed the following directions to the local police:-

> "4. So far as the application u/s 151 CPC is concerned, the prayer of this application from the side of the plaintiff* have been that, the local police be directed to give requisite aid to the plaintiff to have his ingress and egress to the property in the suit, so as to irrigate the crop standing there. During the course of the arguments, I am told that the local police in fact is obstructing the entrance of the plaintiff in the suit land and is not allowed to get his land irrigated even when, there was a restrained order against the defendants from this court. I feel police is not to interfere into the rights of the parties nor it is supposed to help either of the parties to the suit but police is supposed to get the order of the court implemented in its letter and spirit. I hope that local police will not take any initiative to create hindrance in the

> compliance of the order of this court till it is varied or set aside. I am not inclined to direct the local police to give help to the plaintiff as prayed in the application, but I hope police will obey the order of this court. The application is disposed of accordingly. Let, the matter be put up for arguments on application u/o 39 Rules 1 and 2 CPC on 15.05.2000. Till, then, rule will be otherwise."

(*Het Ram)

61. It is important to note that even on 1st May, 2000, Het Ram did not claim that there was any construction on the suit property but made reference only to crops, land and irrigation.

62. Thereafter an order dated 12th August, 2000 in the Suit No. 47/2000 (now CS No.18/2005) was passed by Sh. B.S. Chaudhary, ADJ deciding the application under Order 39 rule 1&2 of the CPC making observations (similar to those recorded in the judgment dated 8th April, 1999) to the effect that Het Ram was in possession of the suit property and directing the parties to maintain status quo during the pendency of the suit. It was directed that Het Ram shall be allowed to enter into the suit property in the portion which according to the revenue record was with Het Ram. It was also observed that the 'whole land' is undivided and the concerned police was directed to ensure that the order as complied with. Het Ram was also prohibited from interfering with the constructed portion with IHBAS.

(xii) CR No. 476/2000

63. The above order dated 1st May, 2000 was assailed by IHBAS by way of CR No. 476/2000 before this court. During the pendency of the revision petition, the trial court passed an order dated 12th August, 2000 granting the application under Order 39 Rule 1 & 2 of the CPC of the plaintiff. This fact was noticed by this Court in CR No. 476/2000 on 22nd August, 2001 and it was observed that the interim injunction application had been disposed of by an appealable order (dated 12th August, 2000) and as a result, the revision petition was rendered infructuous. The same was disposed of as such.

(xiii) FAO No. 391/2000

64. The present plaintiff assailed the order dated 12th of August,

2000 by way of FAO No. 391/2000 before this court which remained pending for a considerable period. Finally, an order dated 16th February, 2004 was passed with the agreement of both parties that the trial court should expedite disposal of the pending suit proceedings within a period of six months. Extension of the period for disposal of the suit has been necessitated and applications to this effect stand granted. It was also agreed on 13th October, 2004 that the interim order of 12th of August, 2000 shall continue till disposal of the suit.

(xiv) Cont. Case (C) No. 769/2004

65. Reference has also been made in the arguments to the Cont. Cas.(C) No. 769/2004 filed by IHBAS against Shri Het Ram.

66. In this case, an interim order dated 9th November, 2004 was passed requiring the respondent to remain personally present and restraining him from cultivating the land which was the subject matter of the order dated 12th August, 2000.

67. On 3rd March, 2005, on the request of the present plaintiff, directions were given to the trial court to consider the request on behalf of IHBAS with regard to demarcation proceedings. The same observations were reiterated on 6th April, 2005 by this court.

68. The defendant has placed reliance on the order dated 11th December, 2006 disposing of CCP No. 769/2004 passed by this court with the following directions :-

> "8. In view of the above, I am of the opinion that even though a case for contempt is not made out, it would be in the interests of all if the petitioner approaches the revenue authorities for appropriate orders including for demarcation. The said application/ request shall be considered in accordance with law and a speaking order issued after granting reasonable opportunity to the respondent/plaintiff in the proceedings. The Local SDM or concerned officer shall ensure that the process shall be completed within eight weeks of the petitioner lodging his request. The parties are bound by terms of the injunction issued on 12th August, 2000 which is subject matter of these proceedings. It is clarified that injunction order issued by this Court on 9th November, 2004 is hereby vacated."

(xv) CS(OS) No.670/2006 (present suit)

69. The present suit has been filed on or about 21st April, 2006 complaining that by the order dated 13th August, 2004, this court directed that parties are directed to respect the order dated 12th August, 2000 inasmuch as "ingress and egress of the appellants (as corrected subsequently to read as 'respondent'–Het Ram) shall not be interfered with". The plaintiff submits that Het Ram started committing contempt of this court on 17th October, 2004 as accompanied by 10/15 persons with tractor and equipment and damaged a portion of the boundary wall and started digging the suit land.

70. Reliance in support of its rights is placed by IHBAS on the above notifications. Referring to action taken by IHBAS, it was urged that Cont. Cas(C) 769/2004 was filed; that on 29th March, 2006; 4th April, 2006 and 13th April, 2006 enquiries were received from unknown sources with regard to the suit property and consequently the plaintiff was apprehending that Het Ram and the legal heirs of Kewal Ram in connivance with each other were attempting to sell the suit property. It was inter alia urged that the claim of ownership based on adverse possession made by these persons in Suit No.293/1998 was contrary to the plea of tenancy set up by them and was legally untenable.

In this background, the plaintiff has sought the following prayers:-

> "a. Pass a **decree of declaration** in favor of the plaintiff and against the defendants thereby declaring that the **decree passed by Sh. B.S. Chaudhary, Lt. ADJ, Patiala House, Delhi in suit No. 293/1998, titled " Kewal Ram and Ors versus Union of India & others is a nullity as the plea of ownership on the basis of adverse possession in Suit 293/1998 being directly contrary to the plea of tenancy,** could not have been permitted to be raised had the plaintiff revealed the factum of the earlier suit and the judgment of Division Bench passed in LPA No. 113/ 1975.
>
> b. Pass a decree of permanent injunction in favour of the plaintiff and against the defendants thereby restraining the defendants or their representatives, agents and attorneys from causing any wrongful interference in the peaceful possession of the suit property.

c. Pass a decree of permanent injunction in favour of the plaintiff and against the defendants thereby restraining the defendants or their representatives, agents and attorneys from creating any third party interest by sale, loss or damage, trespassing, demolition, additions, alterations, constructions and erections on the suit property,

d. Direct the defendants 1, 2 and 3 to execute necessary documents in the name of the plaintiff Institute, thereby, perfecting the title of the plaintiff with respect to the suit property.

e. Pass an ad-interim ex-parte injunction restraining defendant No.1 to defendant No.3 from executing any deed and documents thereby creating any right, title or interests in the suit property in favor of defendant No.4 and legal heirs of defendant No.5 or against any third party."

(Emphasis supplied)

Thus apart from the prayer with regard to the challenge to decree dated 8th April, 1999 in question, the plaintiff has made other prayers in the plaint.

71. The plaintiff has disputed that the defendants were in possession of the suit property or could claim a title therein. Alongwith the suit, the plaintiff has filed the IA No.4518/2006 (under consideration) for interim injunction.

(V). Contentions

72. Appearing for the plaintiff, Mr. Sultan Singh, learned counsel has submitted that Het Ram and Kewal Ram have made desperate attempts to encroach over the land. It is contended that they have indulged in judicial adventurism to fraudulently cause favourable orders to be passed, and, utilising the shield thereof, to occupy public land.

73. Mr. Singh has contended that IHBAS was not a party to CS No.293/1998 or the other litigation initiated by Kewal Ram and/or Het Ram and is not bound by any adjudication therein. Mr. Singh, has vehemently urged that Kewal Ram and Het Ram initially set up a plea of tenancy against payment of rent to the Government and issuance of receipt by it which pleas they have pressed till recently. Concealing this plea, as well as the judgments of the courts on the same upto the Division Bench of this court, a spate of litigation was filed to somehow

or the other usurp the land. It is further urged that Het Ram and Kewal Ram despite knowledge of the true owner of the property, deliberately did not impleaded the real owner, the Delhi Government & IHBAS, the necessary parties, in any of the litigation; they have mis-represented details of land and set up a false claim of cultivatory possession. Not only were these persons never in possession of the suit property, but they have no right, title and interest in the property. The plea that Het Ram and Kewal Ram have been in adverse possession of the property and acquired title by prescription is factually incorrect and legally untenable. It is urged that the adjudication in favour of Het Ram or Late Shri Kewal Ram was a result of a fraud practised by these persons and the judgment and orders in their favour and are a nullity and non-est in law of no consequence so far as the rights of the plaintiff are concerned. It is urged that IHBAS is entitled to the injunction prayed for. Extensive submissions have been made on the public interest in the hospital expansion which is involved in the matter and is being adversely impacted by the mala fide actions of Het Ram and Kewal.

74. Mr. Patwalia, learned senior counsel appearing for Het Ram has vehemently contended that fore fathers of Het Ram were in possession of the suit property and Het Ram derived possession therefrom. The possession of the Het Ram was adverse to that of the real owner and given the adverse nature of possession of Het Ram, he had acquired title by prescription in the suit land. The contention is that the title of Het Ram and Kewal Ram stands recognized and declared by the judgment and decree dated 8th of April, 1999 in CS No.293/98, which has attained finality. An objection is pressed that the challenge to the decree is barred by limitation. It is urged that the suit is not maintainable and no interim injunction can be granted in favour of the plaintiff.

75. Mr. Arvind Nayar, learned counsel also appearing for Het Ram has vehemently contended that IHBAS filed applications in the decided CS No.293/98; challenged orders passed in CS No.47/2000 by way of civil revision and appeals; conceded expeditious disposal of CS No.47/2000 and by application of doctrine of election of remedy, cannot maintain the present suit. It is urged that IHBAS has indulged in forum shopping by virtue of the several remedies invoked by it.

76. IHBAS has vehemently disputed possession over the suit land which is urged to be in the nature of an open plot of land. Mr. Singh

has objected that Het Ram and Kewal Ram were never in adverse possession of the suit property and have never asserted title against the real owner. The submission is that consequently, there is no questions of acquisition of title by prescription by Het Ram. IHBAS has also vehemently contested the bar of limitation raised by Het Ram and contended that it gets a fresh cause of action to challenge the judgment and decree dated 8th April, 1999 each time Het Ram or Kewal Ram relied upon the same. So far as challenge to the judgment and decree dated 8th April, 1999 is concerned, IHBAS contends that it is not barred by limitation. It is urged that no injunction can be granted against IHBAS which is a true owner of the property and that overriding concerns to public interest militate against grant of any injunction to the plaintiff. Extensive submissions have been made pointing out the court orders and the public interest which is involved in the hospital expansion and which is being adversely impacted because of the mala fide actions of Het Ram and Kewal Ram.

77. Mr. Singh has urged at length that none of the judgment and orders relied upon by Het Ram can be worked inasmuch as Het Ram has given incorrect land details and concealed correct facts while causing the same to be passed. It is urged that a plea that the judgment has been fraudulently obtained and has a nullity and no nest can be raised at any stage even in collateral proceedings.

78. Before this court, Het Ram has set up a defence that he has acquired title by adverse possession of the suit land. This was the claim in Suit No. 293/98 of Het Ram and Kewal Ram, but not against IHBAS. Therefore, before proceeding in the matter, it is necessary to examine the nature of the suit property, requirement of legal possession, essential ingredients of acquisition of title adverse possession and the effect of the judgment dated 8th of April, 1999 as well as other orders relied upon by the parties.

79. In view of the rival contentions, it is necessary to examine the litigation with regard to the property in dispute. For the purposes of convenience, the consideration by the court in the following manner:-

VI. Nature of the suit property

VII. Necessary pleadings to support possession

VIII. Can mere occupancy of another's property be legally protected

IX. Possession of a plot of land – whose

X. Fraud has to be considers from the following aspects:-

(i) Non-impleadment of necessary party

(ii) Details of Suit Land

(iii) Claim of Cultivation

XI. Doctrine of election

XII. Claim of Het Ram of acquisition of title for Adverse possession which has to be considered from the following aspects:-

(i) General Principles

(ii) Nature of pleadings to claim acquisition of title by adverse possession, evidence and nature of inquiry by the court

(iii) Burden of proof and nature of enquiry

(iv) Plea of adverse possession – when taken by Het Ram and Kewal Ram?

(v) Nature of Possession to support a claim of acquisition of title by adverse possession

XIII. Bar of Limitation

XIV. Overriding concerns of public interest

VI. <u>Nature of the suit property</u>

80. In view of the rival claims, before proceeding, it is necessary to examine the nature of the property. It is an admitted position that the land in question was an open piece of land which is evidenced in the several pleadings wherein Kewal Ram and Het Ram, have claimed to be in cultivatory possession of the land as tenants against payment of rent and receipts which has been staunchly denied by the plaintiff.

81. In the order dated 19th November, 1973, the Estate Officer had specifically observed that the respondents had not been able to file any documents to show that they were lessees or the legality of the land claimed to be under their occupation. The Estate Officer observed that :-

"However, the Civil Court held that the respondent had the right not to be evicted without the due process of law. <u>The respondents</u>

on the contrary had not been able to file any documents to show that they were the leases and that their occupation originated in legality or otherwise they had any right to remain in possession of the property aforesaid.

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2. I have heard both the parties and examined the record as well. The only question for determination before this court is whether the respondents are unauthorised occupation or whether they can be evicted under the P.P. Act. It is clear from the decisions of the Civil Court that the **properties belong to the Government** which were never legally and validly leased out the respondents and that they were the unauthorised occupation of the same. The applicability of the P.P. Act to my mind is to be replied against the respondents because the proceedings under the P.P. Act are the due process of law in respect of government properties which have been unauthorisedly occupied by the respondents. In view of the above, I hold that the respondents are in unauthorised occupation of the properties detailed above and I therefore, hereby make the notice absolute and the respondents are ordered to **vacate** the **lands** mentioned against their names within 30 days from the date of publication of this order, failing which the respondents or any other persons found in possession of the aforesaid properties, shall be evicted by the use of force." (Underlining supplied)

82. So far as the plea of appellants including Het Ram and Kewal in **PPA No. 88/1973** is concerned, the judgment dated **28th March, 1974** notes that "it has been **contended by everyone of them** that he has been a **lessee of the land for more than 20 years,** then **prior to his possession, his ancestors were in possession of the same as lessee, that he is not in unauthorized occupation** and therefore, should not be evicted under the provisions of the Act."

83. The nature of the property being vacant land was also affirmed by Het Ram and Kewal Ram in the grounds of appeal dated 29th May, 1975 in LPA No. 113/1975 when they stated as follows:-

"4 . .....The concerned decree is wholly in favour of the present appellants and if there are any findings against the present

appellants in the judgment on any issue those are not resjudicata and the appellants can prove in any proceedings that they are in possession of the concerned land as tenants.

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6. That the learned Single Judge has failed to consider this aspect of the matter that the appellants are in possession of the **concerned land** since last more than 20 years as **tenants**. The **receipts to counterfoils concerning the payment of rent to the concerned authority** clearly reveals that the appellants are not in unauthorised occupation of the land in dispute."

(Emphasis supplied)

84. Het Ram and Kewal Ram do not state anywhere that they have raised any construction on the suit property. 85. The communications dated 27th October, 1987 from Sh. B.L. Anand, as well as the possession taking report dated 28th October, 1987 and 29th October, 1987 clearly show that reference is made to 'land' alone.

86. In the decree dated 17th December, 1971, the court disbelieved Het Ram and Kewal Ram's pleas of tenancy of the land and it was held that they could be evicted by following due process of law. These findings were sustained by the judgment dated 31st March, 1975 in CW No.550/72 and decree dated 10th April, 1980 in LPA No.113/75.

87. The learned trial court in the judgment dated 17th December, 1971 had held that the subject property was open land. I also find that there is also not even a remotest plea or claim with regard to any construction on the 86 bighas of land which were the subject matter of the PP Act proceedings, the writ petition or the Letters Patent Appeal No. 113/1975 or its partition/division between the appellants.

88. The Local Commissioner report dated 10th of May, 1991 relied upon by Het Ram categorically confirms that even on 9th May, 1991, there was no construction of any kind on the land by Het Ram and that Het Ram was asserting a claim of cultivation over tracts of land.

89. On 5th May, 2000 in CR No. 476/2000 Het Ram made a statement that he would not change the nature of the suit land. The property in question is therefore admittedly and unquestionably a plot of

land.

VII Necessary pleadings to support possession

90. A similar claim of possession over land arose for consideration before this court in the judgment reported at 1994 (30) DRJ 596 : 1994 III AD(Delhi) 1035 **Sham Lal vs. Rajinder Kr. & Ors.** The plaintiff had filed a suit asserting that he was in open, peaceful and uninterrupted possession of the suit property for over 50 years; had grown vegetables and laid a flower bed on the suit land; had 17 buffaloes with a cattle shed on the land. The suit for permanent preventive injunction was filed in view of the threat of dispossession from the defendant and a prayer was made for protecting the plaintiff's possession. The court noticed that the plaint had been artistically drafted confining it to averments of only such facts as were convenient and astutely not disclosing relevant facts which did not suit the plaintiff. The material facts on which the plaint was silent included the exact point of time and manner in which the plaintiff entered into the possession of the suit property and the capacity in which he occupied and used the same. The court also noticed that the plaintiff did not say a word about the person in whom the ownership of the property vested or if the plaintiff was paying land revenue and/or taxes payable for the land. Though this case was concerned with occupancy of a person who had shown himself as a caretaker/chowkidar of the property, however, the observations of the court in paras 13 to 15 in the judgment by R.C. Lahoti, J (as his Lordship then was) shed valuable light on the claim made by Het Ram before this court and deserves to be extracted. The same read as follows:-

> "(13) **Possession is** flexible term and is **not** necessarily **restricted to mere actual possession of the property.** The legal conception of possession may be in various forms. **The two elements of possession are the corpus and the animus. A person though in physical possession may not be in possession in the eye of law, if the animus be lacking.** On the contrary, to be in possession, it is not necessary that one must be in actual physical contact. To gain the complete idea of possession, one must consider (i) the person possessing, (ii) the things possessed and, (iii) the persons excluded from possession. A man may hold an object without claiming any interest therein for himself. A servant though holding an object, holds it for his master. He has, therefore,

> merely custody of the thing and not the possession which would always be with the master though the master may not be in actual contact of the thing. It is in this light in which the concept of possession has to be understood in the context of a servant and & master.
>
> (14) To have the advantage of law laid down in the rulings relied on by the learned counsel for the plaintiff he shall have to show plaintiff's settled and peaceful possession over the suit property, though he may not show his title. In the case at hand the plaintiff has utterly failed in bringing any material on record enabling a holding in his favor on the point of possession or even right to possess the suit property. Merely because the plaintiff was employed as a servant, or chowkidar to look after the property it cannot be said that he had entered into such possession of the property as would entitle him to exclude even the master from enjoying or claiming possession of the property or as would entitle him to compel the master staying away from his own property.
>
> (15) **The plaintiff was expected to have made a bold and clean disclosure of the facts in the plaint: Having entered into possession initially as a servant or Chowkidar if he had commenced prescribing hostile title by entering into possession of the suit property, then he should have mentioned the point of time with which that event had occurred. As already stated, the plaint does not go beyond making a bald assertion of the plaintiff being in possession.**"
>
> (Emphasis supplied)

91. The position is identical in the present case. In the afore-noticed litigation, Het Ram and Kewal Ram set up the bald plea of occupying the land as tenants against payment of rent receipts; do not disclose any date on which they entered into possession; the person/authority to whom they paid the rent; the particulars of the real owner, or when, if at all, they asserted title as owners of the land or exclusive possession thereof.

VIII. Can mere occupancy of another's property be legally protected

92. It is trite that every occupancy by itself also does not create

either any title or a right to remain in possession. It is only if the entry into possession of the property was lawful and there is a legal right to remain in possession; or, if a person is in settled possession that the court would grant the equitable relief of injunction to against forcible dispossession. A person in settled possession can be dispossessed only after due process of law. It has been held that in certain cases, a person can be evicted by use of reasonable force, in others, by due process of law. In this regard, the following principles were laid down by the Supreme Court in the judgment reported at (2004) 1 SCC 769 **Rame Gowda (D) by Lrs. Vs. M. Varadappa Naidu (D) by Lrs and Anr.**-

> "10. It is thus clear that so far as the Indian law is concerned the person in peaceful possession is entitled to retain his possession and in order to protect such possession **he may even use reasonable force to keep out a trespasser. A rightful owner** who has been **wrongfully dispossessed of land may retake possession** if be can do so **peacefully** and **without the use of unreasonable force.** If the **trespasser** is in settled possession of the property belonging to the rightful owner, the rightful owner shall have to **take recourse to law**; he cannot take the law in his own hands and evict the trespasser or interfere with his possession. The law will come to the aid of a person in peaceful and settled possession by injuncting even a rightful owner from using force or taking law in his own hands, and also by restoring him in possession even from the rightful owner (of course subject to the law of limitation), if the latter has dispossessed the prior possessor by use of force. In the absence of proof of better title, possession or prior peaceful settled possession is itself evidence of title. Law presumes the possession to go with the title unless rebutted. **The owner of any property may prevent even by using reasonable force a trespasser from an attempted trespass, when it is in the process of being committed, or is of a flimsy character, or recurring, intermittent, stray or casual in nature, or has just been committed,** while the rightful owner did not have enough time to have recourse to law. In the last of the cases, the possession of the trespasser, just entered into would not be called as one acquiesced to by the true owner.

11. **It is the settled possession or effective possession of a person without title which would entitle him to protect his possession even as against the true owner.** The concept of settled possession and the right of the possessor to protect his possession against the owner has come to be settled by a catena of decisions. Illustratively, we may refer to **Munshi Ram and Ors. v. Delhi Administration** - : 1968CriLJ806, **Puran Singh and Ors. v. The State of Punjab** - : AIR1975SC1674 and **Ram Rattan and Ors. v. State of Uttar Pradesh** - : 1977CriLJ433 . The authorities need not be multiplied. In **Munshi Ram & Ors.'s** case (supra), it was held that **no one, including the true owner, has a right to dispossess the trespasser by force if the trespasser is in settled possession of the land** and in such a case unless he is evicted in the due course of law, he is, entitled to defend his possession even against the rightful owner. **But merely stray or even intermittent acts of trespass do not give such a right against the true owner. The possession which a trespasser is entitled to defend against the rightful owner must be settled possession, extending over a sufficiently long period of time and acquiesced to by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may re-enter and re-instate himself provided he does not use more force than is necessary. Such entry will be viewed only as resistance to an intrusion upon his possession which has never been lost. A stray act of trespass, or a possession which has not matured into settled possession, can be obstructed or removed by the true owner even by using necessary force.** In **Puran Singh and Ors.'s** case (supra), the Court clarified that it is difficult to lay down any hard and fast rule as to **when the possession of a trespasser can mature into settled possession. The 'settled possession' must be (i) effective, (ii) undisturbed, and (iii) to the knowledge of the owner or without any attempt at concealment by the trespasser.** The phrase settled possession does not carry any special charm or magic in it nor is it a ritualistic formula which can be confined in a strait-jacket. An occupation of the property by a person as an agent or a servant acting at the instance of the

owner will not amount to actual physical possession. The court laid down the following **tests** which may be adopted as a working rule for determining the **attributes of 'settled possession'**:

i) that the trespasser must be in actual physical possession of the property over a sufficiently long period;

ii) that the possession must be to the **knowledge** (either express or implied) **of the owner** or **without any attempt at concealment by the trespasser and** which contains an element of **animus possidendi**. The nature of possession of the trespasser would, however, be a matter to be decided on the facts and circumstances of each case;

iii) the **process of dispossession of the true owner** by the trespasser **must be complete and final and must be acquiesced to by the true owner;** and

iv) that one of the usual tests to determine the **quality of settled possession,** in the case of **culturable land** would be **whether or not the trespasser, after having taken possession, had grown any crop.** If the crop had been grown by the trespasser, then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession.

12. In the cases of **Munshi Ram and Ors.** (supra) and **Puran Singh and Ors.** (supra), the Court has approved the statement of law made in **IIoram v. Rex** - : AIR1949All564 , wherein a distinction was drawn between the trespasser in the process of acquiring possession and the trespasser who had already accomplished or completed his possession wherein the true owner may be treated to have acquiesced in: while the former can be obstructed and turned out by the true owner even by using reasonable force, the later, may be dispossessed by the true owner only by having recourse to the due process of law for re-acquiring possession over his property." (Emphasis supplied)

93. A Full Bench of this court was considering a claim by the petitioner for permanent injunction restraining the municipal corporation from interfering or disturbing him from a kiosk which was allotted to him in an auction on a licence in AIR 1978 Delhi 174 **Chandu Lal vs.**

Municipal Corporation of Delhi. On the issue of the rights of the corporation to take possession of the kiosk after termination of the licence, the Full Bench of court has observed as follows:-

"25. .....After the termination of the license, the licensor is entitled to deal with the property as he likes. This right he gets as an owner in possession of his property. He need not secure a decree of the Court to obtain this right. He is entitled to resist in defense of his property the attempts of a trespasser to co e upon his property by exerting the necessary and reasonable force to expel a trespasser. If, however, the licensor uses excessive force, he may make himself liable to be punished under a prosecution, but he will infringe no right of the licensee. No doubt a person in exclusive possession of the property is prima facie to be considered to be a tenant, nevertheless he would not be held to be so if the circumstances negative any intention to create a tenancy."

94. Light on this issue is thrown on the above issue also by the observations of the Supreme Court while examining the claim by a person in exercise of right of private defence of property under sections 96, 97, 100 and 101 of the Indian Penal Code, 1860. In this regard, the following principles laid down by the Supreme Court in (2005) 12 SCC 657 **Bishna alias Bhiswadeb Mahato & Ors. vs. State of West Bengal** :-

"85. Private defence can be used to ward off unlawful force, to prevent unlawful force, to avoid unlawful detention and to escape from such detention. So far as defence of land against trespasser is concerned, a person is entitled to use necessary and moderate force both for preventing the trespass or to eject the trespasser. For the said purposes, the use of force must be the minimum necessary or reasonably believed to be necessary. A reasonable defence would mean a proportionate defence. **Ordinarily, a trespasser would be first asked to leave and if the trespasser fights back, a reasonable force can be used.**" (Emphasis supplied)

95. It is trite, therefore, that mere occupation of another's property simplicitor could not entitle a person to an injunction against dispossession.

96. The notice dated 16th September, 1972 under Section 4 of the

PP Act was issued by the Estate Officer in respect of land.

(IX). Possession of a plot of land - whose

97. It is now necessary to examine the plea of Mr. Sultan Singh, learned counsel for the plaintiff, that in law, possession of vacant land is presumed to be that of the owner. The submission is that the plea of cultivation set up by Het Ram is false and in any case, does not tantamount to legal possession of vacant land. In support of this submission, reliance is placed on the pronouncement of Gujarat High Court reported at AIR 1998 Gujarat 17 **Navalram Laxmidas Devmurari vs. Vijayaben Jayvantbhai Chavda**.

98. The foregoing narration would show that Het Ram-defendant no.4 and Late Kewal Ram set up bald pleas of being in cultivatory possession of the bare land without anything more. The discussion hereafter would show that possession is not something which is to be construed in the lose manner as suggested by this plea.

99. In AIR 1998 **Gujarat 17 Navalram Laxmidas Devmurari vs. Vijayaben Jayvantbhai Chavda,** the Gujarat High Court was considering a claim by the respondent for declaration of title to the suit property and injunction directing the appellant to remove a water tank, shed etc constructed over the same. The respondent had set up a plea that only one of the shops constructed on plot of land, which belonged to her husband, had been let out to the appellant. The open plot of land was in her possession and the appellant was not entitled to make use of any other part of the plot. The respondent had filed the suit making a grievance that despite this fact, the appellant had constructed a roof in front of the rented shop constructed a water tank and shed for keeping a motor pump to be used for the purpose of drawing water in the suit land and damaged the compound wall, without her knowledge and consent. A prayer was made in the suit seeking declaration and injunction that the appellant had no right to use or enter into the suit land except the house and shop let out to him. The respondent had also sought an injunction directing the appellant to remove the illegal constructions made by him over the suit land and claimed a permanent injunction restraining the appellant from disturbing the respondent(plaintiff) from using the suit land. The appellant/defendant had also set up a prohibition under Section 34 of the Specific Relief Act and contended that the suit for declaration simplicitor without seeking the relief of possession was not maintainable.

This suit was decreed by the trial court.

100. It is noteworthy that in the case in hand, IHBAS-the plaintiff has sought similar prayers. The contesting defendant before me has raised the same objections as the appellant in AIR 1998 Gujarat 17 **Navalram Laxmidas Devmurari vs. Vijayaben Jayvantbhai Chavda** (supra). Inasmuch as such pleas are raised very often, the valuable observations and findings of the court deserve to be considered in some detail and are being reproduced in extensor hereafter:-

> "11. The concept of possession is an abstract one. The ordinary presumption is that possession follows title. Presumption of possession over an open land always is deemed to be that of the owner and not of a trespasser. An open place of land shall be presumed to be in possession of the owner unless it is proved by the trespasser that he had done some substantial acts of possession over the land which may excite the attention of the owner that he has been dispossessed. As indicated above, an owner of an open land is ordinarily presumed to be in possession of it and this presumption becomes strong in his favour when the defendant fails to establish the ground on which he claims to have come in possession.
>
> The presumption that possession goes with the title is not limited to particular kind of cases where proof of actual possession is impossible on account of nature of the land, such as boundary land, forest land or submerged land. The presumption applies to all kinds of lands. Where plaintiff proves his title, but not any **act of possession and the defendant does not prove possession except unnoticed user of small part of land, the presumption that possession follows title will come into play**.
>
> 12. ..... As the appellant has miserably failed to establish the ground on which he claims to have come in possession of the disputed land, I am of the view that presumption that possession follows title will come into play. Except construction of water tank and shed over the open land and construction of roof in front of the shop the appellant has not done any substantial acts of possession over the land which may excite the attention of the respondent that she has been dispossessed. It may be mentioned

that the construction is over a small piece of land which totally admeasures 995-1 sq. yds. The small piece of land over which the construction was made, was of no present use to the respondent and being convenient in many ways to the appellant, the latter had made use of it in various ways without notice of the respondent. **Such user as this, cannot be construed as an act of dispossession of the respondent. User of this sort under similar circumstances is common in this country and excites no particular attention. It is neither intended to denote or understand as denying on one side or the other a claim to dispossession of the land.** Whether such user amounts to dispossession or not has been considered by the Court in the case of **State of Gujarat v. Patel Chhotabhai Bhaijibhai**. In the said case, the land belonged to the Government.

The respondent had been tethering cattle for more than 60 years. It was pleaded by the respondent that he had become owner of the land by adverse possession, as he was using the same for tethering cattle. After making reference to the case of **Framji Cursetji v. Goculdas Madhowji** ILR (1992) 16 Bom 338, the Court has held that evidence to show user of the site by tethering cattle for more than 60 years would not constitute possession. Again, in the case of **Memon Mohmed Ismail Haji** (supra), the plaintiff had filed suit for mandatory injunction for removal of the foundation dug by the plaintiff and for prohibitory injunction restraining the defendant from doing any construction on the suit land. The plaintiff had all along asserted that possession of the open land was with him. The injunction prohibiting defendant from entering into the land was also sought. The suit was dismissed by Trial Court as well as first Appellate Court. It was found that the disputed property therein was an open land where some construction material had been placed and not only foundations were dug, but construction work was also being done. It was noticed that the first Appellate Court had negatived claim of the defendant that they were in legal possession of the land, as they were using part of it for the purpose of drying saries. However, the first Appellate Court had treated act of drying saris as an act of dispossession of the plaintiff. The High Court has held that all along the defendant used open land as any

neighbour could use for drying saris and if the plaintiff s suit was on the allegation that neighbours were now committing acts of waste of his property by digging foundation and they be restrained from doing so, the averments in the plaint could never be treated as averments of the plaintiff having been dispossessed. While allowing the Second Appeal the Court has observed as under:—

> "The plaintiff all along asserted that possession of the open plot was with him as he was a title holder. He even never sought any declaration of his title and claimed only an injunction because such open plot would always be in his possession as a title holder. The defendant tried to assert adverse title to this open land and he failed. Therefore, the defendant had no possession whatever of this open land. Even on his own showing, at the date of the suit he was found only to have started doing waste of the plaintiff's property. The neighbour may not object so long as the user was of drying Saris on this land. A neighbour is surely entitled to object when his land is sought to be wasted and such adverse claim is sought to he asserted on the suit land. Therefore, the relevant injunctions were claimed against these trespassers on the footing that the plaintiff had remained in possession of this open land and the defendant-trespasser who was only trying to commit waste should be prevented from committing such waste, by removing whatever he had done and that he should be restrained from entering in this land. Therefore, the averments were consistent with his being in possession of the land and the defendant-trespasser being completely out of possession. These allegations were completely misread by the Lower Appellate Court and contrary to its own finding that drying of saris would not amount to legal possession, it has recorded a perverse finding that this trespasser was in possession and on that ground, the plaintiff has been non-suited."

13. From the principle laid down in the above-quoted decision, it is evident that mere user of part of the open land would not amount to dispossession of the owner and owner is entitled to

object when the property is sought to be wasted and or when adverse claim is sought to be asserted with reference to the open land. In the case of **Framji Curseti** (supra) in addition to tethering cattle some construction had also been made. But, inspite of that it was held that the user by tethering cattle and the construction of a temporary structure would not amount to possession in case of open land.

14. At this stage it would be advantageous to notice another unreported judgment rendered in **Special Civil Application No. 6390/84** by M.B. Shah, J. (as he then was) on **2/5/6-3-85,** Therein the petitioner had filed H.R.P. Suit before the Small Causes Court at Ahmedabad for a declaration that he was tenant of the suit land. He had also prayed for a permanent injunction. During the pendency of suit, an application Exh. 5 was filed by him claiming temporary injunction. The declaration and permanent injunction were claimed on the ground that he was tenant in possession of land admeasuring 1300 sq. yds. out of final plot No. 1099 at Naranpura and had not only constructed kachcha shed on it, but was also keeping cattle, manure and other articles in the land. The Small Causes Court found that the petitioner did not prove prima facie case and was not tenant of house along with open piece of land admeasuring 1300 sq. yds. In that view of the matter, the Small Causes Court rejected application Exh, 5. Thereupon the petitioner preferred an appeal before the Appellate Bench of the Small Causes Court. After appreciation of evidence, the Appellate Bench dismissed the appeal. The petitioner, therefore, approached High Court by way of filing petition under Article 227 of the Constitution of India. The High Court considered the question whether the petitioner could be said to be in possession of the land in dispute merely because he was tethering cattle, storing cow dung over some part of the land and that some kachcha shed of 9' x 9' was constructed by him over the land. After making reference to the cases of (i) **State v. Chhotabhai** (supra) and **Framji Cursetji** (supra), it is held as under :—

"**In the present case also, there is no evidence on record to show that the petitioner is in exclusive possession of the land in dispute, this type of" casual unnoticed user of open piece of land cannot be considered as exclusive possession of the land and conferring right over the land in the person using it. It is an admitted fact that the respondent is the owner of land and the doctrine that possession follows title requires to be applied, as it is vacant land**. The panchnama clearly shows that on the three sides of the land there is fencing and this also indicates that the respondent is in possession of the land.

So taking into consideration the fact that the petitioner has failed to prove his prima-facie right, title or interest over the land in dispute or even exclusive possession of the land, the learned judge has rightly not granted injunction as prayed for by the plaintiff."

From the principle of law enunciated in the above quoted case, it is evident that casual unnoticed user of open piece of land cannot be considered as exclusive possession of the land and conferring right over the land in the person using it."

(Emphasis supplied)

101. In the decision of the Division Bench of this court in the judgment dated 8th April, 2005 in Regular First Appeal No.134/1982 **Shahabuddin Vs.State of U.P.** MANU/DE/0546/2005 to support a claim of acquisition of title by adverse possession on the plea of actual physical possession, reliance was placed by the appellant on revenue record for 37 years. The claim of the appellant rested mainly on the assertion of continuous possession of the suit property from the time of his forefathers (just as Het Ram and Kewal). In this case, the learned trial Judge had returned the finding that possession of vacant land follows title and that the land being in long possession uncultivated/banjar/fallow showed that there was a presumption of possession of the land in favour of the respondent.

102. The appellant had claimed possession resting on a plea of tethering cattle on open land in the judgment reported at **Shahabuddin vs. State of UP & Ors.** (supra), it was observed as follows :-

"16. Law draws a distinction between possession and occupation. Mere occupation of another's property is not by itself construed as "possession" in the eyes of law.

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46. Tethering of cattle on open land would not amount to absolute or exclusive possession. The cattle must be moved for grazing and put under cover at night. Admittedly the land was banjar land and would not provide for grazing of cattle. Furthermore the tethering of cattle would result in availability of cattle dung which may have been utilised for making the dung cakes.

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57. In view of the aforestated position in law, we are of the view that it is a fact that the suit land was vacant land and was lying uncultivated. Even as per the documents produced by the appellant i.e. from the jamabandi of 1935-36, the land was uncultivated till 1971. Even if the defendant had been tethering his cattle on the open land or being preparing dung cakes, the same did not amount to absolute or exclusive possession in law. The learned trial judge has held the nature of such possession to be "furtive" or at the most permissive possession of which nobody took notice".

(Underlining supplied)

103. From the above judicial precedents, it is evident that so far as open land is concerned, such open plot would always be in the possession of the owner as a title holder. Mere unnoticed user of such land by a neighbor or a trespasser which is not in the nature of a substantial act of possession and would not tantamount to dispossession of the owner. In **Navalram Laxmidas Devmurari** (supra) the appellant had constructed a water tank and shed over a small piece of land out of the larger plot not being used by the plaintiff and it was held that such user could not be construed as an act of dispossession of the respondent.

104. In **Govt. of Gujarat vs. Patel Chhotabhai Bhaijibha** (relied upon in AIR 1998 Guj 17), it was held that evidence of 60 years of user of the site tethering of cattle would not constitute legal possession of the land. The judgment of this court in **Shahabuddin** (supra) was to the

same effect. The fact that the land was 'banjar' was also a consideration.

105. Even possession by itself may not be sufficient to obtain the relief of injunction. In order to become entitled to the relief of possession, in the case of cultivable land, one of the important tests is whether after having taken possession, the trespasser had grown any crop. The claim of the private defendant in the present case has to be examined against these well settled principles.

(X) Fraud

106. Mr. Arvind Nayar, learned counsel appearing for the defendant no. 4 has urged at length that the judgment dated 8th of April, 1999 passed in the Suit No. 293/1998 has attained finality; binds the present plaintiff and governs the rights of the parties in respect of the suit land. A plea of bar of res judicata against the challenge to the judgment dated 8th April, 1999 is pressed.

107. The plaintiff contests this plea of the private defendant, on a basic submission that it was not a party to CS 293/1998 where the judgment dated 23rd December, 1998 was passed. It is urged that the real owner was not impleaded deliberately in the litigation by the private parties. The suit land was not correctly described. It is further submitted that the judgment dated 23rd December, 1998 was obtained by practicing fraud by Het Ram and Kewal Ram and therefore is a nullity and of no legal consequence and effect. The submission is that the plea of res judicata is not applicable to the instant case. It is contended that for all these reasons, the judgment cannot bind the plaintiff.

108. Given the challenge by the plaintiff, it has to be seen as to what would be the standards on which the pleas have to be tested, and in case it is concluded that the judgment was obtained fraudulently, what would be the effect thereof on the present adjudication. Therefore, before proceeding to examine the facts leading to the filing of the present case, it is necessary to notice certain essential principles laid down by the Supreme Court on the issue of fraud by a party on the court.

109. In AIR 1956 SC 593 **Nagubai Ammal & Ors. vs. B. Shama Rao & Ors.,** (paras 15 & 16) the Supreme Court had occasion to rule on the difference between collusion and fraud and observed as follows :-

"15. Now, there is a fundamental distinction between a proceeding which is collusive and one which is fraudulent."Collusion in judicial proceedings is a secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose". (Wharton's Law Lexicon, 14th Edition, page 212). In such a proceeding, the claim put forward is fictitious, the contest over it is unreal, and the decree passed therein is a mere mask having the similitude of a judicial determination and worn by the parties with the object of confounding third parties. But when a proceeding is alleged to be fraudulent, what is meant is that the claim made therein is untrue, but that the claimant has managed to obtain the verdict of the court in his favour and against his opponent by practising fraud on the court. Such a proceeding is started with a view to injure the opponent, and there can be no question of its having been initiated as the result of an understanding between the parties. While in collusive proceedings the combat is a mere sham, in a fraudulent suit it is real and earnest....."

(Emphasis supplied)

110. In para 12 of the judgment reported at (2005) 7 SCC 605 **Bhaurao Dagdu Paralkar vs. State of Maharashtra & Ors.(G-V),** the court has carefully drawn a distinction between fraud in public law and fraud in private law. A reference has been made to a colourable transaction to avoid statutory provision as well as concealment of that which should be disclosed tantamounting to fraud.

111. The Supreme Court has also reiterated the principles laid down in its earlier pronouncements in the judgment reported at (1992) 1 SCC 534 **Shrishti Dhawan vs. Shaw Brothers** wherein it was held that if the misrepresentation caused the court to assume jurisdiction, it is a public fraud. The court observed as follows:-

"xxx

19. ..... What, then, is an error in respect of jurisdictional fact? A jurisdictional fact is one on existence or non-existence of which depends assumption or refusal to assume jurisdiction by a Court, tribunal or an authority. In Black's Legal Dictionary it

is explained as a fact which must exist before a court can properly assume jurisdiction of a particular case. Mistake of fact in relation to jurisdiction is an error of jurisdictional fact. No statutory authority or tribunal can assume jurisdiction in respect of subject matter which the statute does not confer on it and if by deciding erroneously the fact on which jurisdiction depends the court or tribunal exercises the jurisdiction then the order is vitiated. Error of jurisdictional fact renders the order ultra vires and Wade Administrative Law; bad. .....Error in assumption of jurisdiction should not be confused with mistake, legal or factual in exercise of jurisdiction. In the former the order is void whereas in the latter it is final unless set aside by higher or competent court or authority. An order which is void can be challenged at any time in any proceeding. xxx" (Underlining by me)

112. The following observations on "fraud" by the Supreme Court placing reliance on Black's legal dictionary; Oxford; and Halsbury's Laws of England in **Shristi Dhawan** (supra) deserve to be considered in extenso and read as follows :-

"20. .....According to Halsbury's Laws of England, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Contract Act defines fraud as act committed by a party to a contract with intent to deceive another. From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact which he knows to be untrue yet he succeeds in misleading the represented by making him believe it to be true. The representation to become fraudulent must be of fact with knowledge that it was false. In a leading **English Derry v. Peek** [1889] 14 App. Cas. 337 case what constitutes fraud was described thus, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false....."

(Emphasis supplied)

113. Mr. Sanjay Poddar, learned senior counsel for the Govt. of NCT of Delhi (Land & Building Deptt.) defendant no. 1 has stated that

in the instant case as well, that Het Ram and Kewal have fraudulently caused the court to entertain a case which was not maintainable given the applicability of the Public Premises (Eviction of Unauthorised Occupants) Act.

114. On this issue, my attention has also been drawn to the pronouncement of the Supreme Court reported at (2004) 11 SCC 364 **Commissioner of Customs Kandla vs. Essar Oil Ltd. & Ors.**

> "29. By "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from ill will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable, or of money and it will include any harm whatever caused to any person in body, mind, reputation or such other. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always call loss or detriment to the deceived. Even in those rare cases where is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied. [See Vimla (Dr) versus Delhi Admn, and Indian Bank versus Satyam Fibres (India) P Ltd.]"
>
> 31. "Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury enures therefrom although the motive from which the representation proceeding may not have been bad. (Underlining by me)

115. Suppression of a material document tantamounts to a fraud on

the court. In para 31 of **Essar Oil Ltd.** (supra), the court has specifically observed that a misrepresentation by itself tantamounts to fraud; even an innocent misrepresentation may give reason to give relief against fraud and that fraud is an anathema to all equitable principles. The principle is that any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including that of res judicata. In so observing, the court placed reliance on its prior pronouncement reported at (2003) 8 SCC 319 **Ram Chandra Singh vs. Savitri Devi.**

116. In AIR 1955 SC 340 **Kiran Singh vs. Chaman Paswan** the court observed that fraud would relate to assumption of a fact which goes to the roots of jurisdiction of the court which would vitiate the complete proceedings and that such a plea could be set up even in collateral proceedings.

117. In the light of the submissions made before this court and the above legal principles, the plea of the fraud on the part of Het Ram and Kewal Ram has to be considered from four aspects, being, firstly non-impleadment of necessary party; secondly, non-disclosure of complete details of land; thirdly, claim of cultivation; and fourthly, concealment of material fact.

(i) Non-impleadment of necessary party

118. It is urged by Mr. Sanjay Poddar, learned counsel and Mr. Sultan Singh, learned counsel that IHBAS and the Delhi Govt. were necessary and proper parties to the litigation in all proceedings initiated by Het Ram and/or Kewal Ram with regard to the subject land. Their non-impleadment in the cases was deliberate, is fraudulent and fatal to the outcome and the orders and judgments so caused to be passed are a nullity and non-est in law.

119. Let us examine the objection with regard to non-impleadment of necessary party before the other issues raised. In 1969, when the first Suit No. 693/1969 and other suits were filed, Het Ram and Kewal Ram had impleaded Union of India as defendant no.1. The memo of parties or the pleading in the suits have not been filed by the private defendants who would possess the same but the copy of the court orders placed by the plaintiff would show that the Delhi Government or the hospital were not parties.

120. While dismissing PPA No.88/1973, in the judgment dated 28th of March, 1974, Justice G.R. Luthra, the then learned Addl. District Judge has extensively discussed the reliance by the appellants including Het Ram-defendant no. 4 and Kewal-defendant no. 5 on the judgment dated 18th December, 1971 of the civil court and concluded as follows:-

> "7. The appellants brought suits for issue of a perpetual injunction restraining the Union of India and others from interferring with his possession with respect to the land which was subject matter of the proceedings before the Estate Officer. One of the issues framed in that case was to the effect, "If the appellant was a tenant in respect of the land". It was held by the Civil Court vide Judgment dated 17.12.1971 that the appellant was not a tenant but was unauthorised occupant. It was, however, held that inspite of the fact that the appellants were tresspassers they were not liable to be dispossessed except with due process of law. Accordingly, injunction that was granted was that the Union of India and others were restrained from interferring with possession of the appellants except by due process of law. The Estate Officer had held that the appellants were bound by the said judgment.....
>
> "8. I, however, do not agree with the learned counsel. The appellant had prayed for an unqualified perpetual injunction restraining the Union of India and others from interfering with their possession which implied a declaration that they were tenants and not tresspassers. That also implied that they wanted the injunction restraining the UOI and others from interfering with their possession unless their tenancy rights were and could be terminated. Injunction that was granted was in respect of their position as tresspassers and to the effect that they could not be evicted except in due process of law. Therefore, the appellants could go in appeal against the finding that they are not tenants but are unauthorised occupants which they did not do on account of which principles of resjudicata debarred them from now urging that they are tenants."
>
> (Emphasis supplied)

121. On the plea of the tenancy even in **CW No. 550/1972,** it was

held by **H.L. Anand, J** in the decision dated **31st March, 1975** as follows :-

> "What is more, the petitioners really had no possible cause to show and could not have even set up the plea that they had been in authorized occupation of the land in dispute. This is so because it was admitted that prior to the initiation of the proceedings, the petitioners had filed a civil action against the authorities seeking a perpetual injunction restraining the authorities from dispossessing the petitioners otherwise than in accordance with law on the plea that the petitioners have been in occupation of the land in dispute since over 20 years as tenants. The trial court dispelled the plea of the petitioners that they were tenants and held that they were unauthorized occupant had it however held, that even an-unauthorised occupant, had a limited right not to be disturbed except in accordance with law and, therefore, on that plea granted the relief sought by the petitioners and decreed the suit of the petitioners restraining the authorities from interfering with the petitioners possession except in accordance with law. **The petitioners being party to the aforesaid suit the finding of the trial court that the petitioners had been in unauthorized occupation of the land was binding on the petitioners and would operate as resjudicata in the proceedings under the Act** an as to..... the petitioners to set up such a plea. The contention.... District Judge, as indeed before this court, that such a decree would not operate as resjudicata because by the decree the petitioner's suit had succeeded and the petitioners, therefore, could not have filed an appeal against it is, however, unsustainable and was rightly dispelled by the learned Addl. District Judge. **The petitioners had sought relief from the civil court on the basis that the petitioners were tenants in respect of the land in dispute. The decision of the question whether the petitioners were tenants or were in unauthorized occupation was, therefore, necessary for the relief which the petitioners sought. That being so, it could not be said that the refusal by the civil court to grant them the relief on the basis that they were authorized occupants either as tenants or otherwise would not disentitle the petitioners to assail the decree to that extent and that being so, the decree**

would certainly operate as resjudicata. The principle of the decision in the case of **Mohamad Mir vs. Ghulam Mohmudin and others** AIR 1954 Jammu & Kashmir 32 which was invoked by the petitioners before this court, as indeed before the learned Addl. District Judge, was, therefore, of no avail to the petitioners. **In the face of the aforesaid decree the petitioners were, therefore, not entitled to set up a plea that they were in authorized occupation of the land and that being so, any relief to the petitioners in the present case on the basis of the two grounds urged above would amount to granting a futile writ because if the proceedings are quashed, the fresh proceedings would only be an exercise in futility so far as the petitioners are concerned because, being bound by the aforesaid decree, they cannot be heard to say that they were not unauthroised occupants and if they are unauthorized occupants, they are liable to be evicted.**" (Emphasis supplied)

122. On this issue, in the judgment dated 10th April, 1980 in LPA No.113/1975, the Division Bench of this court had observed as follows:-

"The material finding in the suits was that the appellants were not tenants of the lands in their possession, but they could be dispossessed not by force or executive action, but only in due course of law."

xxxx

" On these considerations it is quite clear to us that the **relief of injunction based on title was refused to the plaintiffs who are appellants before us. After having alleged that they were tenants it was that kind of injunction which was asked for by the appellants who were the plaintiffs in the civil suits.** Explanation V to section, therefore, applies and it must be held that the relief claimed in the plaint was that of an injunction based on title without the qualifying words showing that the plaintiffs could be evicted in due course of law. Since the relief has not been granted expressly by the decree, it must be deemed to have been refused. **In that sense, the decree is in harmony with the judgment and the pleadings. It reflects the finding that the plaintiffs were not tenants.** This is why the injunction is toned down and merely protected the possession only till the

authorites evict the appellant in due course of law. We are unable to accept the contention of the appellants that they could not have filed an appeal against the adverse finding regarding tenancy and hence the judgment in the civil court was not res judicata against them. In our view, they could have filed an appeal on the ground that an absolute injunction on the ground of title had been refused to them. They could have got the decree modified to make it absolute by omitting the words "except in due course of law". **The decree as construed by us was thus res judicata on the point of tenancy also."**

(Emphasis furnished)

123. My attention is drawn to the pronouncements in (2004) 1 SCC 317 **Khetrabasi Biswal vs. Ajay Kumar Baral & Ors.** In para 6, the Supreme Court has observed that:-

"6. The procedural law as well as the substantive law both mandates that in the absence of a necessary party, the order passed is a nullity and does not have a binding effect."

124. This very issue of non-impleadment of a necessary and proper party despite knowledge came up for consideration before the Supreme Court in the judgment reported at (2004) 10 SCC 665 **Dattatreya & Ors. vs. Mahaveer & Ors. (G-X)**. The relevant observations of the Supreme Court on this aspect in para 10 may be usefully extracted and read as follows:-

"10. .....By not impleading the present respondents as parties in writ petition No. 5495 of 1992 the appellants deprived the respondents of an opportunity to challenge that order; rather they were kept in dark about the whole proceeding. Any order to consider the application of the appellants moved in 1985 was likely to affect the order dated 3.7.1979 passed in favour of respondents. The appellants knew it, being parties in the earlier proceedings of 1974. The fact thus remains that the material facts were not brought to the notice of the court and the persons who were ultimately to be effected were avoided to be impleaded as parties. It was merely not a question of non-impleadment of necessary parties technically and strictly in accordance with the provisions of the Code of Civil Procedure rather was very much

a question of proper parties being there before the court particularly in proceedings under Article 226 of the Constitution. ..... The appellants cannot be allowed to claim any bonafides in not impleading the respondents as parties in that writ petition or about non-disclosure of the earlier order dated 3.7.1979 in respect of the same land and within their knowledge on the ground that it was not necessary to disclose it. As observed earlier, they knew well that if any order is passed in their favour the respondents would be the effected persons. The respondents were deprived from raising this point before the learned single Judge regarding a pre-existing order relating to the same land and non-disclosure of the same. The conduct of the appellants had been far from being fair if not fraudulent. It was a deliberate suppression of material fact which caused prejudice to the respondents. Fair play is the basic rule to seek relief under Article 226 of the Constitution."

(Underlining supplied)

125. It has been held that non-joinder of a necessary party goes to the root of the matter and violates the principle of audi alteram partum. It has been held that an order issued against a person without impleading him as a party, and thus, without giving him an opportunity of hearing must be held to be bad in law. (Ref : (1984) 4 SCC 251 **Prabodh Verma vs. State of U.P.;** (2004) 2 SCC 76 at para 27 **Ramrao vs. All India Backward Class Bank Employees Welfare Assn.;** (2010) 10 SCC 707 **Girjesh Shrivastava & Ors. vs. State of Madhya Pradesh & Ors.**).

126. In AIR 1963 SC 786 **Udit Narain Singh Malpaharia vs. Additional Member, Board of Revenue, Bihar**, this well settled principles of law was reiterated. It was stated that a necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. In (2010) 10 SCC 744 **Competition Commission Of India vs. Steel Authority of India Ltd.,** the court ruled that though non-joinder of proper parties may not be fatal to the proceedings, non-joinder of necessary parties may prove fatal.

127. Suit No. 293/1998 was filed jointly by Het Ram and Kewal on

23rd December, 1998 against Union of India and the L&DO for the first time ever laying a claim of acquisition of title by prescription. This by itself clearly shows that the plaintiff had knowledge of the 1965 notification under Section 22 of the DDA Act whereby land was placed at the disposal of the Land & Development Office, Govt. of India for further transfer to the Delhi Administration. Yet Delhi Government does not appear to have been impleaded.

128. The transfer of management and control of the Hospital for Mental Diseases by the Government of NCT of Delhi to IHBAS was by way of the public notification dated 22nd December, 1993. Het Ram and Kewal Ram would thus have had full knowledge of the rights of IHBAS. Yet in the suit filed in 1998, did not implead the true owner IHBAS as a party. Most importantly, they do not even remotely disclose the public notifications.

129. The suit was filed on the ground that the "defendants" therein had refused to substitute the names of the plaintiffs in their records. This plea was reiterated in para 9 setting out the cause of action.

130. The plaint in Suit No. 293/1998 read in its entirety, discloses that Het Ram and Kewal Ram sought enforcement of a "right of adverse possession" against "these authorities".

131. More importantly, the 20th December, 1996 notice issued by Shri Narendra Kumar, Estate Officer, was challenged by way of RCA No.19/1996 (PPA No.4/2008) titled **Kewal Vs. Estate Officer, IHBAS**.

This appeal PPA No. 4/2008 (earlier RCA No. 19/1996), filed by Kewal Ram against IHBAS and PPA No.21/1999 **Kewal vs. Estate Officer, IHBAS** (dismissed only on 11th February, 2002) were pending. Kewal Ram was therefore well aware in 1998 when S. No.293/1998 was filed of the rights, claims and objection of IHBAS. Yet no disclosure thereof is made in the plaint. IHBAS is also not impleaded as a party.

132. It is clearly evident that Het Ram and Kewal Ram had full knowledge of the rights and claim of title, ownership and possession by IHBAS and the Delhi Government which were clearly necessary and proper parties in a suit concerning title and rights in the suit property. Yet neither the present plaintiff nor even Government of NCT of Delhi were impleaded as defendants in this case. Thus the true owner was deliberately not impleaded as a party in the suit filed in 1998.

133. The few available details of the Suit No.293/1998 set out at the beginning of this judgment (in the chronological judicial history) show that the persons who stood impleaded as defendants in Suit No. 693/1969 or in the execution proceedings in 1982 were not made parties in the 1998 suit.

134. In the plaint (in Suit No. 293/1998), it was contended that the government authorities were interfering with the possession of the plaintiff in respect of the land. In para 4 of the plaint, Het Ram and Kewal Ram placed reliance on the judgment dated 17th December, 1971; and the said local commissioner's report dated 9th May, 1991 in support of their contention that they were in cultivatory possession of the suit land.

135. The L&DO - defendant no. 3 before this court has placed a statement filed by it in the Suit No. 293/98 that the land was resumed from DDA on 7th May, 1965 and handed over to the Delhi Administration Division III (on behalf of Superintendent (Medical Services). The remaining land was perhaps in the ownership of DDA, and that DDA and PWD appropriately be impleaded in the case.

136. In para 2 of the judgment dated 8th April, 1999 in the suit of 1998, it is noticed by the learned Judge that the UOI had unequivocally stated in a reply that the land in the suit stood handed over to Delhi Admn. Division III and that the defendant no. 2 had no concern whatsoever with the suit land. Yet, no order for its impleadment was made.

137. In the instant case, Het Ram and Kewal Ram have not litigated against the real owner at any point of time. Despite full knowledge, they have deliberately not impleaded the necessary parties in the suits in 1998 and the decree, dated 8th of April, 1999 has not been passed against the correct and necessary party. In view of the principles laid down in the binding judicial precedents noted heretofore, decree obtained by practice of such fraud cannot bind IHBAS the necessary party.

138. The judgment rests on the observation that "there was no objection by the real owner", without returning a finding as to who was the real owner.

(ii) Details of Suit Land

139. Learned counsel for the plaintiff and Govt. of NCT of Delhi

have pointed out the contradictory land claims laid by Het Ram & Kewal Ram at various places with respect to the land. For purposes of convenience and clarity, even at the cost of some repetition the same are set down hereafter:-

(i) Suit No.693/1969 & 703/1969

(i) Two separate suits being Suit No.693/1969 & 703/1969 were filed in 1969 by Kewal Ram and Het Ram seeking permanent injunction restraining the defendants from their claimed possession of the separate plots of land. The plaints in these cases have not been placed before this court. However, the order dated 17th December, 1971 in Suit No.693/1969 **Kewal Ram Vs. UOI** shows that Kewal Ram had laid a claim over land in Khasra Nos.317/17 min 16/20, 21, 10, 11 (measuring 21 bighas 10 biswas) in Village Tahirpur. Similarly, the copy of order dated 17th December, 1971 in Suit No.703/1969 **Het Ram Vs. UOI** shows that the case related to land in Khasra No.317/17 min 15/12, 13, 18, 19, 22 (measuring 21 bighas 8 biswas) Village Tahirpur.

(ii) Suit No. 293/98

The plaintiff has placed an illegible photocopy of the plaint signed in November, 1998 in Suit No.293/98 jointly filed by *Kewal Ram and Het Ram* with regard to 39 bighas of land within khasra no.317/17/15/12/13/18/14/22 min and 317/17/21/10/11 situated in Village Jhilmil Tahirpur, Shahdara, Delhi seeking a decree of declaration that they were owners by way of their adverse possession in respect of the "said land" and a further direction to the defendants and their officials to effect substitution of the names of the plaintiffs in respect of the "said" land. The judgment dated 8th April, 1999 was thus passed against the Union of India, Ministry of Urban Development and its Land & Development Officer.

(iii) Suit No.47/2000

(a) Kewal Ram is not a party to the Suit No.47/2000 (now CS No.18/2005) which has been filed by Het Ram alone. The dishonesty in the pleadings is writ large from the following assertions in the plaint which deserve to be extracted:-

> "1. That the plaintiff filed Suit No.703/1969 for permanent injunction against DDA, Union of India, Land & Development Office and CPWD with respect to the land comprised in Khasra

> Nos.317/17 min 15/12, 13, 18, 14, 22 measuring 21 bighas 8 biswas which is un-demarcated and undivided alongwith land in Khasra Nos.317/17,21,10,11 measuring 21 bighas and 10 biswas situated in village Tahirpur, Shahdara, Delhi. For the undivided and undemarcated land in Khasra Nos.317/17,21,10,11, one Kewal Ram filed a similar suit, like the plaintiff, for permanent injunction against the aforesaid defendants."

(b) Even though Kewal Ram is not co-plaintiff in Suit No.47/2000, Het Ram deviously makes a reference to the land over which Kewal Ram had made a claim. The rest of the plaint is carefully silent with regard to the separate claims laid by these two persons in the 1969 suits. The prayer clause is dishonestly and cleverly couched as follows:-

> "(1) decree the suit for permanent injunction and thereby permanently restrain the defendants, their officers, employees, servants, agents etc etc from interfering in the peaceful cultivatory possession of the plaintiff over the suit land comprised in Khasra Nos.317/17/15/12/13/18/14/22 min and 317/17/21/10/11 situated in village Jhilmil Tahirpur, Shahdara, Delhi as shown in the site plan;

140. To say the least, this prayer which includes land in respect of which Kewal Ram had laid a claim, is not only brazen but completely dishonest. In the above pleadings and prayer made by Het Ram by way of CS 47/2000, the intention to mislead, confuse and take undue advantage of any orders passed in this suit, to usurp land including such land over which Kewal Ram had at one point laid a claim is writ large. The reference to multiple plaintiffs when Het Ram is the sole plaintiff smacks of the malafide intention.

141. Neither Het Ram nor Kewal Ram have ever set out the location of the suit land by any boundaries. The notifications mentioned in the previous part of this order clearly delineate the boundaries which are relied upon. In CS 47/2000, Het Ram merely refers to "suit land" deliberately which description is hopelessly incomplete and unsupported by any site plan or map which would show the reference to which land or the boundaries thereof.

142. Before this court, a certified copy showing a plot of land has been filed by Het Ram which does not reflect what is the demarcation

of the land. It does not even show as to which are the proceedings in which this plan was filed.

143. Het Ram has filed IA No.15078/2011 under Section 151 of the CPC on 11th November, 2010 in these proceedings. In para 31 of this application, Het Ram claims to have sent a precautionary notice to the plaintiff, the SHO, Dilshad Garden, Delhi and the SDM, Seemapuri dated 28th September, 2010. The copy of the notice has been enclosed which shows that it refers to **"land of the undersigned comprised in khasra no. 317/17 min, 16/20, 21, 11 measuring 21 bighas 10 biswas in Jhilmil, Village Tahirpur"**. No other land is referred to by Het Ram. He states in this letter that **"said land** is in **possession** of the **undersigned** and **has not been cultivated since order of stay was passed by Hon'ble High Court on 9th November, 2004 in Cont.Cas(C) No.769/2004"**. In the second sub-para of this letter, Het Ram claims that he has **the right to cultivate the "said property"** under the orders dated 8th April, 2000 and confirmed vide order dated 12th August, 2000. Het Ram writes that he was informing the notices that he "shall **proceed to cultivate** the **abovesaid land** with effect from 5th October, 2010".

144. From the above narration, it is also apparent that no claim at all had been laid by Het Ram to occupancy or possession of khasra no.317/17 min 16/20, 21, 10, 11 measuring 21 bighas 10 biswas. On the contrary, Het Ram had admitted that Kewal Ram had laid a claim over land in khasra no.317/17, 21, 10, 11. So far as khasra no.317/17 min, 16/20 is concerned, neither Het Ram nor Kewal Ram had asserted any title, possession or cultivation. It is not mentioned in the plaint in CS No.47/2000 anywhere.

145. It is also important to note that in the plaint in Suit No.47/2000, Het Ram has mentioned the khasra no.317/17, 10 in the context of Kewal Ram whereas khasra no.317/17 min 10 is not mentioned at all in the letter dated 28th September, 2010 by Het Ram.

146. In view of the plea now propounded and the above discussion, the land is "un-demarcated" and "undivided". Therefore, it certainly cannot be contended or held that Het Ram or Kewal Ram were in possession of or cultivating any specific piece of land.

147. It may be noted that a report dated 29th March, 2007 of the SDM, Seemapuri purporting to be upon a demarcation conducted pursuant

to orders dated 5th March, 2007 of this court, states that it was conducted in the presence of Het Ram and Sh. Kiran Chand who refused to sign the report when their counsels were present. It records that khasra no. 318/17 min is wholly built up in the form of police station Dilshad Garden, DDA Flats and the rest of the raqba is inside the GTB Hospital boundary. So far as the land of khasra no.317/17 min was concerned, the same was lying within the boundary of the GTB Hospital. On the spot the land was lying vacant in the form of banjar and that there was no sign of cultivation of crops. Only a bench claimed by IHBAS was lying on the vacant piece of land which was fenced by boundary walls of IHBAS. The SDM had reported that there was no possession of any private persons/party on the land.

148. Het Ram has filed objections to this report which are pending, to the said report contending that the same was collusive and detailed reference to court proceedings has been made. Even in these objections, there is not even a whisper of a suggestion with regard to the nature of the claimed occupancy or cultivation on the subject land.

149. On merits, Het Ram has emphatically relied only on the judgment dated 8th April, 1999 passed by Shri B.S. Choudhary, ADJ in Suit No.293/1998.

150. The judgment dated 8th April, 1999 is premised on the sole claim of the plaintiffs herein that they have been in continuous use and occupation of the land for the last more than 50 years. In support of this claim, reference is made to revenue records in the nature of jamabandies for the years 1959-60; 1963-64; 1967-68. The judgment of the learned ADJ notes that the jamabandies recorded that the possession of the plaintiffs was entered as "najayaj kabiz". The same has been translated by the trial court to read as "continuous possession since long" whereas literally translated, the expression 'najayaj kabiz' refers merely to an unauthorized occupant. This expression nowhere refers to continuity of the occupation.

151. Before this court also Het Ram and legal heirs of Kewal Ram have not placed any rent receipts or revenue records claimed to be in their possession to support their plea of tenancy; possession or claim of cultivation. There is not a single document placed by them to support the plea of either title or possession.

152. On the contrary, IHBAS has placed the jamabandi of the year 1967. This record reflects the owner as the Government ("sarkar daulat madar ") and the alleged occupant as 'najayaz kabiz'.

153. In this regard, an odd entry in isolated record of unauthorized occupation for a certain period would not support a case of uninterrupted possession. There is not a single document, even of any revenue record of any date prior or subsequent to 1967-68 suggesting even unauthorised occupancy of Het Ram or his predecessors.

154. The legal position on reliance on revenue records, an electricity bill etc to support such claim has been considered by the courts. In para 33 of **Shahabuddin vs. State of U.P. & Ors.** (supra) it was held as follows :-

> "33. It is seen that persons claiming title by virtue of adverse possession have placed reliance on evidence in the nature of mutation in revenue records, electricity bills etc. Such documents, by themselves, do not establish the nature of possession as adverse possession. It has been held that the documentary evidence has to be co-related to the animus possidendi. Thus, mutation in revenue record of the property in the name of one of the co-sharers would not amount to ouster of others unless there in a clear declaration that title of other co-sharers was denied and disputed. In this behalf, reference may be made to dicta of the Apex Court laid down in [2002]1SCR91 entitled **Darshan Singh and Ors. v. Gujjar Singh (dead) by LRs and Anr.** and (2004)1SCC271 entitled **Md. Mohammed Ali (dead) by LRs v. Sri Jagdish Kalita and Ors.** It has also been held that mere non-payment of rent and taxes may be one of the factors for proving adverse possession but it cannot be the sole factor in [1981]1SCR863 **Karbalai Begum v. Mohd. Sayeed and Anr.;** MANU/PR/0014/1934 **Ejas Ali Qidwai and Ors. v. Special Manager,** Court of Wards, **Balram Pur Estate and Ors.;** 57(1995)DLT101 entitled **Harbans Kaur and Ors. v. Bhola Nath and Anr.** AIR 1932 Oudh 46 entitled **Suraj Bali v. Lala Mahadev Parsad.**"

The judgment dated 8th of April, 1999 premised on jamabandies is contrary to this settled legal position as well.

155. After hearing arguments, judgment in the present applications had been reserved. While dictating the order, the contradictions and the concealment with regard to the actual land which was the subject matter of the various litigation was noticed. Consequently, the matter was placed for clarifications. The parties were directed to file written submissions with regard to the land which was the subject matter of the litigation. While the plaintiff and Government of NCT of Delhi-defendant no.1 filed the written submissions pointing out the above-noted contradictions in the claim made by Het Ram and Kewal Ram, the private defendant no.4 for the first time filed written submissions dated 21st October, 2011 taking the following vague plea :-

> "Khasra No.317/17/15/12/13/18/14/22 min & 317/17/21/10/ 11 min as claimed by the defendant nos. 4 & 5 jointly undivided un-demarcated and contiguous (total area being 21 bighas 10 biswas of Kewal Ram and 21 bighas 8 biswas of Het Ram as per the revenue record)."

(iii) Claim of Cultivation

156. It is now necessary to consider Het Ram's claim of cultivation on land. It is noteworthy that in Cont.Cas.No.769/2004, an order dated 9th November, 2004 was passed restraining the respondents from cultivating the land which was the subject matter of the order dated 12th August, 2000. This order was also vacated by the order dated 11th December, 2008.

157. Het Ram places heavy reliance on the judgment dated 17th December, 1971; an order dated 5th May, 1989 in some execution proceedings; the local commissioner's report dated 5th May, 1991 and the judgment dated 8th April, 1999 before this court. A local commissioner's report dated 10th of May, 1991 has been placed on record without disclosing any details of the proceedings or even the order under execution.

158. This local commissioner's report (dated 10th of May, 1991) reflects that it was recorded in execution proceedings (details not disclosed) aforenoticed in the presence of Sh. Kewal and Sh. Inder Raj, without notice to the opposite party. This report records a claim made by Het Ram – the decree holder that *"he sowed jowar crop but the crop is visible towards field of the road side only and in the rear part there was water logging and the crop was not visible. There was a pumping station situated in the north side with two big tanks/ water storage".* According to Shri Het Ram, *"the water was pumped out in his field by the PWS officials from the tanks/storage wall in the right and that damaged the crop of the plaintiff."*

This local commissioner in the report dated 10th May, 1991 vaguely refers to "sowed jowar crop" towards field of the road side" without adverting to any reference or identifiable point or land mark to trace the land. More importantly this report of course does not state the identity of the cultivator or the land. It is impossible to discern the location of the crops or the road reference in the report.

The official occupation of the land is revealed from the said report which suggests existence of a pumping station and storage tanks at the place.

159. There is not even an averment let alone document to support that Het Ram or Kewal Ram were in occupation of the suit land after the possession taking report dated 28th October, 1987 pursuant to Shri B.L. Anand's order till the alleged local commissioner's visit.

160. This court would take judicial notice of the fact that cultivation in Delhi is seasonal and the crop being cultivated would vary from season to season. A person who is cultivating on the land would have sufficient documentary evidence to prove and establish the existence of and nature of the crops and cultivation over the years. Having regard to the claim of period of occupancy and the several decades of litigation involved, there would be voluminous evidence of multiple bills of seeds; seedlings; quantum of produce; its sale and disposal etc. There would be bills of transportation as well. No evidence at all is forthcoming.

161. In the instant case, the subject land is completely land locked. Therefore there would also be material and documentary evidence of the manner in which irrigation was effected; electricity bills if a pump was being used etc. Not a single document has been produced till date.

162. Het Ram (and even Kewal Ram) have never made a disclosure of details of the crops and cultivation; source/manner/expenditure of and or seeds/fertilization/irrigation of the land for the cultivation in any pleadings.

163. Several applications have been filed by Het Ram seeking right

to ingress and egress without placing the location of the land to which Het Ram is to be permitted access except the interim order to remove the fence and level the land and cultivation which clearly manifest that Het Ram did not have possession or absolute possession over the suit property. The material on record shows that a grievance even has been ade by Het Ram of fencing of the suit land by IHBAS. No court has given permission to Het Ram to cultivate on the subject land. There is no material at all to show that the land was ever leveled or cultivation effected. So far as Het Ram is concerned, the above narration also shows that there is not an iota of evidence to the effect that Het Ram was ever in possession as required in law (or settled possession) of any portion of the suit property.

164. It is noteworthy that in Suit No. 47/2000 (renumbered as Suit No.18/2005), Het Ram had prayed that IHBAS be restrained from stopping his ingress and egress to the suit land. It is evident therefrom that Het Ram cannot access the land which he claims rights over unless IHBAS permits the same.

165. The jamabandi of 1967-68 relied upon by Het Ram placed by IHBAS on record, also refers to the land being "banjar" which clearly shows that there was no cultivation. A jamabandi is certainly not a record of rights.

166. A similar claim arose before the Supreme Court in the pronouncement reported at AIR 1979 SC 1303 **Jai Dutt vs. State of Uttar Pradesh and Ors.,** wherein the court held as below :-

> "There is neither any factual nor legal basis for the appellant's contention that he had acquired some kind of tenure as a tenant by remaining in twelve years' continuous possession of the land in dispute. As noticed by Additional District Judge and the learned Single Judge of the High Court, the Khasra tendered in evidence before the Public Authority, shows that in the years 1362, 1363, 1365 and 1367 Fasli (which we are told roughly corresponds to 1955-56, 1956-57, 1958-59 and 1960-61 A.D.) the land in dispute was lying banjar (barren). That is to say, in the years 1955 to 1961, **the appellant was not in occupation of this land**. During these years, when the land was lying banjar, its possession would be presumed to be of the lawful owner, viz., the State Government. The appellant's possession over the land is shown

> for the first time in Khasra of the year 1368 Fasli (roughly corresponding to 1961-62) as "bilatasfia, Ziman 10-Ka". The documentary evidence from the revenue records, accepted by the courts below, had thus discounted the appellant's claim that he had been in cultivatory possession of the disputed land for 12 years preceding the issue of the impugned notice under Section 3(1)."
>
> (Emphasis supplied)

167. The letter dated 28th October, 2010 would show that though the stay had been vacated on 11th December, 2006, admittedly, Het Ram had not attempted to or carried on any cultivation till 5th October, 2010. This further indicates that the claim of being in occupancy or possession or carrying on cultivation is completely sham.

168. The primary plea of fraud by Het Ram and Kewal Ram may now be discussed. It is important to note that the four appellants (in PPA No. 88/1973) including Het Ram and Kewal Ram were claiming to be in cultivatory possession of 86 bighas and 5 biswas of land situated at village Tahirpur, Delhi. It is also an admitted position therefore that till 10th April, 1980 (when the LPA No. 113/1975 was decided), the defendant nos. 4 and 5 were asserting the plea that they were tenants against payment of rent of open land and that the Union of India was their lessor.

169. A person asserting acquisition of title by adverse possession has to give full particulars of the real owner, date on which he entered into possession as well as the date from which he started asserting a title to the property which was adverse to the real owner. There is no such pleadings in CS 293/98.

170. Before the court seized with CS No.293/1998, Het Ram and Kewal Ram not only had to give specifics of the lease of their "forefathers", but also the details of when these acquired interest from their forefathers. They had to specifically plead when such interest turned hostile. Het Ram and Kewal Ram do not disclose even the names of their so called "forefathers". Or how, why and when, they (Het Ram and Kewal Ram) derived interest from the so called forefathers? They did not explain whether their forefathers had other heirs and how come they alone acquired interest in the land.

171. Even in the written statement dated 21st November, 2006 filed by Het Ram (defendant no.4) and signed by Kiran Chand (defendant no.5 (i) in the present case, not a word is contained about who were the predecessors in interest of Het Ram or Kewal. They had not averred how their predecessors acquired rights or the interest in the land or when, if ever, they were ever put in possession.

172. It is evident that the decree dated 8th April, 1999 was obtained without impleading the necessary or proper parties or necessary particulars of the land. Het Ram and Kewal Ram also concealed the fact that the real owners were contesting their claim since 1971; and the fact that they had set up a plea of tenancy from the Government. It was also not disclosed to the court as to the person as well as the correct details of the authority interfering in the claimed possession nor the description of the party who had initiated the proceedings. Government notifications in the public realm as well as proceedings under the PP Act and orders passed therein were also concealed. An examination of the plaint in Suit No. 47/2000 would show that Het Ram even in this plaint does not describe the status of IHBAS impleaded as the sole defendant therein nor does he disclose as to who even according to him was the real owner of the property. Het Ram has prayed only for a decree restraining the defendants from interfering in the "peaceful cultivatory possession of the plaintiff".

173. While passing the judgment dated 8th of April, 1999, the learned ADJ has referred to the judgment dated 17th December, 1971 but failed to consider the claim of the plaintiff therein as recorded even on 17th December, 1971 that this person was claiming cultivatory possession as a tenant against the payment of rent. It also does not notice that the judgment dated 17th December, 1971 was rendered only on the principle that the trespasser in settled possession can be thrown out only by due course of law. IHBAS has admittedly taken such proceedings result whereof has attained finality by orders of the Division Bench.

174. In this regard, in the pronouncement reported at (2006) 7 SCC 416 **Hamza Haji vs. State of Kerala & Anr.,** the court observed that the appellant had falsely claimed that he had title to land and the same had not vested in the State and in the alternative, that he bonafide intended to cultivate the land and was doing the same, whereas as a matter of fact he did not have either title or possession over that land. The Supreme Court held that the plaintiff had played a fraud and had put forward a

false claim for obtaining a judgment based on perjured evidence and that such person was not entitled to the exercise of extraordinary jurisdiction in his favour. The court has also extensively considered, precedents with regard to the manner in which a decree can be reopened against a party who had obtained the same by fraud in para 10 to 15 and paras 20 to 24 which read as follows:-

> "10. It is true, as observed by De Grey, C.J., in **Rex v. Duchess of Kingston** 2 Smith L.C. 687 that:
>
> 'Fraud' is an intrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts ecclesiastical and temporal.
>
> 11. In Kerr on Fraud and Mistake, it is stated that:
>
> in applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior or by the highest Court of judicature in the realm, but in all cases alike it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud.
>
> 12. It is also clear as indicated in **Kinch v. Walcott** 1929 AC 482 that it would be in the power of a party to a decree vitiated by fraud to apply directly to the Court which pronounced it to vacate it. According to Kerr,
>
> In order to sustain an action to impeach a judgment, actual fraud must be shown; mere constructive fraud is not, at all events after long delay, sufficient- but such a judgment will not be set aside upon mere proof that the judgment was obtained by perjury.
>
> 13. In Corpus Juris Secundum, Volume 49, paragraph 265, it is acknowledged that,
>
> Courts of record or of general jurisdiction have inherent power to vacate or set aside their own judgments.
>
> In paragraph 269, it is further stated,
>
> Fraud or collusion in obtaining judgment is a sufficient ground for opening or vacating it, **even after the term at which it was**

rendered, provided the fraud was extrinsic and collateral to the matter tried and not a matter actually or potentially in issue in the action.

It is also stated:

Fraud practiced on the court is always ground for vacating the judgment, as where the court is deceived or misled as to material circumstances, or its process is abused, resulting in the rendition of a judgment which would not have been given if the whole conduct of the case had been fair.

14. In **American Jurisprudence,** 2nd Edition, Volume 46, paragraph 825, it is stated,

Where fraud is involved, it has been held, in some cases, that a remedy at law by appeal, error, or certiorari does not preclude relief in equity from the judgment. Nor, it has been said, is there any reason why a judgment obtained by fraud cannot be the subject of a direct attack by an action in equity even though the judgment has been satisfied.

15. The law in India is not different. **Section 44 of the Evidence Act** enables a party otherwise bound by a previous adjudication to show that it was not final or binding because it is vitiated by fraud. The provision therefore gives jurisdiction and authority to a Court to consider and decide the question whether a prior adjudication is vitiated by fraud. In **Paranjpe v. Kanade** ILR 6 BOM 148 it was held that it is always competent to any Court to vacate any judgment or order, if it be proved that such judgment or order was obtained by manifest fraud. In **Lakshmi Charan Saha v. Nur Ali** ILR 38 Cal 936 it was held that the jurisdiction of the Court in trying a suit questioning the earlier decision as being vitiated by fraud, was not limited to an investigation merely as to whether the plaintiff was prevented from placing his case properly at the prior trial by the fraud of the defendant. The Court could and must rip up the whole matter for determining whether there had been fraud in the procurement of the decree.

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21. In **Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education and Ors.** : AIR 2003 SC 4268, this Court after quoting the relevant passage from **Lazarus Estates Ltd. v. Beasley** (1956) 1 All ER 341 and after referring to **S.P. Chengalvaraya Naidu (Dead) by LRs. v. Jagannath (Dead) by LRs and Ors.** (supra) reiterated that **fraud avoids all judicial acts**. In **State of A.P. and Anr. v. T. Suryachandra Rao** : AIR2005SC3110, this Court after referring to the earlier decisions held that **suppression of a material document could also amount to a fraud on the Court**. It also quoted the observations of **Lord Denning in Lazarus Estates Ltd. v. Beasley** (supra) that,

No judgment of a Court, no order of a minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything.

22. According to Story's Equity Jurisprudence, 14th Edn., Volume 1, paragraph 263:

Fraud indeed, in the sense of a Court of Equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientiously advantage is taken of another.

23. In **Patch v. Ward** 1867 (3) L.R. Chancery Appeals 203, Sir John Rolt, L.J. held that: Fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case, and obtaining that decree by that contrivance.

24. This Court in **Bhaurao Dagdu Paralkar v. State of Maharashtra and Ors.:** AIR 2005 SC 3330 held that: Suppression of a material document would also amount to a fraud on the court. Although, negligence is not fraud, it can be evidence of fraud."

(Emphasis supplied)

175. The plaint of November, 1998 however does not even remotely suggest, let alone refer to the section 4 of PP Act, notice dated 16th September, 1972 or the proceedings thereon including the proceedings in

Eviction Case No. 15/E/C/72; PPA No. 88/1973; CW No. 550/1974, LPA No. 113/1975, and the eviction orders dated September, 1972 passed thereon or the possession report dated 20th October, 1987. Het Ram and Kewal Ram were fully aware of the several public notices with regard to the subject land. They (with Inder Raj & Ganga Sahai) had jointly walked the long road of litigation.

176. The effect of a plaintiff failing to plead material facts or to place the material documents before the court resulting in a judgment to be passed, came up for consideration before the Supreme Court in the judgment reported at (1994) 1 SCC 1 **S.P. Chengalvaraya Naidu (Dead) By Lrs. vs. Jagannath (Dead) By LRs and Ors.**

177. So far as the plea of finality attaching to a judgment or decree so obtained is concerned, the following observations of the Supreme Court in **S.P. Chengalvaraya Naidu (Dead) by Lrs. Vs. Jagannath (Dead) by Lrs and Ors.** are material and clearly apply to the instant case:-

> "5. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean-hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court - process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

178. In para 6 of the case, it was further observed as follows:-

> "6. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage..... A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would he guilty of playing fraud on the court as well as on the opposite party."
>
> (Emphasis supplied)

179. The principles were reiterated by the Supreme Court in the later judgment (2007) 4 SCC 221 **A.V. Papayya Sastry & Ors. vs. Govt. of AP and Ors. (G-III)**. In paras 21, 22, 24, 25 & 26 of this judgment, the Supreme Court has carefully noticed that no finality would attach to an order obtained from the Supreme Court by fraudulent conduct and stated as follows :-

> "21. Now, it is well-settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed:
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> "Fraud avoids all judicial acts, ecclesiastical or temporal."
>
> 22. **It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non est in the eye of law. Such a judgment, decree or order —by the first Court or by the final Court— has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings**.
>
> xxx
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> 24. In Duchess of Kingstone, Smith's Leading Cases 13th Edn., p.644, explaining the nature of fraud, de Grey, C.J. stated that though a judgment would be res judicata and not impeachable

from within, it might be impeachable from without. In other words, though it is not permissible to show that the court was 'mistaken', it might be shown that it was 'misled'. There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely, that on the merits, the decision was one which should not have been rendered, but it can be set aside, if the court was imposed upon or tricked into giving the judgment.

25. It has been said; Fraud and justice never dwell together (fraus et jus nunquam cohabitant); or fraud and deceit ought to benefit none (fraus et doles nemini patrocinari debent).

26. Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. **Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of 'finality of litigation' cannot be stretched to the extent of an absurdity that it can be utilized as an engine of oppression by dishonest and fraudulent litigants.**"

(Emphasis supplied)

180. On the scope of the power of court confronted with fraud by a party resulting in passing of a decree, the following observations of the Supreme Court in **A.V. Papayya Sastry & Ors. vs. Govt. of AP Ors.** have a material bearing on the issue:

"31. In **Indian Bank v. Satyam Fibres (India) Pvt. Ltd.** : AIR 1996 SC 2592 , referring to **Lazarus Estates and Smith v. East Elloe Rural District Council** 1956 AC 336 : (1956) 1 All ER 855 : (1956) 2 WLR 888, this Court stated;

"22. **The judiciary in India also possesses inherent power, specially under Section 151 C.P.C., to recall its judgment or order if it is obtained by fraud on Court. In the case of fraud on a party to the suit or proceedings, the Court may**

direct the affected party to file a separate suit for setting aside the Decree obtained by fraud. Inherent powers are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the Constitution of the Tribunals or Courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behavior. This power is necessary for the orderly administration of the Court's business."

(Emphasis supplied)

181. On the issue whether finality could be attached to a judgment obtained fraudulently by a party because the Supreme Court has put its seal of imprimatur on it, the court in **A.V. Papayya Sastry & Ors. vs. Govt. of AP Ors.** (supra) further stated as follows :

"38. The matter can be looked at from a different angle as well. Suppose, a case is decided by a competent Court of Law after hearing the parties and an order is passed in favour of the applicant/plaintiff which is upheld by all the courts including the final Court. Let us also think of a case where this Court does not dismiss Special Leave Petition but after granting leave decides the appeal finally by recording reasons. Such order can truly be said to be a judgment to which Article 141 of the Constitution applies. Likewise, the doctrine of merger also gets attracted. All orders passed by the courts/authorities below, therefore, merge in the judgment of this Court and after such judgment, it is not open to any party to the judgment to approach any court or authority to review, recall or reconsider the order.

39. The above principle, however, is subject to exception of fraud. Once it is established that the order was obtained by a successful party by practising or playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non-existent and non est and cannot be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by fraud has to be treated as nullity,

whether by the court of first instance or by the final court. And it has to be treated as non est by every Court, superior or inferior."

(Emphasis supplied)

182. The above narration would show that it has been repeatedly held that obtaining relief from court by deliberately suppressing a fact which was fundamental to entitlement of relief sought and founding a claim on non-existent facts, amounts to practicising fraud on court which vitiates the decision or the order of the court. It has been further held that it can be so held by any court at any stage. There is also no reference in the judgment dated 8th April, 1999 to the plea of the Union of India & L&DO that they had no right, title or interest in the subject land. On the contrary, in the judgment dated 8th April, 1999, the learned Judge was persuaded again only by the fact that the Land & Development Office or the Union of India (defendants in the suit) did not cross examine these persons. The obvious question as whether such conduct would implicate an owner who was not impleaded as a party was not addressed by the trial court.

183. No finding is also returned on the issue as to how, when and against whom Het Ram and Kewal asserted title. Even during the hearings in the present application, Mr. Patwalia, learned senior counsel for the defendants could not point out even a single instance where Het Ram or Kewal had ever claimed or asserted ownership prior to the suit of 1998.

184. The judgments dated 31st of March, 1975 in W.P.(C) No.550/1972 and the judgment dated 10th April, 1980 passed by the Division Bench in LPA No.113/1975 further show that Het Ram and Kewal were themselves claiming tenancy and cultivatory possession on Government of India land for which they were paying rent against receipts. This claim stood rejected in the judgment dated 17th December, 1971 passed in Suit Nos.693 & 703/1969. This very plea has been pressed by Kewal Ram even in RCA No.19/1996 (PPA No.4/2008 and finally rejected only on 4th April, 2009). These facts and pleadings were suppressed by Het Ram and Kewal Ram from court.

185. The learned additional district judge seized of CS No. 293/1998, while passing the judgment dated 8th of April, 1999 has completely failed to consider the impact of this plea which shows that Het Ram and

Kewal had never claimed ownership but asserted derived rights as tenants. It is a well settled position that once a tenant always a tenant. Certainly a tenant cannot claim title by adverse possession. The plea that Kewal Ram and Het Ram had perfected title by adverse possession would have to fail on this ground alone.

186. It is also noteworthy that the order of eviction passed under the PP Act proceedings and the above judgments by the Division Bench against Het Ram and Kewal Ram had long attained finality.

187. The Supreme Court has also authoritatively held that every court has an inherent power to recall its judgment or order if it is obtained by fraud on the court. Such judgment can be challenged in collateral proceedings.

188. In para 32 of IA No.15078/2010 filed in the present case, Het Ram has claimed that he alongwith some labourers on 9th October, 2010 entered upon the "suit premises" in order to make the same fit for cultivation which was prevented by the plaintiff. Which or where, according to Het Ram are these claimed "suit premises"?

189. My attention is drawn to IA No.5778/2007 filed under Section 340 of the CrPC purportedly by "defendant nos. 4 and 5". The application is not signed by any applicant. It is supported by an affidavit of Sh. Het Ram alone. IA No.5778/2007 is also neither signed by any of the legal heirs of Kewal Ram nor is supported by their affidavits. It seeks initiation of criminal proceedings against Sh. R.C. Gupta, SDM, Seemapuri; Sh. Yashpal Singh, Tehsildar, Seemapuri; Sh. Krishan Lal, Kanungo for "furnishing false information/evidence before this court by way of demarcation report dated 26th March, 2007". The defendant nos.5(i) to (iii) have not joined in the filing of this application. This application thus wrongly mentions the description of the applicants.

190. Before this court, Het Ram has asserted that the witnesses produced by him in Suit 47/2000 (CS No.18/2005) have established his claim in the suit before the district courts. In support of the opposition to the grant of prayer in the applications under consideration, selective reliance is placed on the extracts of evidence of the halka patwari as PW-6; of the Patwari-Nazul Section, DDA as PW-3 and the partial statement of PW-3 Dr. Nimesh Desai Medical Superintendent, IHBAS. It appears that this doctor has been in the witness box on several dates between

23rd July, 2005 to 10th August, 2005; 16th January, 2006 and 14th February, 2006. Het Ram has deliberately not produced the full statements of these witnesses. He has consciously withheld the evidence led by him as a plaintiff including his own deposition, documents, if any, and placed only incomplete testimonies of the defendants. witnesses before this court. Given his reference to the land with respect to Kewal Ram litigated, Het Ram was bound to have placed the pleadings in all the afore-noticed cases, including copy of the appeal RCA No.19/1996, PPA No.4/2008 and the judgments therein.

191. In the instant case, not only pleadings and material documents but also binding judicial pronouncements, including the judgment of a Division Bench of this court which had attained finality have been deliberately concealed from the court which passed the judgment and decree dated 8th of April, 1999 in CS No.293/1998.

192. The above observations of the Supreme Court in the several judgments noticed above clearly apply to the conduct of Shri Het Ram and Late Shri Kewal Ram in the instant case. The principles laid down in all the judicial pronouncements would show that an order, judgment or decree obtained by fraud is a nullity and has to be treated as non est by every court. It would be so treated even if the same is not challenged.

193. Prima facie the judgment dated 8th of April, 1999 is therefore an outcome of deliberate fraud practised by Het Ram and Kewal Ram; it is therefore non-est and a nullity and cannot bind the present plaintiff or the adjudication in the present case.

194. Can a party urge a plea of resjudicata with regard to a judgment caused to be passed fraudulently? This question was answered in **Essar Oil Ltd.** (supra) in para 31 in the following terms:-

> "31. .....An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, **fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res Judicata.** See Ram Chandra Singh versus Savitri Devi (2003) 8 SCC 319.)

> 32. .....The colour of fraud in public law or administration law, as it is developing, is assuming different shades. It arises from a deception committed by disclosure of **incorrect** facts **knowingly** and **deliberately** to **invoke exercise of power and procure an order from an authority or tribunal.** It must result in exercise of jurisdiction, which otherwise would not have been exercised. The misrepresentation must be in relation to the conditions provided in a section on existence or non-existence of which the power can be exercised. But non-disclosure of a fact not required by a statute to be disclosed may not amount to fraud.
>
> xxx
>
> 35. **Suppression of a material document would also amount to a fraud on the court.** (see **Gowrishankar v. Joshi Amba Shankar Family Trust** : [1996] 2 SCR 949 and **S.P. Changalvaraya Naidu's** case (supra)."
>
> (Emphasis supplied)

195. Clearly the equitable doctrine of res judicata would not attach finality to such a judgment and decree as the judgment dated 8th of April, 1999 which results from fraud by the parties.

XI. Doctrine of election

196. Mr. Patwalia, learned senior counsel for the defendant nos. 4 & 5 has urged that the plaintiff could have either sought a review or filed the present suit; and having elected the remedy of the review petition before the trial court, the plaintiff is estopped from filing the suit. It has been urged that the plaintiff is also contesting Suit No. 47/2000. It is also contended that IHBAS filed CR No.476/2000 as well as FAO No.391/2000 and therein conceded expeditious disposal of Het Ram's suit. The submission is that by operation of the doctrine of election, the plaintiff is estopped from maintaining the present suit. Therefore the present suit is not maintainable.

197. The doctrine of election is a species of estoppel which has been explained in several binding judicial precedents. The observations of the Supreme Court in (1994) 2 SCC 647 **A.P. State Financial Corpn. vs. M/s Gar Re-Rolling Mills & Anr.,** explain the doctrine in the

following terms :-

> "15. The Doctrine of Election clearly suggests that when **two remedies are** available **for the same relief, the party to whom the said remedies are available has the option to elect either of them but that doctrine would not apply to cases where the ambit and scope of the two remedies is essentially different. To hold otherwise may lead to injustice and inconsistent results.**"

In this case the Supreme Court was considering the option available to the State Financial Corporation whether to invoke the remedy under section 29 or to avail the remedy under section 31 of the State Financial Corporation Act.

198. IHBAS has challenged the actions of Het Ram and Kewal Ram inter alia on grounds of fraud. In **United India Insurance Co. Ltd. v. Rajendra Singh and Ors.,** [2000] 2 SCR 264, the claimant obtained an award by practising fraud upon the Insurance Company for compensation from the Motor Accident Claims Tribunal. On coming to know of fraud, the Insurance Company had applied for recalling of the award. The Tribunal, however, dismissed the petition on the ground that it had no power to review its own award. The High Court confirmed the order. The Company approached the Supreme Court. The Supreme Court allowed the appeal and setting aside the orders holding that:-

> "15. It is unrealistic to expect the appellant company to resist a claim at the first instance on the basis of the fraud because appellant company had at that stage no knowledge about the fraud allegedly played by the claimants. If the Insurance Company comes to know of any dubious concoction having been made with the sinister object of extracting a claim for compensation, and if by that time the award was already passed, it would not be possible for the company to file a statutory appeal against the award. Not only because of bar of limitation to file the appeal but the consideration of the appeal even if the delay could be condoned, would be limited to the issues formulated from the pleadings made till then.
>
> 16. Therefore, we have no doubt that the remedy to move for recalling the order on the basis of the newly discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No Court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wrangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim.
>
> 17. The allegation made by the appellant Insurance Company, that claimants were not involved in the accident which they described in the claim petitions, cannot be brushed aside without further probe into the matter, for, the said allegation has not been specifically denied by the claimants when they were called upon to file objections to the applications for recalling of the awards. Claimants then confined their resistance to the plea that the application for recall is not legally maintainable. Therefore, **we strongly feel that the claim must be allowed to be resisted, on the ground of fraud now alleged by the Insurance Company. If we fail to afford to the Insurance Company an opportunity to substantiate their contentions it might certainly lead to serious miscarriage of justice."**

(Emphasis supplied)

199. In (2004) 9 SCC 619 MD, **Army Welfare Housing Organisation vs. Sumangal Services (P) Ltd.** The Supreme Court held that the interim order passed by the arbitrator was without jurisdiction and therefore it did not attract the principles of estoppel, waiver and acquiescence so as to bar the petitioner from challenging the award. On this issue, it was further held that the principles of estoppel, waiver and acquiescence were not applicable to an order which had been passed without jurisdiction. The well settled principle that the doctrine of election does not apply as an estoppel against statute was also reiterated in this judgment.

200. Mr. Patwalia, learned senior counsel for the defendant nos. 4 has placed reliance on the pronouncement of the Supreme Court reported at **National Insurance Co.Ltd. vs. Mastan & Anr.**. In this case, it appears that the respondent who was the claimant had chosen not to withdraw his claim under the Workman's Compensation Act and before it reached the point of judgment, approached the Motor Accidents Claim Tribunal. What he did was to pursue his claim under the Workman's

Compensation Act till the award was passed and also invoked the provision of the Motor Vehicles Act (which was not made applicable to claims under the Workman's Compensation Act by section 167 of the Motor Vehicles Act). In this background, it was held by the Supreme Court that he was not entitled to do so. In this case, the Supreme Court had construed the provisions of Section 167 of the Motor Vehicles Act. In the concurring judgment of P.K. Balasubramanian, J in para 33, it was observed that the exclusiveness of the jurisdiction of the Motor Accidents Claim Tribunal stood taken away by Section 167 of the Motor Vehicles Act in the one instance, when the claim could also fall under the Compensation Act, 1923.

On the doctrine of election, the Supreme Court has observed as follows:-

> "23. The 'doctrine of election' is a branch of 'rule of estoppel', in terms whereof a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. The doctrine of election postulates that **when two remedies are available for the same relief,** the aggrieved party has the option to elect either of them but not both. Although there are certain exceptions to the same rule but the same has no application in the instant case.
>
> 24. In **Nagubai Ammal and Others v. B. Shama Rao and Others** [AIR 1956 SC 593], it was stated:
>
> "It is clear from the above observations that the maxim that a person cannot 'approbate and reprobate' is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto."
>
> 25. In **C. Beepathuma and others v. Velasari Shankaranarayana Kadambolithaya and others** [AIR 1965 SC 241], it was stated:
>
> " .....The same principle is stated in White and Tudor's Leading Cases in Equity Vol. 18th Edn. at p. 444 as follows:
>
> "Election is the obligation imposed upon a party by courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both.... That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument."
>
> [See also **Prashant Ramachandra Deshpande v. Maruti Balaram Haibatti,** 1995 Supp (2) SCC 539]
>
> 26.Thomas, J. in **P.R. Deshpande v. Maruti Balaram Haibatti** [(1998) 6 SCC 507] stated the law, thus:
>
> "The doctrine of election is based on the rule of estoppel the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel) which is a rule in equity. By that rule, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had."
>
> (Emphasis supplied)

201. The above narration would also show that doctrine of election is premised on a election between substantive legally available remedies in respect of the same transaction and involving the same persons who are parties thereto.

202. IHBAS filed the applications under order 1 rule 10 of the CPC in review petition and section 340 of the CrPC in the decided suit (CS No.293/1998). IHBAS was not a party to this suit.

203. The plaintiff's application under Order 1 Rule 10 of the CPC in the decided suit is stated to have been rejected on the ground that the court was functus officio. A review petition can only be made by the party to the litigation. Obviously these applications were misconceived and legally not maintainable.

204. In para 16 of the written statement filed in the present suit by Het Ram and Kiran Chand-defendant nos. 4 & 5(i), they have objected that the application filed under Order 1 Rule 10 having been dismissed, the review application is not maintainable. It is also averred that the plaintiff was not a party to the suit (CS No.293/98) and as such cannot

seek review of the judgment passed therein. Therefore even as per the defendants, filing of such applications would not preclude the party from bringing the suit for its substantive claim against the other party. IHBAS cannot be deemed to have elected abandonment of its substantive remedy of asserting its rights by way of the present suit.

205. The doctrine of election would for the same reason can have no application to the filing of the application under section 340 of the CrPC and certainly cannot bar the filing of the present suit.

206. An objection has been urged that given the identity of the defence put up by IHBAS to CS No.47/2000, it has waived rights, if any, to bring the present suit. In (2004) 8 SCC 229 **Krishna Baha vs. Purna Theatre & Ors.** (para 9), the Supreme Court pointed out that the principle of waiver although is akin to the principle of estoppels; the difference between the two, however, is that whereas estoppels is not a cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration. It was further held in para 10 that whenever waiver is pleaded, it is for the party pleading the same to show that an agreement waiving the right in consideration to some compromise came into being. In this regard, reference can also be made to the pronouncement of this court reported at 21 (1982) DLT 11 **Jay Rubber India Pvt. Ltd. vs. State Chemicals and Pharmaceutical Corpn**.

207. Faced with a suit, the opposite side has the right to file its defence by way of a written statement. So far as any substantive rights possessed by it are concerned, it is open by the party to either raise a counter claim or to file a separate suit in respect thereof. Mere filing of the written statement and defending its rights cannot be treated as the abandonment of the substantive rights and claims which the party filing the written statement has against the other side.

208. Reference in this regard can also be made to the pronouncement of the Supreme Court at (1995) 3 SCC 33 **Mahadeo Savlaram Shelke vs. Pune Municipal Corp**.

209. It is noteworthy that CS No. 47/2000 (now CS No. 18/2005) has been filed only by Het Ram. The CR No. 476/2000 and FAO No. 391/2000 were filed by the present plaintiff only against Het Ram assailing

interim orders passed in favour of Het Ram alone against IHBAS in the Suit No. 47/2000.

210. The suit filed by Het Ram (Suit No. 47/2000) has to be considered and decided on adjudication of the issues raised by the parties therein.

211. IHBAS has a legal right to contest and defend the suit and has a statutory right to assail the orders passed in the said suit (CS No.47/2000).

212. Right to file a suit is conferred on a person under Section 9 of the CPC. It is trite that "waiver or acquiescence, like election, presupposes that the person to be bound is fully cognizant of his rights, and, that being so, he neglects to enforce them, or chooses one benefit instead of anther, either, but not both, of which he might claim.(Ref: Sir Johan Romilly M.R. in **Vyuyan v. Vyuyan** (1861) 30 Beav. 65, 74: 54 E.R. 813, 817). An issue with regard to waiver of limitation arose in (1974) 96 ITYR 390 (SC) **The Director of Inspection of Income Tax (Investigation), New Delhi & Anr. Vs. Pooran Mal & Sons and Anr.** The Supreme Court extracted the legal principles from the judicial precedents as stated in Crais on Statute Law (6th Edition) at page 369 which was to the following effect :-

> "As a general rule, the conditions imposed by statutes which authorise legal proceedings are treated as being indispensable to giving the court jurisdiction. But if it appears that the statutory conditions were inserted by the legislature simply for the security or benefit of the parties to the action themselves, and that no public interests are involved, such conditions will not be considered as indispensable, and either party may waive them without affecting the jurisdiction of the court."

213. Kewal Ram or his heirs are not a party to the Suit No. 47/2000. Even assuming for the sake of arguments that the plea of the present suit being barred, on account of pendency of Suit No.47/2000 (18/2005) was tenable, the suit qua legal heirs of Kewal Ram is still maintainable.

214. Suit No. 293/1998 was jointly filed by Het Ram and Kewal Ram. The pleas as well as the judgment dated 17th December, 1971 and decrees in the prior Suit Nos. 693/1969 and 703/1969 as well as the

proceedings under the PP Act, 1971 and the challenges thereto were identical. It is apparent that Het Ram would be a necessary and proper party, in a suit if brought, against the legal heirs of Kewal Ram for adjudication of the contentions of IHBAS.

215. Even if the applications, civil revision or the appeal would have been allowed, IHBAS would still be required and entitled to pursue a substantive remedy for the reliefs which have been sought in the present suit.

216. This petition and appeal cannot be treated as independent substantive proceedings whereby IHBAS has pressed for the reliefs which have been sought in the present suit.

217. The present plaintiff who was not impleaded as a party to the earlier litigation (the Suits of 1969, 1998), is asserting right, title and interest in the suit property and seeking its protection by way of the present suit.

218. Het Ram has also objected to the maintainability of the present suit on the ground that the same tantamounts to forum shopping by the plaintiff and that having repeatedly consented to expeditious disposal of Suit No. 47/2000 in the appeal before this court, IHBAS would thereby stand estopped from maintaining the present suit.

219. It is now necessary to consider the impact of the orders dated 16th February, 2004 in FAO No. 391/2000 and the subsequent orders granting extension of time for completion of the proceedings in Suit No. 47/2000 are concerned, IHBAS has consented only to expeditious adjudication in Het Ram's suit. An order directing expeditious trial without adjudicating on the issues or claims raised therein certainly does not tantamount to an adjudication of the rights of the parties. Nor can consent by a party to an order extending time for completion of the trial cannot be deemed waiver of the substantive rights of the party with regard to the land involved. IHBAS has at no stage stated that it has abandoned its rights or claims against Het Ram and Kewal Ram or objections to the decree. There is, therefore, no merit in the plea that IHBAS would stand estopped from filing, maintaining or prosecuting the present case on account of the order dated 16th February, 2004 in FAO No. 391/2000 or the orders of extension passed thereafter. On the contrary, these orders manifest the urgency expressed on the part of IHBAS for

expeditious proceedings in the suit filed by Het Ram-defendant no. 4 herein.

220. Another limb of this objection pressed is that IHBAS is contesting CS No.47/2000 on the same pleas as asserted in the present case and therefore cannot as well maintain the present case.

221. This objection is to be noted only to be rejected. There is no legal prohibition from a party seeking a substantive decree based on the pleas taken by it in defence to a case filed by the other side. This objection would therefore have no application to the facts of the present case. Before this court, there is nothing to show that the plaintiff at any point of time waived its objection that the decree which had been obtained by Het Ram and Kewal Ram was a decree obtained by fraud and was void or its right to prohibit them from wasting property which had vested in IHBAS.

222. Mr. Sanjay Poddar, appearing for the defendant-Govt. of NCT has urged that in view of the non-impleadment of the necessary and proper party in the prior adjudication, CS No. 293/1998 would require to be treated as a case decided ex-parte. Reliance has been placed on the following observations in para 15 and 16 of the pronouncement of the Supreme Court reported at (2009) 2 SCC 205 **Mahesh Yadav and Ors. vs. Rajeshwar Singh Ors.,** in this regard:-

> "15. The proviso appended to Order IX Rule 13 of the Code of Civil Procedure postulates that when an ex parte decree has been passed against some of the defendants and it is necessary to set aside the entire decree, the Court is not powerless to do so. If an application for setting aside the ex parte decree was maintainable at the instance of the appellants, we fail to understand as to why a separate suit was required to be filed. When an ex parte decree is passed, the defendant may have more than one remedies. He may file a suit contending that the decree was obtained fraudulently. He may file an application under Order IX Rule 13 of the Code of Civil Procedure for setting aside the ex parte decree. He may prefer an appeal from the ex parte judgment and decree. In a given case, he may also file a review application.
>
> 16. In **Bhanu Kumar Jain v. Arcbana Kumar and Anr.** MANU/SC/1079/2004 : AIR2005SC626, this Court held:

"26. When an ex parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9 Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex parte decree passed by the trial court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9 Rule 13 of the Code a petition under Order 9 Rule 13 would not be maintainable. However, Explanation I appended to the said provision does not suggest that the converse is also true." It was, however, observed: "28. It is true that although there may not be a statutory bar to avail two remedies simultaneously and an appeal as also an application for setting aside the ex parte decree can be filed; one after the other; on the ground of public policy the right of appeal conferred upon a suitor under a provision of statute cannot be taken away if the same is not in derogation or contrary to any other statutory provisions."

223. The objection taken by Het Ram on a plea of waiver is not maintainable for yet another reason. In AIR 1971 SC 2213 Lachhu Mal vs. Radhey Shyam, the Supreme Court held that the general principle is that every one has a right to waive and to agree to waive only such advantage of a law or rule which has been made solely for the benefit and protection of the individual in his private capacity. Such law or rule or right may be dispensed with without infringing any public right or public policy. (Ref: AIR 1964 SC 1300 **Dhirendra Nath Gorai vs. Sudhir Chandra**).

It has been held in (2004) 8 SCC 229 **Krishan Bahadur vs. Poorna Theatre** (para 188) that if a party pleads waiver, it is for such party to show that an agreement waving the right in consideration to some compromise came into being. In this regard, reference can also be made to the judgment at (21) 1982 DLT 11 **Jay Rubber India (P) Ltd. Vs. State Chemicals & Pharmaceuticals Corpn**.

224. In the judgment of the Supreme Court reported at (2008) 12 SCC 401 : AIR 2008 SC 2919 **Babulal Badriprasad Varma vs. Surat Municipal Corporation & Ors.,** the court laid down the parameters within which a right can be waived by the party as follows :-

"10. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct."

225. The relief of injunction is an equitable relief. In (1994) 2 SCC 647 **A.P. State Financial Corpn. vs. M/s Gar Re-Rolling Mills & Anr.,** the Supreme Court observed that *"there is no equity in favour of a defaulting party which may justify interference by the courts in exercise of its equitable extraordinary jurisdiction under Article 226 of the Constitution of India to assist it in not repaying its debts. The aim of equity is to promote honesty and not to frustrate the legitimate rights of the Corporation which after advancing the loan takes steps to recover its dues from the defaulting party*".

The Supreme Court further observed as follows:-

"18. .....A court of equity, when exercising its equitable jurisdiction under Article 226 of the Constitution must so act as to prevent perpetration of a legal fraud and the courts are obliged to do justice by promotion of good faith, as far as it lies within their power. Equity is always known to defend the law from crafty evasions and new subtleties invented to evade law."

226. The land in question is public premises and needed for an Institute of Human Behaviour & Applied Sciences. There is a huge element of public interest in the matter. The defendants before this court are asserting waiver contending election by IHBAS of having taken the aforenoticed steps. Given the nature of the public property involved and its utilization for a hospital, there is no question of waiver of the right to take substantive proceedings.

227. It is noteworthy that before this court, the learned counsels

for the private defendants have not been able to point out any statutory prohibition to the maintainability of the present suit. The objection to the maintainability of the present suit premised on doctrine of election, looked at from any angle, is misconceived and legally untenable.

228. It, therefore, cannot be held that it has waived its rights or "elected" a "remedy" which would prohibit its right to assert its claims against Het Ram as well as Kewal Ram (through his heirs) by appropriate legal proceedings, merely because IHBAS is contesting Het Ram's claim in CS No.47/2000 or has exercised its statutory right of challenging interim orders passed therein by filing a civil revision and an appeal.

XII. Claim of Het Ram of acquisition of title for Adverse possession

(i) General Principles

229. The primary claim urged by Het Ram even in the present case rests on a plea of acquisition of title over the suit land by adverse possession. It is, therefore, necessary to examine the essentials of such a claim. On this issue, the principles laid down by the Supreme Court in the authoritative pronouncement reported at (2007) 6 SCC 59 **P.T. Munichikkanna Reddy & Ors. vs. Revamma & Ors.,** shed valuable light. The court reiterated the nature of pleadings required to support the plea of acquisition of title by adverse possession and the burden of proof as well as the nature of rights observing as follows:-

> " Adverse possession is a right which comes into play not just because someone loses his right to reclaim the property out of continuous and willful neglect but also on account of possessor's positive intent to dispossess. Therefore it is important to take into account before stripping somebody of his lawful title, whether there is an adverse possessor worthy and exhibiting more urgent and genuine desire to dispossess and step into the shoes of the paper-owner of the property. This test forms the basis of decision in the instant case.
>
> Intention is a mental element which is proved and disproved through positive acts. Existence of some events can go a long way to weaken the presumption of intention to dispossess which might have painstakingly grown out of long possession which otherwise would have sufficed in a standard adverse possession

> case. The fact of possession is important in more than one ways: firstly, due compliance on this count attracts Limitation Act and it also assists the court to unearth as the intention to dispossess.
>
> The intention to dispossess needs to be open and hostile enough to bring the same to the knowledge and the plaintiff has an opportunity to object. After all adverse possession right is not a substantive right but a result of the waiving (wilful) or omission (negligent or otherwise) of the right to defend or care for the integrity of property on the part of the owner of the property on paper. .....Intention implies knowledge on the part of adverse possessor. The issue is that intention of the adverse user gets communicated to the owner of the property on paper. This is where the law gives importance to hostility and openness as pertinent qualities of manner of possession. It follows that the possession of the adverse possessor must be hostile enough to give rise to a reasonable notice and opportunity to the owner of the property on paper." (Underlining supplied) In this judgment, the court also drew a distinction between 'intention to dispossess vis-a-vis intention to possess'.

230. In para 5, the court observed that "adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession".

231. It was further observed in para 6 that "efficacy of adverse possession in law in most jurisdictions depends on strong limitation statutes by operation of which right to access the court expires through efflux of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property".

232. The Supreme Court had authoritatively laid down the tests and the nature of the inquiry by the court as follows:-

> "8. Therefore, to assess a claim of adverse possession, two-pronged enquiry is required: 1. Application of limitation provision thereby jurisprudentially "willful neglect" element on part of the

owner established. Successful application in this regard distances the title of the land from the paper-owner. 2. Specific positive intention to dispossess on the part of the adverse possessor effectively shifts the title already distanced from the paper owner, to the adverse possessor. Right thereby accrues in favour of adverse possessor as intent to dispossess is an express statement of urgency and intention in the upkeep of the property."

233. In para 21 of **P.T. Munichikkanna Reddy vs. Revamma** (supra), the Supreme Court reiterated the principle that 'animus possidendi' is one of the essential ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence..

The principle laid down in the earlier pronouncement in (1994) 6 SCC 591 **Thakur Kishan Singh vs. Arvind Kumar** to the effect that "mere possession for howsoever length of time does not result in converting the permissive possession into adverse possession" was also reiterated.

234. On the aspect of intention in adverse possession law, the court has held that intention implies knowledge on the part of adverse possessor.

235. In para 35 of the pronouncement in **P.T. Munichikkanna Reddy** (supra), the principle laid down in the earlier pronouncement reported at (2005) 8 SCC 330 **Saroop Singh vs. Banto** to the effect that "in terms of Article 65, the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendant's possession becomes adverse" was also emphasized.

(ii) Nature of pleadings to claim acquisition of title by adverse possession, evidence and nature of inquiry by the court

236. On the issue of nature of pleadings, so far as a claim of acquisition of title by adverse possession is concerned, reference may also be made to earlier pronouncements of the Supreme Court reported at (1995) 6 SCC 309 **R. Chandevarappa & Ors. vs. State of Karnataka & Ors.,** the court held as follows:-

"11. The question then is whether the appellant has perfected his title by adverse possession. It is seen that a contention was

raised before the Assistant Commissioner that the appellant having remained in possession from 1968, he perfected his title by adverse possession. But the **crucial facts to constitute adverse possession have not been pleaded.** Admittedly the appellant came into possession by a derivative title 'from the original grantee. It is seen that the original grantee has no right to alienate the land. Therefore, **having come into possession under colour of title from original grantee, if the appellant intends to plead adverse possession as against the State, he must disclaim his title and plead his hostile claim to the knowledge of the State and that the State had not taken any action** thereon within the prescribed period. Thereby, the appellant's possession would become adverse. **No such stand was taken nor evidence has been adduced in this behalf.** The counsel in fairness, despite his research, is unable to bring to our notice any such plea having been taken by the appellant."

237. The Supreme Court in the judgement reported at AIR 2004 **Punjab & Haryana 353 Hazara Singh & Anr. Vs. Faqiria (D) by L.R. & Ors.** has authoritatively held that mere long and continuous possession by itself will not constitute adverse possession. Merely because in revenue record their possession was recorded as 'forceful' the same cannot be said to be adverse to defendants.

238. The essential and important component of establishment of a plea of adverse possession is the assertion of title of the property by the claimant. The denial of title of the real owner is implicit in the assertion of title by the person claiming the acquisition of title by adverse possession. The question is how must such denial of title be displayed? In (2005) 7 SCC 653 **Devasahayam (Dead) By LRs vs. P. Savithramma & Ors.,** the court had occasion to consider an eviction petition under the applicable rent statute on the ground of denial of title of the landlord by the tenant. The observations of the court on the aspect of denial of title shed valuable light on this issue in the present case in the context of a claim of title by a person claiming acquisition of title by adverse possession. It was observed by the court thus:-

"20. The pleadings as are well-known must be construed reasonably. The contention of the parties in their pleadings must be culled out from reading the same as a whole. Different

considerations on construction of pleadings may arise between pleadings in the mufossil court and pleadings in the original side of the High Court.

21. So read, the plaintiffs in its plaint merely ascribed that he continued to be in possession of the tenanted premises after the oral agreement of sale was entered into by and between the parties pursuant to or in furtherance thereof.

xxx

23. Under the provisions of the Transfer of Properly Act, a landlord can evict his tenant only upon service of proper notice as envisaged under Section 106 of the Transfer of Property Act. A lease can be determined by forfeiture inter alia **when the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself**.

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27. In **Sheela and Ors. v. Firm Prahlad Rai Prem Prakash** : [2002] 2 SCR 177 whereupon Mr. Nageshwara Rao placed strong reliance, Lahoti, J., as the learned Chief Justice then was, while construing the provisions of Clause (c) of Sub-section (1) of Section 12 of the M.P. Accommodation Control Act 1961 observed:

xxx

"17. In our opinion, **denial of landlord's title** or disclaimer of tenancy by tenant is an act which is likely to affect adversely and substantially the interest of the landlord and hence is a ground for eviction of tenant within the meaning of Clause (c) of Sub-section (1) of Section 12 of the M.P. Accommodation Control Act, 1961. **To amount to such denial or disclaimer,** as would entail forfeiture of tenancy rights and incur the liability to be evicted, **the tenant should have renounced his character as tenant and in clear and unequivocal terms set up title of the landlord in himself or in a third party.** A tenant bona fide calling upon the landlord to prove his ownership or putting the landlord to proof of his title so as to protect himself (i.e. the tenant) or to earn a protection made available to him by the rent

control law but **without disowning his character of possession over the tenancy premises as tenant cannot be said to have denied the title of landlord or disclaimed the tenancy.** Such an act of the tenant does not attract applicability of Section 12(1)(c) abovesaid. **It is the intention of the tenant as culled out from the nature of the plea raised by him, which is determinative of its vulnerability**."

(Emphasis supplied)

239. It is therefore well settled that continuous hostile or unlawful possession simplicitor by itself is not sufficient to establish the claim of title by adverse possession. The party so claiming is legally required to establish that it has asserted a claim of ownership which is hostile to that of the real owner and to the owner and public at large and set up a title coupled with possession, coupled with hostile, open and continuous possession.

240. The above principles apply to a claim of acquisition of title by adverse possession. Clearly, an occupant setting up a plea of ownership by adverse possession, has to explicitly and in clear terms, have claimed title in absolute and unequivocal terms as against the real owner.

(iii) Burden of proof and nature of enquiry

241. The court also authoritatively examined not only the ingredients of adverse possession, the burden of proof on the person so claiming title and the nature of inquiry into the particulars of adverse possession in the judgment in **P.T. Munichikkanna Reddy** (supra) and laid down the essential principles thus :-

> "34. The law in this behalf has undergone a change. In terms of Articles 142 and 144 of the Limitation Act, 1908, the burden of proof was on the plaintiff to show within 12 years from the date of institution of the suit that he had title and possession of the land, whereas in terms of Articles 64 and 65 of the Limitation Act, 1963, the legal position has underwent complete change insofar as the onus is concerned: **once a party proves its title, the onus of proof would be on the other party to prove claims of title by adverse possession**."

From paras 40 to 50 in **P.T. Munichikkanna** (supra) the Supreme

Court has considered the important aspect of the matter that the right to property is considered to be not only a constitutional or statutory right but also a human right.

242. In the decision dated **23rd September, 2008** in Civil Appeal No. 1196/1997 **Hemaji Waghaji Jat vs. Bhikhabhai Khengarbhai Harijan & Ors.(AP-V)** the principles laid down in **P.T. Munichikkana Reddy** (supra) as well as earlier pronouncements of the Court were reiterated by the Supreme Court thus:-

> "13. This Court in **P. Lakshmi Reddy v. L. Lakshmi Reddy** : [1957] 1 SCR 195 while following the ratio of **Debendra Lal Khan's** case (supra), observed as under:
>
> "xxx
>
> It is a settled rule of law that as between co- heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to be knowledge of the other so as to constitute ouster."
>
> The court further observed thus:
>
> "The burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession."
>
> xxx

(iv) Plea of adverse possession – when taken by Het Ram and Kewal Ram?

243. In the judgment dated 23rd September 2008 rendered in **Hemaji Waghaji** (supra), the Supreme Court placed reliance on several judicial precedents and reiterated the principles laid down. The judgment in **Hemaji Waghaji** (supra) reiterates the prior principles as follows :-

> "17. In **Md. Mohammad Ali (Dead) by LRs. v. Jagadish Kalita and Ors.** : (2004) 1 SCC 271, this Court observed as under:
>
> "21. For the purpose of proving adverse possession/ouster, the defendant must also prove animus possidendi.
>
> 22. ...We may further observe that in a proper case the court may have to construe the entire pleadings so as to come to a conclusion as to whether the proper plea of adverse possession has been raised in the written statement or not which can also be gathered from the cumulative effect of the averments made therein."

244. The suit (CS No.293/98) was jointly filed by Het Ram and Kewal Ram and the decree dated 8th April, 1999 passed therein.

245. The issue thus, is whether Het Ram or Kewal Ram ever raised the proper pleas and satisfied this stringent test? If it could be held that they did, then, on what date and in what manner?

246. It now requires to be seen whether the claim made by Het Ram (in the present case or prior) meets these legal requirements. It is noteworthy that in the instant case it is an admitted position that the ownership of the land vested in Govt. authorities.

247. In para 6 of the plaint, in Suit No. 293/1998, Het Ram and Kewal have asserted that the Government has attempted to dispossess them. This fact by itself shows that the real owners were asserting right, title and interest in the subject property.

While the authorities say that trespass was being prevented or removed, these private persons urge that their possession was being interfered with.

248. Mr. Sanjay Poddar, the learned senior counsel for the Govt. of NCT of Delhi and Mr. Sultan Singh, learned counsel for IHBAS have urged that a plea of acquisition of title by adverse possession has to be against the true, real and right owner only.

249. An order dated 20th December, 1996 was passed by the Estate Officer of IHBAS against Kewal Ram.

250. RCA No.19/96 (subsequently registered as PPA No. 04/2008) was filed by Kewal against Estate Officer, IHBAS under section 9 of the PP Act. This appeal was pending till the dismissal in default on 11th February, 2000 and on merits on 4th April, 2009. As per copy of an order dated 4th April, 2009 passed in the same appeal on merits Kewal Ram had claimed to be a tenant against payment of lease money to the erstwhile Delhi Improvement Trust, succeeded by the DDA. He had

further claimed that he was only in cultivatory possession of the subject land. In this appeal, which was filed, Kewal Ram has not set up any plea of ownership by adverse possession.

251. On this very issue, so far as Suit No. 293/1998 is concerned, in para 1 of the plaint, Kewal and Het Ram merely stated that they were in cultivatory possession of land measuring about 39 bighas for the last more than fifty years.

In para 3 of the plaint in CS No.293/1998, a bald plea was taken for the first time that "Kewal and Het Ram have also become owners of the said land by way of their right of adverse possession as against the defendants and other departments of Government of India and public at large on account of hostility of their rights continuously against these authorities.. However, the defendants have been illegally claiming the ownership right in respect of the said land knowing fully that the plaintiffs have become owners of the said property on account of their right of adverse possession."

252. In Suit No. 293/1998 Kewal Ram and Het Ram made a carefully incomplete reference to Suit No. 693/1969 as well as the aforesaid judgment dated 17th December, 1971 without disclosing the details of their claims or the adjudication therein or the steps taken by the real owners of the suit land under the Public Premises (Eviction of Unauthorised Occupants) Act. The litigation thereafter and the pronouncements of this court are not mentioned.

253. It is well settled that a party who is seeking a relief as a plaintiff has to establish its claim which, in the instant case would include its plea that the defendants in the suits were actually the real owners of the suit property. Het Ram and Kewal do not even describe the defendants in the suits filed by them or how a claim based on title was maintainable against them. In fact they deliberately do not even disclose the particulars of real owner of the property in the pleadings in any litigation when, clearly the suit claims were untenable in the absence of the real owner. Even in the written statement filed by Het Ram in the present case, this is not disclosed.

254. Despite the clear dispute with regard to title and authority of the Union of India and the Land & Development Officer in Suit No. 293/1998, the learned ADJ does not deal with or answer the primary question

of who is the real owner?

255. A Division Bench of this court (of which I was a member) had occasion to consider the plea of acquisition of ownership rights by adverse possession. In the judgment reported at MANU/DE/0546/2005 **Sh. Shahabuddin vs. State of U.P. & Ors.,** a challenge was laid to the rejection of this plea by the trial court. On the aspect of title in Shahabuddin, it was observed thus:-

> "29. It is thus implicit that a claim of adverse possession can arise only against the real owner of the property. In a case where title itself of the plaintiff is disputed, the plaintiff would have to establish lawful title in accordance with law. In such a case, the defendant also would have to establish by clear and cogent evidence as to the manner in which it had expressed hostile intention and a claim adverse to that of the real owner of the property. It may not be wrong to state that the defendant or his adverse possession would have to assert as to the name and particular of the person against whom it was claiming title by adverse possession.
>
> xxxx
>
> "xxxx
>
> There must be on the part of the trespasser, an expressed or implied denial of title of a true owner and animus of exclusive ownership. (Ref. AIR 1976 Ori 218 entitled **Basanti Dei v. Bijayakrushna Patnaik and Ors.**)".
>
> (Emphasis supplied)

256. In the pronouncement of the Supreme Court reported at 2000 (5) SCC 562 **State of Rajasthan vs. Harphool Singh (Dead) through His LRs,** the court set aside the findings returned by the high court on the ground that they were not based on any legally acceptable evidence and that the necessary legal ingredients of adverse possession had not been substantiated. It was observed that the claim of the plaintiff of title was held mechanically proved merely on the basis that the plaintiff was found to be the owner. It was reiterated that in order to substantiate a claim of adverse possession, the ingredients of open, hostile and continuous possession with required animus had to be proved against the State for

a continuous period of 30 years. Slender material could not be considered perfunctorily and the claim has to rest on legal evidence. In this regard, the court had come down heavily on the findings of the appeal court and observed as follows:-

> "13. ..... While that be the factual position, it is beyond comprehension as to how anyone expected to reasonably and judiciously adjudicate a claim of title by objective process of reasoning could have come to the conclusion that the legal requirement of 30 years of continuous, hostile and open possession with the required animus stood satisfied and proved on such perfunctory and slender material on record in the case. The first appellate court as well as the High Court ought to have seen that perverse findings not based upon legally acceptable evidence and which are patently contrary to law declared by this Court cannot have any immunity from interference in the hands of the appellate authority. The trial court has jumped to certain conclusions virtually on no evidence whatsoever in this connection. Such lackadaisical findings based upon mere surmises and conjectures, if allowed to be mechanically approved by the first appellate court and the second appellate court also withdraws itself into recluse apparently taking umbrage under Section 100, Cr.P.C.(sic), the inevitable casualty is justice and approval of such rank injustice would only result in gross miscarriage of justice."

(Emphasis supplied)

Before the learned ADJ deciding CS 293/1998, there was neither pleading nor any evidence. The discussion in the judgment dated 8th April, 1999 is interesting. Despite the defendants having stated that they had no relationship to the suit land, no issue was struck on this plea. There is also no discussion of the impact of the binding findings in the previous adjudication (the suit of 1969; the PP Act proceedings, the judgments in CW No.550/72 & LPA No.113/75) between the parties. The real owner was not even a party.

There is no material at all to support a conclusion that either Het Ram or Kewal Ram ever asserted a title against the real owner, (or any person) except the claim made for the first time in the plaint in CS No.293/1998.

257. The claim of title hostile or adverse to that of the real owner has to be made before approaching the court of law. It cannot for the first time be raised in pleadings in a suit.

258. Before the courts, Het Ram and Kewal have also not set out any particular date or manner or the person/authority against whom they asserted a title hostile to that of the real owner. There is not an iota of pleading or documentary material placed before any court. There was none in CS No.293/1998. There is none at all in the present case.

259. Het Ram and Kewal Ram have not challenged the Government notifications at any point of time, not even in the present proceedings. Kewal Ram & Het Ram have thus never disputed the Delhi Government's ownership of the land and title of IHBAS. No representations sent at any time challenging the correctness of the notification. Instead in CS No.293/98 they set up a plea of ownership by adverse possession against the Union of India.

260. It would appear that neither Het Ram nor Kewal Ram have asserted title of the land against the real owner; not even in the litigation prior to 1998.

261. Having regard to the judgment dated 8th April, 1999 decreeing Suit 293/1998, I find that it records that only the following issue was framed:-

> "Whether the plaintiffs are owners in possession upon the suit land by way of adverse possession? OPP"

262. The above narration also makes it abundantly clear that the forefathers of Het Ram and Kewal Ram also had never claimed right or ownership or title to the said property. After them, Het Ram the defendant no. 4 and Kewal Ram (represented by defendant nos. 5(i) to (iii) herein) have also laid no claim of ownership till 1998 or a claim of possession of the land resting on title as noticed in the judgment of the Division Bench on 10th of April, 1980. The defendant nos. 5(ii) and (iii) do not challenge IHBAS's claim in the present case.

263. Het Ram appears to have filed an execution petition on 15th September, 1982. Copy of the execution petition, details of the orders passed therein and pleadings have been concealed by him from this court. Reliance is placed on an order dated 5th May, 1989 passed therein

which suggests that the execution petition presumably seeks execution of the judgment dated 17th December, 1971 wherein Kewal Ram and Het Ram had asserted a plea of tenancy of the subject property from the Government of India. Therefore, even till 1989, Het Ram was relying on a plea of occupancy as a tenant against receipts from the Government.

264. The same stand has been asserted in Kewal Ram's appeal in 1996 which was dismissed for default of appearance on 11th February, 2000 and on merits by the order passed as late as on 4th of April, 2009 rejecting this plea.

265. Unfortunately, the proceedings in the previous litigation are premised on the incorrect and completely erroneous assumption that the defendants in those cases were required to prove title. The aforenoticed judgment dated 8th April, 1999 proceeds as if the defendants were required to establish their case without even examining as to whether the plaintiff had discharged the onus and burden of proof on it to establish its claim.

266. A claim of ownership against a person or authority not having rights or title in the property is of no consequence so far as acquisition of title by adverse possession is concerned. . The concealment by Het Ram and Kewal Ram with regard to the ownership of the land, and the complete lack of pleadings and materials with regard to the description of the party impleaded as defendant and the real owners of the property and absence of particulars of date/property with regard to person against whom they asserted adverse title or possession in the present case prima facie shows that Het Ram and Kewal Ram have never asserted a title hostile to the real owner or adverse possession till date. The essential elements of the plea of acquisition of title by adverse possession by Het Ram (or even Kewal Ram) are thus completely missing.

(v) Nature of Possession to support a claim of acquisition of title by adverse possession

267. It is further urged by Mr. Sultan Singh that the suit property was in the nature of an open tract of land and possession thereof, has to go with title. The plaintiffs have urged that an isolated act of trespass or presence on the suit land on any occasion or date would not tantamount to 'possession' in the eyes of law and would not even create such right to remain in possession which the courts would protect, let alone result in acquisition of ownership by adverse possession. Learned counsels for

the plaintiff has submitted at great length that there are no pleadings or material placed by Het Ram or Kewal Ram or his heirs on any record in this regard as well. This is staunchly disputed by Mr. Arvind Nayar, learned counsel.

268. It is trite that every unlawful possession is also not adverse possession. However, The contesting defendant would suggest that occupation of the land on any particular date would justify its claim of ownership by adverse possession and that the decree dated 8th April, 1999 would bind adjudication on this question. Therefore, before examining the rival claims, it is necessary to understand the essential ingredients of such adverse possession to perfect a title to the land, including the pleadings necessary to support the same as well as the onus and the burden of proof.

In AIR 1997 SC 2930 **D.N. Venkatarayappa and Anr. v. State of Karnataka and Ors.,** the Supreme Court held that "**in the absence of crucial pleadings,** which constitute adverse possession **and evidence to show** that the petitioners have been in **continuous and uninterrupted possession of the lands** in question **claiming right, title and interest in the lands** in question **hostile** to the right, title and **interest of the original grantees, the petitioners cannot claim that they have perfected their title by adverse possession.**"

269. On the aspect of possession to support the acquisition of title by prescription in **Shahabuddin vs. State of U.P.** (supra) The court held that :-

> "26. A person claiming title by adverse possession has to show that he has asserted hostile title as well as done some overt act to assert such claim. Even mere continuance of unauthorised possession by licensee after termination of license for more the an 12 years does not enable a licensee to claim title by adverse possession. Ouster of the real owner does not mean actual driving out of the co-sharers from the property. In any case, it will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession.
>
> xxx
>
> 28. A claim of adverse possession being a hostile assertion

involving expressly or impliedly in denial of title of the real owner, **the burden is always on the person who asserts such a claim to plead and prove by clear and unequivocal evidence that his possession was hostile to the real owner and in deciding such a case the Court must have regard to the animus of the person doing such."**

xxx

30. Actual possession without the required animus militates against the claim of title based on adverse possession. Thus, mere unlawful possession does not mean adverse possession. A trespasser's possession is adverse to the true owner only when the adverseness of the trespasser's claim is within an owner's knowledge.

31. So far as property of the State is concerned, the question of a person claiming adverse possession requires to be considered most seriously inasmuch as it ultimately involves destruction of right and title of the State to immovable property conferring upon a third party an encroacher, a title where, he had none. In order to substantiate such a claim of adverse possession, the ingredients of open, hostile and continuous/possession with the required animus should be proved for a continuous period of 3 years."

(Emphasis supplied)

270. So far as the claim of adverse possession is concerned, it has been authoritatively held that there are human right issues attached to the same. In this regard, in **Shahabuddin vs. State of U.P.** (Supra), this court had observed as follows :-

"59. Person pleading adverse possession has no equities in his favor. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. In this behalf, reference may be made to the judgment reported at AIR1996SC869 entitled **Dr. Mahesh Chand Sharma v. Smt. Raj Kumari Sharma.**"

271. The claim by Het Ram has to be examined in the background of these well settled principles.

272. The plea of Het Ram and Kewal Ram in para 7 of S.No.293/1998 was only that there was "no objection by real owner". Therefore Kewal Ram and Het Ram's claim of acquisition of title, rested on a mere plea that the real owner was silent on their claim of occupation and that this was sufficient for a declaration of their title.

Thus it would seem that the learned trial court has been influenced by the plea set up before it that the alleged silence of the defendant in the suit (who was not the owner of the property) to the claimed occupancy of the subject land (not supported by any material or documentary evidence) by the plaintiff, by itself was enough to establish a legal entitlement of protection of the same and enough to support a plea of adverse possession. This was factually incorrect. It is certainly not the correct position in law.

273. The judgment passed on 17th December, 1971 in Suit No. 693/1969 has noted that defendant no.2 was struck off the record by an order passed on 17th April, 1968. It was further noted that defendant no. 1 (UOI) and defendant no.3 had contended that the land in the suit was nazul land with the Delhi Development Authority; that it was transferred on 7th May, 1965 for extension of a Hospital for Mental Diseases and its physical possession was made over by the Delhi Development Authority to the CPWD and that Het Ram/Kewal Ram unauthorisedly took possession of the suit land under the garb of the court's injunction order in an earlier suit between the parties after 7th May, 1965. It was asserted that the plaintiff was only a trespasser on the subject land.

274. Para 11 of the judgment dated 17th December, 1971 (of Shri Ripu Sudan Dayal, SJ) notes that in Suit No. 703/1969 defendants had led the evidence of DW 3, Shri Ram Nath, Naib Tehsildar of the DDA to the effect that on 7th May, 1965 he took over possession of the suit land lying vacant and uncultivated by beat of drum on the spot. DW 3 has also stated that after taking the possession of the suit land, the land was handed over to the DDA. DW-2 Shri Shanker Singh, Senior Surveyor of the Delhi Land and Development Office corroborated DW3 when he had deposed that on 7th May, 1965, he took over the possession of the suit land from the Kanungo Shri Ram Nath of the DDA and handed over possession of the same to Sh. R.K. Jain, Section Officer. Appearing as DW-5, Sh. R.K. Jain stated that on 7th May, 1965 he took over possession of the site for the Hospital for Mental Diseases, Shahdara; that the land

site was uncultivated and free from encroachment at that time. DW-6 Sh. H.L. Bhatia, Section Officer, CPWD, D-Division, New Delhi had further deposed that possession of the site in dispute was taken over by him on 17th May, 1965 for the construction of the hospital for mental diseases. Dr. P.B. Bakshi, Medical Superintendent of the Hospital for Mental Diseases had appeared as DW-4 and confirmed that possession of the disputed land was taken over by the CPWD on behalf of the hospital on 7th May, 1965. The judgment (dated 17th December, 1971) notes that DW-7, Sh. P.R. Kalra, Naib Tehsildar, DDA also deposed that the possession of the suit land was transferred by the DDA on 7th May, 1965 to the Land Development Officer and further that at that time the land was lying vacant.

275. It is important at this stage to note some other observations given in the judgment dated 17th December, 1971 passed in Suit No. 693/1969 filed by Kewal Ram (as well as in Suit No. 703/1969 entitled Het Ram vs. UOI & Ors) passed by Sh. Ripusudan, SJ, Delhi. After noticing the evidence of the seven official witnesses with regard to the transfer of the land to the hospital as well as the possession, the judgment makes the following:-

> "12. It is clear from the above that there is no evidence of the defendants clearly to show that the plaintiff was dispossessed. The evidence is only to the effect that certain officers took the possession of the suit land on 7.5.65. That evidence is of no value as the matter relates to open land and any person may say that possession was taken over by him.xxx"

The trial court was thus of the view that the witnesses were of no value as the matter relates to open land and any person may say that possession was taken over by him.

The learned trial court completely overlooked that the possession claim made by Het Ram and Kewal Ram was over bare land and deserved the same treatment.

276. Het Ram has not placed a single document before this court to support even occupation or presence on the land. on any date. The parties have not been able to point out any document which was before the court in the Suit No.693 and 703/1969 to support a plea of settled possession or ouster of the real owner. The judgment of 17th December,

1971 also does not refer to any document. No challenge to the notification of 1965 was laid. It was for the plaintiff to prove its case. Yet, in para 12, Shri Ripusudan held as follows :-

> "12. .....The documents referred to earlier show that the plaintiff was in possession upto 7.5.65 from the evidence of Shri Ram Nath, Naib Tehsildar, DDA also it appears that the defendants were not in possession of the suit land prior to 7.5.65 the plaintiff was admittedly in possession on the date of the institution of the suit. The defendants have contended in their written statement that the plaintiff unauthorisedly took possession of the suit land under the garb of courts injunction order in an earlier suit between the parties after 7.5.65. No date has been given when the possession was allegedly taken unauthorisedly by the plaintiff. The allegation contained in the written statement is vague and no evidence has been led to prove that the plaintiff took over the possession under the garb of any injunction order. I have, therefore, no reason to disbelieve the evidence of the plaintiff that he has been in possession over the disputed land for the last 20 years."

The following reasons were given in support of the decree :-

> "13. Inspite of the fact that the plaintiff had no right to occupy the disputed land and his possession was unauthorized, still under the law of the land, he had the right to the effect that he must not be dispossessed except through due process of law. Our country is governed by the constitution and Article 31(1) of the same lays down that no person shall be deprived of his property except by the authority of law. This fundamental right is a command of the constitution to the state not to proceed against its citizens except in accordance with the procedure prescribed by law and the obligation of the state to obey it gives rise to its corresponding right in favour of the subjects by which their peaceful possession and enjoyment of a property in dispute is protected until action is taken against them in accordance with law. Again under the Ordinary Civil Law, even on trespasser cannot be thrown out except in due course of law. Even unauthorized occupants are entitled to the protection of the law to the extent that they cannot be dispossessed except in due

course of law. In this view, I find support from the authority of **Baldev Raj vs. Delhi Development Authority** 1971 RLR 84, **Mohan Lal vs. State of Punjab & Ors.** 1970 All India Rent Control Journal 95 and **Bishan Dass vs. State of Punjab** AIR 1961 SC 1570."

(Underlining supplied)

277. Interestingly, this order also notices that the plaintiff stood dispossessed on 7th May, 1965. In this background, despite the material that certain officers took possession of the suit land on 7th May, 1965, a decree for permanent injunction dated 17th December, 1971 was passed against defendant nos. 1 and 3 (in that suit) restraining them from interfering with the admittedly non-existent possession of the plaintiff over the suit land (on the date of passing of the decree), except by due process of law. Het Ram and Kewal Ram did not challenge this decree.

278. As per the further documents placed by the plaintiff in the present proceedings the land is stated to have been taken over by the Medical Superintendent of the hospital on 28th October, 1987 and a communication dated 29th October, 1987 was sent by him to the Joint Secretary. This letter also records that the project officer had been requested to put the wire fencing etc to prevent further unauthorized occupants and that the land may be handed over to the GTB Hospital as decided for its use.

279. The taking over of possession has been confirmed by a communication dated 3rd November, 1987 of the Project Manager and 5th December, 1987 by Sh. A.K. Garg Executive Engineer who informed the Project Manager of the GTB Hospital of the same.

280. After the taking of possession by the hospital in 1987, a letter dated 26th April, 1991 was addressed thereafter by the Medical Superintendent of the Hospital to the DCP (East) intimating the apprehension that some persons may make efforts to encroach upon the land. With regard to such event, a letter dated 20th December, 1996 sent by IHBAS to Kewal Ram has been placed on record.

281. Mr. Patwalia, learned senior counsel appearing for the private defendants has submitted that the notice dated 20th December, 1996 is an admission on its part that Kewal Ram was in possession of the subject

land. This notice dated 20th December, 1996 has to be examined in the light of the several actions by the authorities which have been noticed hereinabove including taking over of the possession on 5th December, 1987.

282. I find that Dr. R.K. Yadav, the learned ADJ in his judgment dated 4th of April, 2009 (in PPA No.4/2008) rejecting Kewal Ram's challenge to the notice dated 20th December, 1996, has clearly concluded that possession of the land was taken over. The following observations of the learned ADJ on the communication dated 20th December, 1996 in the judgment dated 4th of April, 2009 passed in PPA No.4/2008 are material and read as follows :-

"5. As the contents of the impugned notice tell that it was a notice to the appellant to remove his belongings out of Government land, which was in his possession as trespasser. Whether said notice intimates the appellant, intention of the Estate Officer to initiate proceedings, as contemplated by Section 4 of the Act? For initiation of a proceeding under section 4 of the Act, the Estate Officer is required to serve a notice on any person, who is in unauthorized occupation of public premises, calling upon him to show cause as to why an eviction order should not be passed, besides specifying the grounds on which eviction orders is proposed to be made and requiring him to show cause, if any, against the proposed order and to appear before him on a specific date, alongwith evidence, which he proposed to produce in support of cause to be shown and also for personal hearing. When impugned notice is perused, it came to light that it is not a notice under sub-section (1) of section 4 of the Act. Neither the impugned notice is a eviction order under sub-section 91) of section 5 of the Act. As contents of the notice tell, the appellant was called upon to handover possession of land in dispute, reminding him in case of his non-compliance, possession of land would be taken by way of removal of his belongings. Therefore, this notice was a sort of hue and cry notice for the appellant to remove his belongings. **It was in the course of execution of eviction order, which was already passed against the appellant and others and attained finality, as detailed above.**

6. It was agitated that **possession of the land in dispute was**

> **taken over on 23.12.96** with police aid and thereafter appeal had become infructuous. Under these circumstances, it is evident that **appeal became infructuous on the very day, when it was filed.** Contentions of the appellant that execution of order cannot be taken over after a period of 12 years is uncalled for. Act nowhere specifies the period of limitation during which the execution of eviction order may be carried out. Limitation Act provides period of limitation during which assistance of the executing Court can be sought, for execution of an order. Here in the case, eviction order was not brought to the Court of law for seeking its assistance for execution. Therefore, provisions of Limitation Act does not come into operation, when Estate Officer himself is competent to execute its order. Under these circumstances, I find no force in the contentions of appellant on that score too."
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> (Emphasis supplied)

283. Mr. Patwalia, learned senior counsel for the defendant nos. 4 and 5 has also drawn this court's attention to a letter dated 17th July, 1993 in support of the private parties. claim of possession. This letter was purportedly addressed by Sh. S.R. Verma, Asstt. Engineer of the PWD Div. VII (DA) to Sh. Kewal Ram and Sh. Het Ram. The Asstt. Engineer of the PWD is stated to have written as follows:-

> "It is understood that the attached land as per plan attached between GTB hospital and Mental Hospital boundaries at the edge of Road No. 64 belongs to you. This matter has been discussed with you at site on 16.7.1993 and it agreed to provide ramps to the existing work of construction of the Government boundary wall has started. You are requested not to create any dispute in the way of the work. In case any legal benefit is demanded by you in respect of the attached land etc, this office does not have any objection. Please acknowledge the receipt of this letter and convey your consent at an early date."

284. It is submitted that this communication tantamounts to an admission by the Government agency of their possession as well as ownership. A bare perusal of this communication would show that the same does not disclose any authority of an Asstt. Engineer to issue a

letter of this nature. The letter makes a reference to the author's "understanding" that valuable land belongs to the addressees. The author had agreed to provide ramps to the existing path at three places and repeatedly refers to the subject land as being 'your land'. The Asstt. Engineer has stated that his office has no objection in case any legal benefit is demanded by the addressees in respect of the attached land etc.

285. The above narration of facts would show that the PWD was not the owner of the land. The source or basis of the stated "understanding" of the author of the letter is not disclosed. The authority of an Asstt. Engineer to allot or transfer ownership and possession of government land to any private person is not disclosed. From the tenor of the communication, it would appear that the basis of the letter is discussions with the addressees.

286. Such a communication would not legally bind even the PWD, unless the person relying on it could show authorization by the person issuing the same. So far as valuable immoveable property of the State is concerned, even approvals for allotment may be necessary. Ordinarily the jurisdiction of the PWD relates to execution of construction works and not land allotments. The magnanimity of the author of the letter and the dispensation portrayed therein is inexplicable. The private defendants give no reason or necessity for such a communication to be generated. Any statement by such Asstt. Engineer of the PWD would certainly have no concern with or bind the real owner of the property. It certainly cannot create legal right of the addressees in valuable Government land. The communication appears to be a self serving, procured document.

Prima facie, such letter would not bind the present plaintiff to whom the land had been allotted and with whom it vested.

287. There is yet another important aspect of this case. It is noteworthy that apart from Het Ram and Kewal Ram, two more persons Inder Raj and Ganga Sahai had jointly filed the appeal, writ petition and letters patent appeal.

Ganga Sahai and Inder Raj have not agitated any claim against the Government authorities or IHBAS after 1987.

288. The position of Het Ram is not much different. The order of eviction passed by the Estate Officer against him has also attained finality.

Het Ram, Kewal Ram as well as Ganga Sahai and Inder Raj have accepted the judgment dated 10th April, 1980 of the Division Bench in the Letters Patent Appeal of this court which has attained finality. Execution proceedings stand undertaken.

289. Learned counsel for the plaintiff has drawn my attention to the pronouncement of the Supreme Court reported at (2000) 3 SCC 708 **Roop Singh (Dead) Through Lrs. Vs. Ram Singh (Dead) Through Lrs.** in support of the contention that even if it could be held that Het Ram and Kewal Ram had been in settled possession, however the same was insufficient to establish the claim of acquisition of title by adverse possession.

290. On the same issue, reliance has also been placed on the pronouncement of the Supreme Court reported at (1997) 2 SCC 203 **Madhvakrishna & Anr. Vs. Chandra Bhaga & Ors.,** wherein the Supreme Court has held as follows :-

> "5. In this case, except repeating the title already set up but which was negative in the earlier suit, namely, that they had constructed the house jointly with Mansaram, there is no specific plea of disclaiming the title of the appellants from a particular date, the hostile assertion thereof and then of setting up adverse possession from a particular date to the knowledge of the appellants and of their acquiescence. Under these circumstances, unless the title is disclaimed and adverse possession with hostile title to that of the Mansaram and subsequently as against the appellant is pleaded and proved, the plea of adverse possession cannot be held proved. In this case, such a plea was not averred nor evidence has been adduced. The doctrine of adverse possession would arise only when the party has set up his own adverse title disclaiming the title of the plaintiff and established that he remained exclusively in possession to the knowledge of the appellant's title hostile to their title and that the appellant had acquiesced to the same."
>
> (underlining be me)

291. The legal position on this issue was summed by this court in **Shahabuddin vs. State of UP** (supra) in the following terms :-

> "32. When the property was a vacant land before the alleged construction has been put up, to show open and hostile possession which could alone in law constitutes adverse possession to the State, some concrete details of the date of absolute and exclusive occupation, nature of occupation with proof thereof would be absolutely necessary and a mere bald assertions cannot by themselves be a substitute for concrete proof required of open and hostile possession. The person claiming adverse possession as against the State must disclaim the State's title and plead this hostile claim to the knowledge of the State and that the State had not taken any action within the prescribed period. It is only in such circumstances that the possession would become adverse. The pleadings and proof have to be clear and cogent. (Ref. MANU/SC/0805/1995 : (1995)6SCC309. **R. Changevarappa v. State of Karnataka;** MANU/SC/0766/1997 : AIR1997SC2930 **D.L. D.N. Venkatarayappa and Anr. v. State of Karnataka and Ors.** and MANU/SC/0348/2000 : (2000)5SCC652 entitled **State of Rajasthan v. Harphool Singh (dead)** the rough his LRs.)
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> xxx
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> 35. **In the light of the above, it is apparent that both pleadings and the evidence has to be clear, unequivocal and specific as to on what date and even in which month the property was occupied and the date of the dispossession of the real owner. All questions relating to the date and nature of a person's possession whether the factum of his possession was known to the owner and the legal claimants and the duration for which such possession has continued and also the question whether the possession was open and undisturbed are all questions of facts and have to be asserted and proved.** The attributes of adverse possession is that it begins with dissension or ouster of the owner. It remains an "inchoate" title or a growing title till expiration of the statutory period of its continuous open and hostile assertion and enjoyment. Before title of adverse possession is perfected, all presumptions and intendments are in favor of the real owner. Burden of proving adverse possession is a very heavy one. No court can take the **plea of acquisition of title by adverse possession casually**

and it is settled law that much importance should not be attached to the mere evidence of witnesses who casually and cavalierly simple deposed that the land was in possession of somebody and/or another. Mere oral evidence may not be sufficient to substantiate a claim of adverse possession. The party who so pleads must show something more than that. In this behalf, reference may be made to the observations made in AIR 1921 Pat 234 entitled **Gajadhar Prasad and Ors. v. Musamad Dulhin Gulab Kuer and Ors.**"

(Emphasis supplied)

In so concluding reliance has been placed on the prior judgment of this court reported at 57 (1995) DLT 101 (para 23) Harbans Kaur & Ors. vs. Bhona Nath.

292. IHBAS filed an application in CS No. 47/2000 (now CS No.18/2005) seeking a direction to Het Ram not to interfere in the process of demarcation of the suit land.

293. Despite the observations of this court in CWP No. 2374/2001, Het Ram staunchly opposed the present plaintiff' prayer. As a result, the trial court by the order dated 21st April, 2005 in CS 47/2000 (18/2005) rejected the prayer of IHBAS for demarcation of the land with costs holding that IHBAS was adopting dilatory and delay tactics to delay proceedings.

294. Het Ram-defendant no.4 by his opposition thus has obstructed the demarcation proceedings which would have brought out the truth. The judgment and orders in favour of Het Ram or Kewal Ram would not be binding for this reason as well. (Ref: 182 (2011) DLT 597 (SC) **Khatri Hotels P. Ltd. & Anr. vs. UOI & Anr.**).

295. In support of the plea of title by adverse possession, reliance was placed by the present private defendants on the pronouncement of the Gujarat High Court reported at 1 (1999) CLT 569 **Prabhat Bhai Shankar Bhai Parmar vs. Mahinbhai Nanabhai Panwar & Ors.** which related to continuous possession which was open and hostile to the title of the real owner.

296. The pleadings which are necessary as well as the nature of evidence and the enquiry by the court which is essential to establish a

claim of adverse possession have been authoritatively laid down by the Supreme Court in **P.T. Munichikkanna Reddy** (supra) placing reliance on the earlier pronouncement in AIR 1964 SC 1254 **S.M. Karim vs. Bibi Sakina**. The court in paras 31 and 32 in P.T. Munichikkanna held as follows :-

"31.Inquiry into the starting point of adverse possession i.e. dates as to when the paper owner got dispossessed is an important aspect to be considered. In the instant case the starting point of adverse possession and other facts such as the manner in which the possession operationalized, nature of possession: whether open, continuous, uninterrupted or hostile possession - have not been disclosed. An observation has been made in this regard in **S.M. Karim v. Mst. Bibi Sakina** : [1964]6SCR780:

Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is **no evidence** here when possession became adverse, if it at all did, and a mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "an absolute title" was not enough to raise such a plea. **Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea**.

32. Also **mention as to the real owner of the property must be specifically made in an adverse possession claim.**"

(Emphasis by me)

297. In **Karnataka Board of Wakf v. Govt. of India** : (2004) 10 SCC 779, this Court observed as under:

"In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true

owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period."

The court further observed that plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, **a person who claims** adverse possession should show: (a) on what **date he came into possession,** (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) **how long his possession has continued,** and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. **Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession**.

30. 'Animus possidendi' is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See **Md. Mohammad Ali (Dead) by LRs. v. Jagdish Kalita and Ors.** : (2004) 1 SCC 271)

21. This Court had an occasion to examine the concept of adverse possession in **T. Anjanappa and Ors. v. Somalingappa and Anr.** : 2006(8)SCALE624. The court observed that a **person who bases his title on adverse possession must show by clear and unequivocal evidence that his title was hostile to the real owner and amounted to denial of his title to the property claimed.** The court further observed that the classical requirements of acquisition of title by adverse possession are that such possession in **denial of the true owner's title must**

be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action."

(Emphasis supplied)

298. Shri B.S. Chaudhary, learned ADJ while passing the judgment dated 8th of April, 1999 has relied on oral testimony of Kewal Ram and Het Ram with regard to continuity of their claimed possession. The judgment dated 8th April, 1999 fails to notice that the judgment dated 17th December, 1971 has recorded the plea of the DDA that on 7th May, 1965 possession of the suit land which was lying vacant and uncultivated stood taken by beat of drums on the spot.

299. Prima facie, that the private persons were not in possession is also manifested by the documents on record including the notification dated 10th August, 1965; as on 23rd December, 1965 as per para 12, 13 of the judgment dated 17th December, 1971; the official letters dated 23rd/28th October, 1987; 3rd November, 1987 & 5th December, 1987 which show that IHBAS was in possession; as well as from 23rd December, 1996 as per the judgment dated 4th April, 2009 in PPA 4/2008 by Dr. R.K. Yadav, ADJ. Despite a close reading of the pleadings and documents on record, I have been unable to find any material to show how or when, if at all, Kewal Ram and Het Ram were in exclusive occupation, let alone legal possession of the land at any point of time. The contesting private defendants make no disclosure on this aspect. There is no finding on this aspect in the judgment dated 8th April, 1999 relied upon by Het Ram and Kewal Ram.

300. The defendants have also nowhere pleaded any specific date or even the year in which their forefathers initially came into possession of the subject land in any document or pleadings.

It was for Het Ram and Kewal Ram to also show the date when they had come into "possession" of the suit property. No averment or evidence in this regard is available.

301. Given the findings of the courts below, even if it could be held that Het Ram and Kewal had been in possession of the suit land, the same

was not continuous. It was certainly not settled possession. Even assuming that their contention of having been in cultivatory possession of the property was to be accepted, the same was interrupted by the proceedings on 7th May, 1965 and 23rd December, 1996. These events are enough to defeat the 1998 claim of continuous possession of thirty years essential to support a claim of ownership by adverse possession.

302. Claims of adverse possession which have rested on non-participation in rent and taxes or on mere denial of the owner's title have been rejected in [1981] 1 SCR 863 **Karbalai Begum v. Mohd. Sayeed and Anr;** : [1995] 1 SCR 88 entitled **Anu Sahed Bala Sahed v. Balwant @ Bala Saheb and in** AIR 1995 SC 1789 entitled **Vidaya Devi @ Vidya Vati v. Prem Parkash**.

303. To establish a plea of title by adverse possession, it is also essential that the real owner does not object to such possession. On the other hand, the assertion of title by the real owner is evident from the eviction proceedings under the PPA Act right from 1969; the execution of the order of eviction on 27th October, 1987 by the Estate Officer; and the further actions of IHBAS noted hereinabove.

These facts do not find consideration in the judgment dated 8th April, 1999.

304. It is manifest that under section 27 of the Limitation Act, the period of 12 years for which the person must assert a hostile title against the real owner and continuous, open possession, let alone the 30 year period against the State, in order to acquire title by prescription under the limitation statute. Neither of these periods, from the afore-noticed dates was over when Suit No.293/1998 or CS No.47/2000 (now renumbered 18/2005) were filed. It is noteworthy that the period of 30 years is not over even today. The judgment dated 8th April, 1999 is thus completely without any basis and contrary to law.

305. The above discussion shows that there was neither pleading nor evidence on any of the aspect of adverse possession in CS No.293/1998 before the court. All essentials to establish title by adverse possession were missing. In the light of the above discussion, the judgment dated 8th April, 1999 is contrary to all principles of law governing acquisition of title by adverse possession.

306. It is well settled that a judgment in a civil suit is inter partes and is not a judgment in rem. Given the claim of Het Ram and Kewal Ram against the defendants in Suit No. 293/1998, the claim of ownership by adverse possession can bind only the defendants in the said suit. The judgment dated 8th April, 1999 thus has to bind only the Union of India and the Land and Development Office who were the defendants in the suit (CS 298/1998). The judgment cannot bind IHBAS which was not a party to those proceedings.

Het Ram-defendant nos. 4 also states this legal position in their written submissions dated 21st April, 2010 filed in the present case.

307. The facts placed before this court also do not render it possible for this court to hold these proceedings that Het Ram and Kewal Ram (or his successors) were in settled, exclusive, continuous, open and hostile possession of the suit land or any portion thereof or had ever asserted title of the property to support a finding that they had acquired title by adverse possession.

XIII. Bar of Limitation

308. Mr. Arvind Nayar, learned counsel for Het Ram has contended that the present suit has been filed laying a challenge to the decree dated 8th of April, 1999 when the challenge to it by way of an appeal was barred by limitation. It has been objected by the defendants that the suit is barred by limitation. In this behalf, protracted reference to the plaintiff's knowledge of the decree dated 8th April, 1999 passed in the Suit No. 293/1998 has been made. It is contended that the present suit is not maintainable for this reason.

309. Mr. Sultan Singh, learned for the plaintiff and Mr. Sanjay Poddar, appearing for the defendant no. 1 have extensively urged that a challenge to a fraudulent judgment and decree can be made at any stage and at any time and such challenge would not be governed by the law of limitation. Several judgments relied upon in this regard have been cited.

310. Mr. Arvind Nayar, learned counsel has also emphatically urged that IHBAS is not a statutory authority or a legal authority and therefore the window of 30 years under Article 65 or the period under Article 111 or 112 for computation of the limitation for the relief of possession is not

available to it.

311. In this regard, it is necessary to note that so far as title is concerned, it has never been disputed by Het Ram or Kewal Ram the land was owned by the government. All litigation was filed by them against government authorities. Het Ram and Kewal Ram have placed reliance on jamabandi which reflects the 'Sarkar Daulat Madar' i.e. the government as the owner of the property. These persons had claimed to have acquired title by adverse possession on this basis.

312. It was the plea of Het Ram and Kewal Ram that they were tenants of the Government of India in this litigation and in the PP Act proceedings as well as the ground of appeal no.6 in LPA No.113/75. In the judgment dated 10th April, 1980 in LPA No. 113/1975, the Division Bench had confirmed the finding that the suit property was public premises. Het Ram has not been assailed by the judgment.

313. The private defendant has claimed that an application has been filed in Kewal Ram's appeal under the Public Premises Act, the decided RCA No. 19/1996 under the PP Act (arising out of proceeding, Kewal Ram had set up the plea of tenancy under the Government in this appeal. If the above position is correct, the claim of tenancy is pending even on date.

Certainly, it does not lie in the mouth of Het Ram or the legal heirs of Kewal Ram to urge that the subject land is not government property or that the window of 30 years for the purposes of asserting adverse possession is not available.

314. By the notification dated 22nd December, 1993, the management of the Hospital for Mental Diseases, Shahdara was transferred to IHBAS, the present plaintiff. IHBAS is run purely on grant in aid of the Central Government and the Government of NCT of Delhi. Perusal of the structure of the joint body of IHBAS as contained in its bye-laws would show that IHBAS is headed by the Lieutenant Governor of Delhi as its President and the General Body consists of senior government officials etc. Prima facie the contention that the window of 30 years is not available to the plaintiff is devoid of merit.

315. Learned counsel for the plaintiff has urged that looked at from any angle, the suit claim is not barred by limitation. It has been submitted

that it is the plaintiff's case that it is in possession of the subject property and the suit has been necessitated because of the constant efforts of the defendants to trespass on the property. In this regard, reliance has been placed on the pronouncem`nt of the Supreme Court reported at (2000) 1 SCC 586 Lata Construction; (1997) 1 SCC 99 **Bengal Waterproof Ltd. Vs. Bombay Waterproof Manufactuirng** and (2006) 3 SCC 605 **N. Khosla vs. Rajya Lakshmi**.

316. So far as the aspect of delay is concerned, Mr. Sultan Singh, learned counsel for the plaintiff and Mr. Sanjay Poddar have also placed reliance on the pronouncements of the Supreme Court reported at 2008 (3) SCALE 556 **Ganpatibhai Mahijibhai Solanki vs. State of Gujarat and Ors. (G-XII)** In this case, the court was concerned with the delay of 2205 days in filing a review petition and the effect thereon of suppression of a material fact resulting in the passing of the decree. The order of the High Court condoning this delay was assailed before the Supreme Court. The respondents before the Supreme Court have asserted that the appellant had committed fraud on the court as it had suppressed earlier orders which had attained finality. In this regard, the court observed as follows:-

> "12. We are not oblivious of the fact that the authorities of the State have made a complete goof up with the situation. By its action, it allowed subsequent events to happen, viz. sales of the lands have taken up, constructions have come up, but the question which arises for our consideration is as to whether even in such a situation, this Court would allow a suppression of fact to prevail.
>
> It is now a well settled principle that fraud vitiates all solemn acts. If an order is obtained by reason of commission of fraud, even the principles of natural justice are not required to be complied with for setting aside the same.
>
> In **T. Vijendradas and Anr. v. M. Subramanian and Ors.,** AIR 2008 SC 563, this Court held;
>
> 21. ...**When a fraud is practiced on a court, the same is rendered a nullity. In a case of nullity, even the principles of natural justice** are not required to be complied with. [**Kendriya Vidyalaya Sangathan and Ors. v. Ajay Kumar Das and Ors.**

: (2002) IILLJ 1057 SC & **A. Umarani v. Registrar, Cooperative societies and Ors.** : (2004) III LLJ 780 SC]

22. Once it is held that **by reason of commission of a fraud, a decree is rendered to be void rendering all subsequent proceedings taken pursuant thereto also nullity, in our opinion, it would be wholly inequitable to confer a benefit on a party, who is a beneficiary thereunder....**

13. The object and purport of a statute must be given effect to. If there is a conflicting interest, the Court may adjust equities but under no circumstance it should refuse to consider the merit of the matter, when its attention is drawn that suppression of material facts has taken place or commission of fraud on Court has been committed.

The courts, for the aforementioned purpose may have to consider the respective rights of the parties. The State has a constitutional duty/obligation to comply with the principle of social justice as adumberated under Section 23 of the Act and take the decision to their logical conclusion.

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15. In the matter of passing an order of condonation of delay, we may notice that the Court of Appeal in **Smith v. Kvaerner Cementation Foundations Ltd (Bar Council intervening)** 2006 3 All ER 593 condoned the delay on the ground that the appellant therein had a human right to get his lis adjudicated before an independent and impartial tribunal and as the Judge was biased, delay in preferring the appeal was condoned stating;

xxx"

317. Mr. Sultan Singh learned counsel has placed reliance on the pronouncement reported at (2001) 7 SCC 749 **Pallav Seth vs. Custodian Ors.** and submitted that the judgment relied upon by the defendant nos. 4 & 5 was obtained by fraud and concealment and therefore the plaintiff cannot be penalized for failing to adopt legal proceedings when facts and material necessary for allowing the challenge have been willfully concealed by the plaintiff. In this behalf, reliance has been placed on para 47 of the judgment wherein the Supreme Court held as follows :-

"47. Section 17 of the Limitation Act, inter alia, provides that where, in the case of any suit or application for which a period of limitation is prescribed by the Act, the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of the defendant or his agent (Section 17(1)(b)) or where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him (Section 17(1)(d)), the period of limitation shall not begin to run until the Plaintiff or Applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the Plaintiff or the Applicant first had the means of producing the concealed document or compelling its production. These provisions embody fundamental principles of justice and equity, viz, that a party should not be penalised for failing to adopt legal proceedings when the facts or material necessary for him to do so have been wilfully concealed from him and also that a party who has acted fraudulently should not gain the benefit of limitation running in his favour by virtue of such fraud."

318. In (2004) 7 SCC 541 **Ramaiar vs. N. Narayan Reddy [Dead] by LRs.,** the court observed that the plaintiff cannot invoke applicability of Article 65 of the Limitation Act having suppressed material facts. The court reiterated the principle that the issue as to whether Article 63 or 65 of the said Act would apply to a particular case has to be decided by reference to pleadings and the plaintiff cannot be allowed by skillful pleading to avoid an inconvenient article in the Limitation Act.

319. A claim based on the decree of 8th April, 1999 (in Suit No. 293/1998) has been asserted against IHBAS, for the first time by Het Ram alone when he filed the Suit No. 47/2000. A specific plea on the bindingness of the decree dated 8th April, 1999 has been asserted in the plaint in Suit No. 47/2000 against IHBAS. IHBAS was not a party in the litigation where the decree had been passed while the party which had been impleaded as a defendant had denied right or interest in the property.

320. IHBAS has claimed knowledge of the passing of the said decree in 1999. It thereafter filed the three applications as noted above one of which stood dismissed.

321. At this stage and in this background, the present suit was filed on or about 21st April, 2006 by the plaintiff against the Government of NCT of Delhi, DDA, Land & Development Office as defendant nos. 1, 2 and 3 and against Het Ram (defendant no. 4) as well as Kewal Ram (deceased through his legal heirs defendant no. 5 (i), (ii), (iii)).

322. The plaintiff has consistently been asserting that the decree is fraudulent and void and does not bind it. This was the plea in its applications filed in 1999 in Suit No. 293/1998 and elsewhere. It has been pointed out that this very plea has been urged as the defence to the pending Suit No. 47/2000 filed by Sh. Het Ram.

323. In the given facts, the date of passing of the decree or knowledge of the same would not be determinative of the commencement of the limitation for the first prayer in the suit to the effect that the decree dated 8th April, 1999 be declared to be fraudulent.

324. IHBAS was not impleaded as a party in CS No.293/1998. In the written statement filed in present suit, amongst the legal pleas, Het Ram and Kiran Chand have assailed the maintainability of the suit. In para 2.4, Het Ram has pleaded that the judgment dated 8th April, 1999 was in personam and the plaintiff who was not a party to the suit could simply ignore the judgment and decree without incurring any inability or incapacity; the suit is barred by limitation as well as under section 34 of the Specific Relief Act; having sought declaration, no relief of possession has been sought.

325. IHBAS challenges to the decree dated 8th of April, 1999 is premised on grounds of fraud. The Supreme Court has held that a decree obtained by fraud is a nullity and nonest and would not bind any court. It has also been held that the same can be challenged in collateral proceedings at any stage.

326. On each occasion that the private defendants relied on the judgment and decree, a fresh cause of action for laying a challenge to the decree obtained by practicing fraud, would have arisen in favour of IHBAS and against the defendants.

327. It is important to note that a void decree would not be rendered legal merely by passage of time. A decree which is void and non est remains so, even if not challenged. A concession by the other party

cannot lend legality or bindingness to such judgment.

328. In the given facts, the plaintiff therefore is not required to specifically seek a declaration to this effect. The plaintiff could have stopped at laying the factual matrix and its objections to the decree dated 8th of April, 1999 without seeking a specific declaratory decree. IHBAS could have sought only the remaining prayers in the plaint. The contesting defendants would have disputed the plaintiffs contentions. Adjudication on the effect and bindingness of the decree dated 8th April, 1999 would as a result be inherent in the adjudication of the other prayers and entitlement of the plaintiff to a judgment. The prayer made by Het Ram in Suit No.47/2000 in fact tantamounts to a prayer for execution of a fraudulent decree.

329. Suit No. 47/2000 has been filed by Het Ram alone after 21st February, 2000 (when PPA No.4/2008 was dismissed in default) and before 8th April, 2000 when it (PPA No.4/2008) was dismissed on merits who has set up a claim against IHBAS solely premised on this decree. Kewal Ram (or his legal heirs) are not parties in S. No.47/2000.

330. Het Ram and during his life, Kewal Ram persistently made efforts, physical and legal to acquire, by any measure and prescription, right, title and interest over the subject land.

331. This objection may be examined from another angle. The plaintiff has claimed to be in possession of the suit premises which is being challenged by the contesting defendants. In the present suit, apart from the prayer with regard to the challenge to the decree in question, the plaintiff has made other prayers for injunctions and directions in the plaint. A specific prayer for prohibiting the private defendants from trespassing and wasting the suit land has been made. The decrees prayer for a decree of permanent injunctions sought in respect of this land based on the plaintiff's averments that the private defendants are trying or may try to encroach upon the land, are certainly not beyond limitation nor are the other reliefs. Of course, the question as to whether the plaintiff is entitled to the decrees which have been sought would require to be considered after the parties have led evidence thereon.

332. Even assuming that it could be held that the challenge laid by the plaintiff to the decree of 2000 is barred by limitation, the other prayers in the suit would survive.

333. For all these reasons, the bar of limitation premised on the date of the passing of the decree under challenge on 8th April, 1999 in Suit No. 293/1998 by Het Ram is misconceived and not made out.

334. The parties to Suit No.47/2000 (now 18/2005) are parties before this court. It also cannot be denied that the suit property is extremely valuable. So far as evidence recorded in the earlier suit is concerned, appropriate orders with regard to reading of the said evidence in the present suit can be made.

335. The relief of injunction is a discretionary and equitable relief. It is trite that a person claiming entitlement to a relief has to establish a subsisting legal right and entitlement to the same. Such a right has to be independently established. It cannot rest on the pleas or case set up by a defendant. In other words, a trespasser cannot say that the other side has no right to the land and, therefore, he (the trespasser) is entitled to protection of his possession. A person who as a plaintiff, claims a relief in equity, has not only to establish his bonafide and that he is before a court with clean hands but, more importantly, that he has a legal right to the relief. It is also well settled that when a person invokes discretionary jurisdiction, the court would decline relief to a person has not approached it with clean hands as the grant of relief would defeat the interests of justice.

XIV. Overriding concerns of public interest

336. It is important to note the present plaintiff's reliance on proceedings in Civil Writ Petition No. 2374/2001 a PIL, which include the order dated 7th January, 2004 passed by the Division Bench of this court. My attention has been drawn to the order dated 23rd October, 2002 of this court taking serious note against IHBAS and MCD for causing delay in construction of the hospital for mental diseases by nine years and the direction by the court to complete the construction of the building within 18 months from 23rd October, 2002.

337. So far as the rights of IHBAS are concerned, the notification and the possession report placed on record would show that the land stands allotted to IHBAS which has legal right, title and interest in the subject land. The note on the public notification shows that the hospital was put in possession of the land.

338. It has been authoritatively held in a catena of authoritative and binding judicial precedents that wider public interest is liable to be borne in mind while exercising the power of issuing a prohibitory order and granting a stay and injunction.

339. There is no dispute that there is genuine need for such like institutions in Delhi. Such a purpose must necessarily prevail over private interest of persons who are attempting to purportedly encroach upon the land in question.

340. It is noteworthy that where a challenge was laid to the taking of possession on completion of acquisition by the beneficiary of the acquisition proceedings, in 2003(70) DRJ 721 **Nagin Chand Godha vs. Union of India and others** the Division Bench of this Court held thus:-

> "10. ..... Suffice it so say that after symbolic possession is taken, if the petitioner is enjoying the possession, he is enjoying the possession as a trustee on behalf of the public at large and that by itself cannot be considered to be a ground to contend that possession is not taken. It is the duty of the person who is occupying the property to look after the property and to see that the property is not defaced or devalued by himself or by others. He cannot subsequently come to the Court to say that actual possession is not taken and therefore he should be protected and land be denotified."

Such was the legal principle laid down when owners challenged the factum of possession having been taken pursuant acquisition.

341. Even if it were to be found that a person had some kind of a right, it has been held by the Supreme Court that such individual right has to give way to overriding interests of the public at large. In this behalf, in (1997) 1 SCC 134 entitled **Ramniklal N. Bhutta and another vs. State of Maharashtra and others,** the Court held thus:-

> "10. .....Whatever may have been the practices in the past, a time has come where the courts should keep the larger public interest in mind while exercising their power of granting stay/ injunction. The power under Article 226 is discretionary. It will be exercised only in furtherance of interests of justice and not merely on the making out of a legal point. And in the matter of

land acquisition for public purposes, the interest of justice and the public interest coalesce. They are very often one and the same. Even in a civil suit, granting of injunction or other similar orders, more particularly of an interlocutory nature is equally discretionary. The courts have to weigh the public interest vis-a-vis the private interest while exercising the power under Article 226 — indeed any of their discretionary powers."

(Underlining supplied)

342. With regard to the delays which result in execution of public projects on account of prohibitory writs and interim orders of injunction, it would be useful to advert to the observations of the Supreme Court in a public interest litigation where a challenge was laid to the grant of a tender for components of a public project relating to a thermal power station. In the pronouncement reported at 1999 (1) SCC 492 entitled **Raunaq International Limited vs. IVR Constructions Limited and others,** the court has held that the considerations which apply to the main proceedings must weigh with the court while considering interim orders. In para 18, 24 and 25, it was held by the court that:-

"The same considerations must weigh with the court when interim orders are passed in such petitions. The party at whose instance interim orders are obtained has to be made accountable for the consequences of the interim order. The interim order could delay the project, jettison finely worked financial arrangements and escalate costs. Hence the petitioner asking for interim orders in appropriate cases should be asked to provide security for any increase in cost as a result of such delay or any damages suffered by the opposite party in consequence of an interim order. Otherwise public detriment may outweigh public benefit i granting such interim orders. Stay order or injunction order, if issued, must be moulded to provide for restitution.

xxx

24. Dealing with interim orders, this Court observed in **Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd. and Ors.,** MANU/SC/0169/1984 : 1985ECR4(SC) that an interim order should not be granted without considering balance of convenience, the public interest involved

and the financial impact of an interim order. Similarly, in **Ramniklal N. Bhutta and Anr. v. State of Maharashtra and Ors.,** MANU/SC/0279/1997 : AIR1997SC1236, the Court said that while granting a Stay the court should arrive at a proper balancing of competing interests and grant a Stay only when there is an overwhelming public interest in granting it, as against the public detriment which may be caused by granting a Stay. Therefore, in granting an Injunction or Stay order against the award of a contract by the Government or a Government agency, the court has to satisfy itself that the public interest in holding up the project far outweighs the public interest in carrying it out within a reasonable time. The court must also take into account the cost involved in staying the project and whether the public would stand to benefit by incurring such cost.

25. Therefore, when such a Stay order is obtained at the instance of a private party or even at the instance of a body litigating in public interest, any interim order which stops the project from proceeding further, must provide for the reimbursement of costs to the public in case ultimately the litigation started by such an individual or body fails. The public must be compensated both for the delay in implementation of the project and the cost escalation resulting from such delay. Unless an adequate provision is made for this in the interim order, the interim order may prove counter-productive."

343. In yet another matter at JT 1994(6) SC 585 entitled **Premji Ratansey Shah and others vs. Union of India and others** expressing anguish for the delay which ensued on account of injunctions being granted at the instance of persons who ultimately may be held to be without any legal right or entitlement to the same, the Court observed thus:-

"4. ..... The question, therefore, is whether an injunction can be issued against the true owner. Issuance of an order of injunction is absolutely a discretionary and equitable relief. In a given set of facts, injunction may be given to protect the possession of the owner or person in lawful possession. It is not mandatory that for mere asking such relief should be given. Injunction is a personal right under Section 41(j) of the

Specific Relief Act, 1963; the plaintiff must have personal interest in the matter. The interest or right not shown to be in existence, cannot be protected by injunction.

5. It is equally settled law that injunction would not be issued against the true owner. Therefore, the Courts below have rightly rejected the relief of declaration and injunction in favour of the petitioners who have no interest in the property. Even assuming that they had any possession, their possession is wholly unlawful possession of a trespasser and an injunction cannot be issued in favour of a trespasser or a person who gained unlawful possession, as against the owner. Pretext of dispute of identity of the land should not be an excuse of claim injunction against true owner."

(Emphasis supplied)

344. IHBAS prima facie has abiding right, title and interest in the property as owner. The above discussion would show that Het Ram and late Kewal Ram have not placed any material of exclusive occupation. They had at best attempted trespass on open public land and were never able to complete the trespass. They were never in settled possession of the property which could be held entitled to protection These persons could not even show occupancy on any particular date, let alone an enforceable right to protection thereof. The doctrine that possession follows title is clearly applicable to the present case.

345. The land in the instant case is owned by IHBAS which has taken over the Hospital for Mental Diseases. The plaintiff has placed before this court, orders of the Supreme Court of India as well as the Division Bench of this court with regard to the dire need of adequate facilities for the persons suffering from mental diseases. The efforts of the plaintiff to expand facilities, wholly in public interest, have been thwarted by the fraudulent acts of the private defendants which have been detailed hereinabove.

346. On this aspect, reference may usefully be made to a pronouncement of this court reported at 54 (1994) DLT 484 **Rajender Kakkar vs. DDA** wherein this court held as follows:-

"9. .....Time has now come where the society and the law

abiding citizens are being held to ransom by persons who have no respect of law. The wheels of justice grind slowly and the violators of law are seeking to the advantage of the laws delays. That is why they insist on the letter of the law being complied with by the Respondents while at the same time showing their complete contempt for the laws themselves. Should there not be a change in the judicial approach or thinking when dealing with such problems which have increased in recent years viz., large scale encroachment on public land and unauthorized construction thereon, most of which could not have taken place without such encroachers getting blessing or tacit approval from the powers that be including the municipal or the local employees. Should the courts give protection to violators of the law? The answer in our opinion must be in negative. Time has come when the courts have to be satisfied, before they interfere with the action taken or proposed to be taken by the governmental authorities qua removal of encroachment or sealing or demolishing unauthorized construction specially when such construction like the present, is commercial in nature."

347. The above discussion would show that there is no contest to the suit by defendant nos. 2 and 3. Even if it were assumed that defendant no.5(i) has filed a written statement, however, there is a clear finding in the judgment dated 4th April, 2009 of Dr. R.K. Yadav, learned Additional District Judge to the effect that Kewal Ram was not in possession of the subject land or any portion of the land. Kewal Ram or his heirs have not joined Het Ram in filing Suit No.47/2000. Therefore, the proceedings and the orders passed therein have no concern at all so far as defendant nos.5 (i) to (iii) are concerned.

348. It is well settled that re-agitation or re-litigation is an abuse of the process of the court. (Ref: 1998(3) SCC 573 **K.K.Modi vs. K.N. Modi**).

349. By way of IA No.4518/2006, the plaintiff has prayed for interim orders against the defendants from causing any further wrongful interference in the peaceful possession of the suit property and also to restrain them from creating third party interest by sale, loss or damage, trespassing, demolishing, additions, alterations, construction and eviction on the suit property.

350. A prayer is also made for restraining defendant nos.1 to 3 from executing any deed or documents creating right, title or interest in the suit property in favour of defendant no.4 and legal heirs of defendant no.5 or any other third party.

Whether the prior judgment and orders could impede grant of relief to the plaintiff on the present application.

351. The present discussion would be incomplete without examining an important aspect of the matter. Het Ram has placed reliance on judicial orders passed in prior proceedings. The directions which this court could consider passing, require examination of the impact of the judicial orders noticed hereinabove. This consideration may be summed up as follows: -

(a) Order dated 5th of May, 1989 in the execution (probably filed in 1982)

(i). In support of the plea that cultivation was going on, Het Ram has enclosed copy of an order dated 5th May, 1989 passed in an execution petition filed by Het Ram against the Union of India etc. wherein the court noticed the submission of Het Ram in the following terms:-

"An order Dated 5th May, 1989 was passed wherein it was stated that a decree was passed against the respondent no.1 but the respondent no.3 on 28th April, 1982 started interfering with the lawful possession of agricultural land of the petitioner and digging the land and throwing the earth on his field and also found his field with wire due to which he is unable to cultivate on his field and the respondents have not stopped interfering the DH despite his protect. The D.H./applicant has, therefore, filed the present application praying for enforcement of the decree in the manner, it was passed and to direct the respondents, not to interfere in his possession of the land and also not to put further earth on or to dig the land or to put any fence on the land of the petitioner".

The order dated 5/5/89 further records that :-

"2. The respondents have filed their reply in which they have denied that the respondents have dug the earth of the D.H. and to put any fence on the land of the D.H. and have submitted that

whatever work was done by them is in another land which does not pertain to the D.H./applicant.

3. The learned counsel for the D.H./applicant has also submitted that the work which is being done by the respondents is on another land. As, the respondents, have not admitted that they have dug the land of the D.H. or put the fence on the land nor there is no evidence on record. Hence, the D.H. is allowed to remove the earth and the fence and get it levelled and to make it fit for his agriculture at his own cost in terms of the decree passed by this court. The application of the D.H./applicant stands disposed of accordingly. Case file be consigned to record room."

(ii) The order dated 5th May, 1989 thus permitted Het Ram to remove the earth and the fence and get "it levelled" and to make it fit for agriculture at his own cost in terms of the decree passed by this court. It is impossible to discern which is the land under reference.

(iii) It is also important to note that there is nothing placed before this court that any steps were taken pursuant to this order by Het Ram.

(b) Orders in CS No.47/2000 and proceedings arising therefrom

(i) An ex-parte order dated 8th April, 2000 was passed (in Suit No.47/2000) by Shri B.S. Choudhary, ADJ restraining the defendants from interfering with the possession of the plaintiff or from causing obstruction in the ingress and egress of the plaintiff(Het Ram) "in land Khasra Nos.317/15/12/12/1-22 min **and 317/17/21/10/11min** in village Tahrpur."

(ii) As noticed above, Het Ram's application u/o 39 R.1 & 2 was disposed of by the order dated 12th August, 2000 directing **parties** to maintain **status quo**. It was also directed that Het Ram also will not interfere into the constructed portion of the defendant (IHBAS). It was directed that Het Ram shall be allowed to enter into the suit property in the portion which according to the revenue record was with Het Ram. It was also observed that the 'whole land' is undivided and the concerned police was directed to ensure that the order was complied with. Het Ram was also prohibited from interfering with the constructed portion with IHBAS. Unfortunately the order is completely silent on the question of what or where is the "suit land"; and the "while land" mentioned in the

order.

(c) Orders in FAO 391/2005

It is noteworthy that the trial court order with regard to ingress and egress was protected by this court by the order dated 13th October, 2004 (corrected on 15th October, 2004) passed in FAO No. 391/2000 entitled IHBAS vs. Het Ram; the order dated 12th August, 2000 was extended till disposal of the suit by the order dated 11th February, 2005 in FAO 391/2005. But the above discussion would show that the location of the land is not known. There is no discussion at all or a prima facie finding on right, title or interest of Het Ram to any portion of the land; no explanation as to why the defendants in the earlier litigation were not party in this case.

(d) Orders in Cont. Cas. No.769/2004

This case was disposed of by the order dated 11th December, 2006 holding that the parties are bound by the terms of the injunction issued on 12th August, 2000.

352. Mr. Arvind Nayar, learned counsel has drawn my attention to the order dated 12th August, 2000 passed by Shri B.S. Chaudhary, the learned Additional District Judge which has been simply continued in all the above cases. This order also makes very interesting reading. In para 7 of the order, the learned Additional District Judge noted that *"the entries is the Revenue Record is showing the possession of the plaintiff being "Kabza-Najayaz". May be that "Kabza-Najayaz" shows unauthorized occupation upon a particular suit land and then, it is to be confirmed as to whether the possession of the plaintiff had ripened into ownership by way of adverse possession by the time the proceedings of ejectment were initially against him. I don't think all these aspects can be looked into at this juncture particularly for the reasons that the relevant documents are yet to be summoned and proved on the record."*

353. On the issue of title, Shri B.S. Chaudhary, ADJ further recorded that "it is matter of trial as to whether the defendant has really been dispossessed and also according to the law or not. Another question which requires consideration during the trial is as to whether the hostile title of the plaintiff had ripened into ownership by that time when the proceedings of ejectment were started against him or not which "point

in issue" can be decided only during the trial." It is noteworthy that neither Het Ram nor Kewal Ram have set up such a case. Further, if the applicant is not in possession, where is the occasion to pass an injunction in its favour. On the issue of possession, the learned judge relies upon the judgment of the year 1971. He fails to notice that the judgment passed on 17th December, 1971 in these suits would merge in the judgments passed thereafter against Het Ram and Kewal Ram, which include the eviction orders, and the judgments in appeal, writ proceeding and the Letters Patent Appeal to the Division Bench as well as the specific order dated 4th of April, 2009 by Dr. R.K. Yadav, ADJ.

354. Interestingly, in the context of the averments in para 1 of the plaint in CS No.47/2000, there is no clarity with regard to the land in respect of which the injunction order dated 12th of August, 2000 has been passed. The same is clearly an attempt to grab land over which Het Ram does not have possession. The same does not appear to have crystallized.

355. It is well settled that an order of the court has to be confined to the substantial claim made by the plaintiff in the suit and nothing beyond. Het Ram obviously cannot lay or maintain with regard to a claim with regard to land over which Kewal Ram had asserted a claim. The land in the suit or "suit land" or "whole land" referred in the plaint or the order has to be confined to the said land over which Het Ram had laid a claim and nothing beyond.

356. By the order dated 12th of August, 2000, Het Ram was also prohibited from interfering in the constructed portion of the defendant since the defendant therein (IHBAS) is government/public institution, so the partly constructed portion in the land in dispute may be kept intact. It is unfortunate that such vague directions are made without describing what is the suit land or the construction and an injunction order is based referring to "suit land" and "whole land" without any clarity. This order has been continued in the appeal and the contempt proceedings.

357. The above narration would show that till date, in effect Het Ram has only been permitted ingress and egress to the "suit land" that is to say, the land which is the subject matter of Suit No.47/2000) and "shown in the revenue record" without any clarity about the land. There is no finding at all by any court that he is cultivating any land in any manner till date. There is no material in these proceedings even to show

cultivation at any point of time.

On the contrary, his primary prayer for directions to the police to facilitate cultivation has not been granted by the order dated 1st May, 2000. Interestingly, Het Ram and Kewal Ram have laid no challenge to any of the findings noticed hereinabove nor challenged the same.

358. The above discussion would show that it is not clear even to Het Ram as to where is the location of the land over which he claims possession let alone cultivation. There is also no order or finding to this effect in any of the orders relied upon by Het Ram which could bind the adjudication on the present application.

359. It is trite that an order of injunction must relate to a specific and identified plot of land. Given the cloud over the actual land to which Het Ram laid a claim, the doubts over its physical location; the interim orders dated 12th August, 2000 as well as the order dated 11th December, 2008 in Contempt Case No.769/2004 or in the appeal cannot be worked. In fact, Het Ram as noticed above, has made a concerted misrepresentation manifesting his intention of grabbing land in respect of which Kewal Ram had earlier laid a claim by devious pleadings and concealment. The judgment and decree dated 8th April, 1999 has been held to be an outcome of the fraud as well as nullity and non est in law. A prima facie finding has been returned that Het Ram and Kewal Ram (nor any other person on their behalf) are in possession or cultivating any portion of the suit land. Therefore, the previous litigation or the judgment and orders passed therein cannot impact the present consideration.

360. On application of the principle laid down in **Ramniklal N. Bhutta** (supra), given the above circumstances, the damage to the public interest on account of inability of the hospital to complete its expansion is irreversible. This can brook no further delay at all. It needs no elaboration that the event that the plaintiff fails to establish its claim or Het Ram succeeds in CS No.47/2000 (18/2005), the final relief can be normally moulded by directing restitution and calling upon IHBAS to remove any alteration or construction carried on by it during the pendency of the suit.

361. It has been vehemently urged by the plaintiff that Het Ram's suit for injunction is not maintainable. It is urged that no injunction can be issued in law against the real owner. In this behalf, reliance is placed on the pronouncement of the Supreme Court in AIR 2004 SC 1801

Sopan Sukhdeo Sable and Ors. vs. Assistant Charity Commissioner. In this case, the court observed that though a trespasser could seek restoration of possession on the ground that he had been illegally dispossessed by real owner, however he was not entitled to any injunction against the real owner.

362. Placing reliance on the pronouncement reported at (1994) 5 SCC 54 **Premji Ratan Shah vs. UOI** and 94 (2001) DLT 254 **Madho Prasad vs. Ram Krishan,** it is urged that no order of injunction can be made in favour of trespasser. This issue would be considered at the time of adjudication in the suit.

363. It has been found that Het Ram & Kewal Ram were never in legal possession of the land. In view of the principles noticed hereinabove, Het Ram and Kewal Ram would not be entitled to injunction against the real owner.

364. In view of the above discussion, the plaintiff has made out a prima facie case for grant of ad interim injunction. Balance of convenience is in favour of the plaintiff. Grave and irreparable loss and damage shall enure not only to the plaintiff but to the wider public at large which would be utilising the services available in the mental hospital which are certainly in short supply in the suit. Balance of convenience and interests of justice are also in favour of the plaintiff and against the defendants.

It is made clear that only a prima facie view in the matter has been taken. Final adjudication has to rest on the result of the evidence which shall be placed before this court.

365. In view of the above, it is directed as follows:-

(i) The defendants, their representatives, agents shall stand restrained from interfering in the possession of the suit property as well as from creating any third party interest by sale, loss or damage, trespassing, demolition, additions, alterations, constructions and erections on the suit property;

(ii) The defendant nos. 1 to 3 shall stand restrained from executing any document in respect of the suit land in favour of defendant no.4 and legal heirs of defendant no. 5 or any other third party.

(iii) In the event that the plaintiff raises any construction on the suit land or alters the nature of the suit property in any manner during the pendency of the suit, it shall not be entitled to claim any equity in respect thereof and appropriate orders of restitution may be passed.

(iv) The plaintiff shall place on record photographs of the suit property in order to enable effective order to be passed at the stage of restitution.

(v) This application is allowed in the above terms.

IA No.8011/2006

366. This application has been filed by the plaintiff praying for stay of the proceedings in Suit No.18/2005 (earlier Suit No.47/2000) which was filed by Het Ram against the present plaintiff in the Tis Hazari Courts. It has been averred that the suit was transferred to the District Courts at Karkardooma and renumbered as CS No.18/2005. As on 20th July,2006 when the present application was filed, the suit was pending in the court of Shri Rakesh Kumar, Civil Judge, Karkardooma Courts, Delhi.

367. For the purposes of adjudication upon the present case, the detailed factual narration set out hereinabove is relied upon.

368. So far as Suit No.47/2000 is concerned, the prayer premised on the judgment and decree dated 8th April, 1999 passed in Suit No.293/98 is as follows:-

"(1) decree the suit for permanent injunction and thereby permanently restrain the defendants, their officers, employees, servants, agents etc from interfering in the peaceful cultivatory possession of the plaintiff over the suit land comprised in Khasra Nos.317/17/15/12/13/18/14/22 min and 317/17/21/10/11 situated in village Jhilmil Tahirpur, Shahdara, Delhi as shown in the site plan;

(2) decree the suit for mandatory injunction and thereby direct the defendants not to obstruct the ingress and egress of the plaintiff, hi,s agents, servants, employees and others visiting the plaintiff over the suit land as shown in the site plan and direct the defendants to return and restore generator, cultivator, other

agricultural implements and tubewell which have been stolen in the back of the plaintiff;

(3) any other relief or reliefs as this court may deem fit and proper; (4) award costs."

In substance, Het Ram really seeks execution of the said judgment dated 8th of April, 1999.

369. IHBAS, the plaintiff herein has asserted substantive rights and interest and title in the property.

370. A view has been taken in the order recorded on IA No.4518/2006 that the said judgment and decree is not binding inasmuch as the same has been obtained by practice of fraud against a person who was not the real owner of the property.

371. The above narration makes it amply clear that the land claimed by Het Ram in Suit No.47/2000 is the subject matter of the present case. Het Ram is also a party in the instant suit. The issues in the previous suits are directly and substantially in issue in the first suit. The present suit, which is the subsequent suit, is also wider in its scope and also impacts the issues raised in both the suits. It is evident that the adjudication of the two cases would result in saving unnecessary costs and expenses to all parties.

It also appears that the parties would be relying on the same evidence in support of their contentions in both the suits.

372. The pendency of two separate suits would results in multiplicity of adjudication on the same issues as well as delay in justice. It may result in conflict of judgments.

373. The prayer for stay of the proceedings in Suit No.18/2005 (earlier Suit No.47/2000) Het Ram vs. The Institute of Human Behavior And Allied Sciences rested on the challenge by the plaintiff herein to the legality and validity of the judgment and decree dated 8th April, 1999 in Suit No.293/1998 which is relied upon by Het Ram in the suit filed by him.

374. An alternative prayer under Section 24 of the CPC for transfer of proceedings in the said Suit No.18/2005 (earlier Suit No.47/2000) has also been taken and that further proceedings be taken with the proceedings

in the present case.

375. Given the scope of the adjudication in the present suit, it is in the interests of justice that an order transferring the said suit for being tried with the present case be made. It is trite that the jurisdiction to apply such technique vests in the court ex debito justicio. Such orders are made in exercise of inherent powers of the court in such circumstances.

376. In (2003) 1 SCC 488 **Abdul Rahman vs. Prasony Bai & Anr.,** the court held that the High Court has the requisite jurisdiction to even suo motto withdraw a suit to its file and adjudicate itself all or any of the issues involved therein.

377. It is equally well settled that the court has the power to direct consolidation of two suits largely depending upon identity of the subject matter and convenience in proceedings of the trial, having regard to the nature of the evidence which is to be led in the suits and the controversies which arise for trial in the two suits. (Ref: AIR 1987 Allahabad 335 **Mohd. Yusuf vs. Ahmad Miya & Ors.;** Decision dated 12th January, 1983 in Suit No.722 and 723/81 **The Laxmi Commercial Bank Ltd. Vs. M/s Interade Advertising (P) Ltd.;** AIR 1981 Delhi 251 **Bharat Nidhi Ltd., Delhi vs. Shital prsad Jain;** (2004) 3 SCC 85 **Chitivalasa Jute Mills vs. Jaypee Rewa Cement**).

378. In AIR 1960 Allahabad 184 **P.P. Gupta vs. East Asiatic Co. Bombay,** the Court held that even Section 10 CPC is not a bar to an order of consolidation of suits and that Section 10 of the CPC would not apply to the simultaneous hearing of a later and an earlier suit, after consolidation of the two, if the matter in issue in both is directly and substantially the same. It was specifically held that Section 10 was not intended to take away the inherent power of the court to consolidate in the interest of justice in appropriate cases.

379. In this regard, reference may be made to a judgment by HMJ R.C. Lahoti, (as his Lordship then was) reported at 67 (1997) DLT 189 **S.C. Jain vs. Bindeshwari Devi.** In this case, the court in para 18 has observed as follows :-

> "18. The jurisdiction to consolidate the suits can be exercised by the court only when the two suits are before it. If the suits be pending before different courts and a party may be desirous of seeking consolidation then its appropriate remedy is to move the High Court or the District Court, as the case may be, for transferring the two suits in one court. The High Court or the District Court may exercise its power of transfer if satisfied of the necessity of doing so-to avoid multiplicity of the trial of the same issues and conflicting decisions (see AIR 1960 Ker 199 **District Collector Kozhikode vs. Karela Verma Civil Thampuran**)."

380. Mr. Sultan Singh, learned counsel for the plaintiff has urged that the decree dated 8th April, 1999 was passed by Shri B.S. Chaudhary, Additional District Judge. Suit No. 47/2000 was filed by Het Ram-defendant no. 4 was originally listed before the same Additional District Judge who passed the interim orders on 8th April, 2000 confirmed on 12th August, 2000. However, on account of amendment of the pecuniary jurisdiction, the case is pending before a learned Civil Judge who is lower in the hierarchy of courts and therefore may consider himself bound by the judgment and decree dated 8th April, 1999. This submission is also not without substance.

381. The land in question is an open piece of land. There is no evidence at all of inclusive occupation let alone possession of Het Ram on any particular portion of land. Casual unnoticed user of open piece of land or intrusion thereon too cannot be considered as exclusive possession of the land conferring any right over the land in the person using it. It is an admitted fact that the government authorities were the owner of the land. There is no challenge to the public notifications allotting the same to IHBAS. As a result, the doctrine that possession would follow title has to be applied.

382. In view of the above, in the given facts and circumstances, I am satisfied that the interest of justice merit that CS No.18/2005 (earlier Suit No.47/2000) Het Ram vs. The Institute of Human Behavior And Allied Sciences be withdrawn from the trial court.

383. It is accordingly directed as follows :-

(i) CS No.18/2005 (earlier Suit No.47/00) Het Ram vs. Institute of Human Behavior And Allied Sciences shall stand withdrawn from the trial court and transferred for adjudication with the present case. The trial court shall transmit the records of the case to this court.

(ii). Upon receipt of the record of the case, the same shall be placed alongwith the present suit before the court for appropriate orders regarding consolidation if required.

(iii) This application is allowed in the above terms.

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W.P. (C)

AZRA POULTRY EQUIPMENTS ....PETITIONER

VERSUS

UNION OF INDIA & OTHERS ....RESPONDENTS

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

W.P. (C) NO. : 286/1991 DATE OF DECISION: 07.03.2012

Central Excise Tariff Act, 1985—Petitioner, manufacturer at Banglore of poultry equipment like poultry cages, welded wire mesh for poultry industry claimed exemption from payment of Excise duty under heading 84.36 of the Act—Assistant Collector of Central Excise, Banglore observed goods, manufactured by petitioners do not form part and do not go into making of machines of rearing and laying units or batteries and merited classification under heading 7314—While said issue was pending consideration, Trade Notice dated 19.11.1990 was issued clarifying, heading 84.36 covers only 'Poultry Keeping Machinery' but not equipment which does not have any mechanical functions—Said Trade Notification was challenged by petitioner urging, while Excise Authorities at Bangalore were treating goods of petitioner under heading 7314 of but Excise Authorities at Ahmedabad and Maharashtra were treating said goods as exempt under heading 84.36 of

the Act—Petitioner was thus, being discriminated—Held:- Machinery includes all appliances and instruments whereby energy or force is transmitted and transformed from one point to another—Wire mesh manufactured by petitioner even if sold to a poultry farmer for assembling of cages for poultry or battery of such cages cannot qualify as machinery under heading 84.36 and would be an article of iron and steel wire within meaning of 7314.

'Machinery' must mean something more than a collection of ordinary tools; it must mean something more than a solid structure built upon the ground whose parts either do not move at all or if they do move, do not move the one with or upon the other in interdependent action. 'Machinery' was further described as meaning some mechanical contrivances which by themselves or in combination with one or more other mechanical contrivances, by the combined movement and interdependent operation of their respective parts generate power, or evoke, modify, apply or direct natural forces with the object in each case of effecting definite and specific result. **(Para 19)**

Important Issue Involved: Machinery includes all appliances and instruments whereby energy or force is transmitted and transformed from one point to another.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Proxy counsel.

FOR THE RESPONDENTS : Proxy counsel.

CASES REFERRED TO:

1. *Commissioner of Central Excise* vs. *Weld Fuse Pvt. Ltd.* reported as MANU/CB/0332/2006.
2. *Durga Enterprises (P) Ltd.* vs. *Principal Secretary, Govt. of UP* (2004) 13 SCC 665.

3. *Siemens India Ltd.* vs. *UOI* 2002 (140) E.L.T. 62 (Del).
4. *State of U.P.* vs. *Harish Chandra* (1996) 9 SCC 309.
5. *Dr. Bal Krishna Agarwal* vs. *State of U.P.* (1995) 1 SCC 614.
6. *Ambica Wood Works* vs. *State of Gujarat* 1979 43 STC 338.
7. *D.B. Bhandari* vs. *State of Mysore* MANU/KA/0069/1965.
8. *Corporation of Calcutta* vs. *Chairman of the Cossipore Municipality and Chitpore Municipality* AIR 1922 PC 27.
9. *Engineering Traders* vs. *State of U.P.* 31 STC 456.

RESULT: Petition dismissed.

RAJIV SAHAI ENDLAW, J.

1. The petition impugns the Trade Notice dated 19th November, 1990 issued by the Collector of Central Excise, Bangalore and consequently seeks to restrain the respondents from recovering Excise duty from the petitioner. Notice of the petition was issued and upon the petitioner offering to furnish bank guarantee in favour of the Asstt. Collector of Central Excise, Bangalore, subject to the petitioner furnishing the said bank guarantee it was directed that the petitioner's goods be cleared under heading no.84.36 of the Schedule to the Central Excise Tariff. Pleadings were completed and on 17th July, 1992 Rule DB was issued and the interim order confirmed. The writ petition was dismissed in default on 15th October, 1992. An application for restoration was filed in the year 1994. The writ petition was again dismissed in the year 1995. The petitioner again applied for restoration. On 5th August, 2002 the petitioner was called upon to, in the first instance, satisfy this Court as to how the remedy by way of statutory appeal to the Customs, Excise and Gold (Control) Appellate Tribunal now Custom Excise Service Tax Appellate Tribunal (CESTAT) is not an efficacious remedy. The matter was thereafter at the instance of the parties adjourned from time to time. The writ petition was again dismissed in default on 7th March, 2006 but was yet again restored. On application of the petitioner, early hearing was allowed. However when the writ petition came up for hearing the counsels for both parties requested adjournment. In the circumstances aforesaid, request for adjournment was denied and judgment reserved with liberty

to the parties to file written submissions. The petitioner has filed written submissions. None have been filed by the respondents.

2. The petitioner claims to be a manufacturer at Bangalore of the poultry equipment like poultry cages, welded wire mesh for poultry industry etc. The petitioner claimed classification of "parts of Rearing and Laying Units or Batteries" viz top, bottom and partition made from G.I. wire claiming full exemption from payment of Excise duty under heading 84.36 of the Central Excise Tariff, 1988. However the Asstt. Collector of Central Excise, Bangalore refuted the said claim of the petitioner claiming that the said goods manufactured by the petitioner do not form part of and do not go into the making of the machines of rearing and laying units or batteries and merited classification under heading 7314. While the said issue was pending consideration, the Trade Notice dated 19th November, 1990 (supra) was issued clarifying that the heading 84.36 covers only 'Poultry Keeping Machinery', but not equipment which does not have any mechanical functions. Challenging the said Trade Notice, this writ petition was filed.

3. It was also the plea of the petitioner in the writ petition that while the Excise Authorities at Bangalore were treating the goods of the petitioner under heading 7314 of Central Excise Tariff, the Excise Authorities in Ahmedabad and Maharashtra were treating the same goods as exempt under heading 84.36 and the petitioner was thus being discriminated against.

4. The respondents have filed a counter affidavit contesting the maintainability of the writ petition owing to the availability of remedy of appeal to CESTAT. On merits it is pleaded that top, bottom and partitions made from G.I. wire of cages meant for housing/keeping poultry do not go into the making of machines for rearing and laying units of batteries and therefore do not merit exemption under heading 84.36.

5. The petitioner has filed a rejoinder to the said counter affidavit in which it has reiterated that Wire mesh top, bottom and partitions meant for cages for keeping poultry are entitled to exemption under heading 84.36.

6. The respondent Asstt. Collector of Central Excise, Bangalore, in or about the year 1993 filed an application for vacation of stay contending that interim stay was granted to the petitioner primarily on the plea of

discrimination and citing the order dated 20th September, 1991 of Collector of Central Excise Bombay, taking the same stand as the Excise Authorities at Bangalore.

7. The petitioner filed an additional affidavit dated 21st January, 2002 in which it is *inter alia* stated

> "The petitioner's contention is that the poultry keeping equipment used by the end-users who are poultry farmers, is exempt from excise under 84.36 of the Central Excise Tariff Act. That the petitioner has always clearly maintained the distinction of end-users by claiming exemption under 84.36 only when the poultry keeping equipment is sold to a poultry farmer. Under other circumstances, when the wire mesh is used for other purposes are sold for other purposes, the entire excise duty has been deposited in accordance with law. This distinction maintained by the petitioner is evident from copies of a number of invoices which are collectively annexed as Annexure P/12 (colly.). These invoices relate to the period 1990-91, 1991-92 and 1992-93. By way of illustration, a sale made to a poultry farmer, M/s Supreme Poultry Pvt. Ltd. Erode, Tamil Nadu under Invoice No.1743 dated 24.10.1991 is treated as exempted from payment of excise duty and has been cleared by providing a bank guarantee. On the other hand, a sale to Newlong Wires & Weldmesh Pvt. Ltd. under Invoice No.1819 dated 13.10.1992 is cleared with payment of full excise duty under entry 74.13."

8. Heading 84.36 (supra) is as under:-

> "84.36 Other agricultural, horticultural, poultry-keeping or bee-keeping machinery, including germination plant fitted with mechanical or thermal equipment, poultry incubators and brooders."

9. The question for adjudication is whether Wire mesh partitions manufactured by the petitioner which as admitted by the petitioner also in the additional affidavit (supra) can be used for other purposes also, if sold to a poultry farmer for use in cages meant for keeping poultry become exempt from excise duty under heading 84.36 (supra) or are :-

> "Articles of Iron & Steel wire viz; welded wire mesh for construction purpose in the form of sheets and rolls."

within the meaning of heading 7314.

10. Before entering into the aforesaid aspect, we may notice the aspect of territorial jurisdiction though not raised by the respondents in their counter affidavit. The cause of action for the petitioner situated in Bangalore as aforesaid was the Trade Notice issued by the authorities at Bangalore. Though the petitioner in the array of respondents has also impleaded the Union of India and the Central Board of Excise at New Delhi as respondents no.1&2 respectively but the contesting respondents are the respondents no.3 to 5 being the Excise Authorities at Bangalore. It is thus evident that the entire cause of action has accrued to the petitioner at Bangalore. The Trade Notice impugned is also not issued by the Union of India for the petitioner to invoke (if at all permissible) jurisdiction of the Courts at Delhi. According to the petitioner itself the said Trade Notice is localized and is not being followed in other States. We are thus unable to comprehend as to how this Court would have territorial jurisdiction to entertain this petition. Though the writ petition is liable to be summarily dismissed on this ground alone but since the same has remained pending for the last over 20 years, we deem it appropriate to adjudicate the controversy on merits also.

11. As far as the plea of the respondents as to the maintainability of the petition owing to the availability of alternative remedy of appeal before the CESTAT is concerned, the petitioner in its written arguments has relied on:-

> "(a) **State of U.P. v. Harish Chandra** (1996) 9 SCC 309;
>
> (b) **Dr. Bal Krishna Agarwal v. State of U.P.** (1995) 1 SCC 614;
>
> (c) **Siemens India Ltd. v. UOI** 2002 (140) E.L.T. 62 (Del); and,
>
> (d) **Durga Enterprises (P) Ltd. v. Principal Secretary, Govt. of UP** (2004) 13 SCC 665."

to contend that writ petitions impugning Trade Notices are maintainable and the rule of exclusion of writ remedy owing to alternative remedy is not an absolute rule. Again merely for the reason of the petition having remained pending in this Court for long, we ignore the said plea also to proceed on merits of the case, though we may notice that a Division Bench of this Court in **Internsil P. Ltd. v. Union of India**

(2007) 207 ELT 500 has held that when this Court is not found to have territorial jurisdiction and alternative remedy of appeal is available, merely because the writ petition has remained pending for long, in that case for ten years, is no ground to entertain the same.

12. The star argument of the petitioner on merits is that benefit of exemption under heading 84.36 was given to M/s Weld Fuse Pvt. Ltd., Hyderabad and the appeal preferred by the Revenue namely **Commissioner of Central Excise v. Weld Fuse Pvt. Ltd.** reported as MANU/CB/0332/2006 was dismissed by CESTAT, Bangalore on 27th October, 2006. It is further contended that the said order of CESTAT has not been challenged by the Revenue.

13. Though we fail to see as to why the petitioner inspite of claiming a favourable verdict from CESTAT is continuing to pursue this petition but we have examined the said judgment of CESTAT. It is found to raise identical issues. However the CESTAT, Bangalore has proceeded to hold such goods to be entitled to exemption under heading 84.36 for the reason:-

> "The dictionary meaning of the word 'battery' relevant to poultry industry is "series of cages for the intensive breeding and rearing of poultry or cattle" and hence the word battery includes the impugned goods, which are parts for making cages. In fact, the entire battery is made up only of the impugned goods. The parts of the said batteries are also covered in the said headings subject to general provisions relating to classification of parts under the General explanatory notes to Section XVI as per the HSN notes on 'parts' of the machinery covered under the heading CHSH 8436-00, in the general provisions relating to Section XVI also these parts are not excluded and in fact it is mentioned in the general provisions to Section XVI that the section and the chapters cover the parts thereof also unless they fall under the exclusions and that the goods of these section may be of any material. **As it is not disputed that the goods are not items of general use and it is agreed that the goods are used only for making cages which are parts of battery, which is a Poultry keeping machinery,** I do not find any other basis as to how the goods can be classified under any other heading other than CHSH 8436.00. The HSN explanation has clearly

> included the rearing units and laying units or the batteries of poultry cages in the CHSH 8436.00. The impugned goods are therefore specifically included in the CHSH 8436 and hence the questions of attempting to classify the item in any other heading should not arise. The ratio of the Hon'ble apex courts judgment in the case of **Dunlop India Ltd. & Madras Rubber Factory Ltd. v. Union of India** wherein it was held that "When an article is by all standards classifiable under a specific item in the Tariff Schedule it would be against the very principle of classification to deny it the parentage and consign its residuary item" is relevant here.
>
> I observe that the impugned goods are specially designed for the making of cages to form the battery in poultry keeping and the goods cannot be marketed for any other use and are called in commercial parlance as poultry keeping machinery parts only and no evidence has been placed on record to prove otherwise by the revenue. Hence, in view of the Hon'ble Supreme court judgment in the case of **G.S. Auto International Ltd. v. Collector of C. Ex., Chandigarh** wherein it was held that "It needs to be ascertained as to how the goods in question are referred to in the market by those who deal with them, be it for the purposes of selling, purchasing or otherwise", the classification under the said CHSH 8436 appears to be correct. The function of the impugned goods is only for poultry keeping, meaning rearing, feeding, cleaning, egg collecting and other functions, which are fulfilled in combination with other components such as feeders and egg collectors and hence, in accordance with the section notes 4 to Section XVI of the Central Excise Tariff Act, 1985 also, the impugned goods merit classification under CHSH 8436."

14. It would thus be apparent that while CESTAT, Bangalore in the aforesaid case observed that "the goods are not items of general use" and it was agreed before it "that the goods are used only for making cages which are parts of battery", it is the admission of the petitioner itself before us in the additional affidavit (supra) that the Wire mesh partitions manufactured by it are being sold to poultry farmers as well as for other uses. It thus cannot be said that the goods of the petitioner are not items of general use or are meant only for making cages for keeping poultry. The order of the CESTAT, Bangalore is thus based on the premise that

the said goods cannot be marked for any other use and are called in commercial parlance as poultry keeping machinery parts only but which is not so in the present case. It thus appears that the said order of CESTAT, Bangalore was a consent order and/or on "no evidence" having been placed by the Excise Authorities to prove otherwise. Here we have admission to the contrary.

15. CESTAT, Bangalore in the order aforesaid has negatived the contention of the Revenue, of the goods falling under heading 7314 by observing as under:-

> "The appellant's contention that the goods are classifiable as articles of iron and steel as they are made of iron and steel only, does not have any bearing on the classification of the impugned goods as the general provision (B) to the Section XVI of the HSN clearly mentions that the goods of the Section XVI may be of any material and in majority of base metal. It is well settled law and the spirit of the Central Excise Tariff Act, 1985 that constituent material is not the only deciding factor to classify any machinery or part. In view of Note 2(b) to Section XVI of the Tariff, parts, if suitable for use solely or principally with a particular kind of machine, are to be classified with the machine of that kind. The exception to the Note is that parts of general use will not be covered by Section XVI, which covers Chapters 84 and 85. No evidence has been adduced by the Department to show that the impugned goods are parts of general use.
>
> The Tariff Heading CETH 8436 reads as follows: " Other agricultural, horticultural, forestry, poultry keeping or bee-keeping machinery, including germination plant fitted with mechanical or thermal equipment; poultry incubators or brooders" and the HSN explanation to CHSH 8436 given at page No. 1318-HSN states that the term "poultry incubators or brooders" with relevance to the impugned goods includes among other equipment "Rearing and laying units or "batteries", large installations equipped with automatic devices for filling the feeding troughs, cleaning the floors and collecting the eggs".

16. We are unable to agree with the reasoning aforesaid. It seems to have escaped CESTAT, Bangalore that when CHSH 8436 at page 1318

SHN referred to batteries it was in the context of large installations "equipped with automatic devices for filling the feeding troughs, cleaning the floor and collecting the eggs". A manufacturer of such batteries which are not merely a series of cages but are also equipped with automatic devices as aforesaid would definitely qualify as machinery and the Wire mesh partition used in such cages would be part of machinery and would be exempt under heading 84.36. However a manufacturer of Wire mesh partitions and one of the uses of which Wire mesh partition may be for assembly as cages, cannot claim exemption under heading 84.36 (supra).

17. What is significant is that heading 84.36 refers to poultry keeping 'machinery'. A mere equipment or structure for "poultry keeping" would not qualify classification under heading 84.36. To fall under heading 84.36 the test, of being a machinery has to be satisfied. The Concise Oxford Dictionary 10th Edition defines 'machine' as an apparatus using or applying mechanical power and having several parts, each with a definite function and together performing a particular task. 'Machinery' is defined as machines collectively, or the components of a machine. Similarly the Black's Law Dictionary 8th Edition defines 'machine' as a device or apparatus consisting of fixed and moving parts that work together to perform some function.

18. A Division Bench of Gujarat High Court in **Ambica Wood Works v. State of Gujarat** 1979 43 STC 338 was called upon to decide whether wooden tables covered with buff-leather and fitted with steam pipes below them with a view to have instantaneous drying of the prints intended for screen printing could qualify as machinery. The High Court concluded that a combination of things, the harmonious working of which results in a desired end, qualifies to be known as machinery. It was further observed that mere assembly of articles or things or some solid structure with no moving parts cannot be termed as machinery; it would be machinery only if such structure, complete in itself, has moving parts in relation with others when they move interdependently by application of force-mechanical or manual-with an avowed object to produce a given product. The Gujarat High Court found that the entire assembly of tables, pipes, screen prints and rolls constituted machinery and thus the tables were accessories of the machinery.

19. Reference may also be made to **Corporation of Calcutta v.**

Chairman of the Cossipore Municipality and Chitpore Municipality AIR 1922 PC 27 where the question was whether a raised reservoir for storing water by erecting a solid steel tank with supporting structure was machinery. The tank was connected with pipes with the pumping house which was situated at a distance. However a reservoir had been constructed on the ground under the tank, where water was stored. It was held that 'machinery' must mean something more than a collection of ordinary tools; it must mean something more than a solid structure built upon the ground whose parts either do not move at all or if they do move, do not move the one with or upon the other in interdependent action. 'Machinery' was further described as meaning some mechanical contrivances which by themselves or in combination with one or more other mechanical contrivances, by the combined movement and interdependent operation of their respective parts generate power, or evoke, modify, apply or direct natural forces with the object in each case of effecting definite and specific result. The tank and its supporting structure were not found to satisfy the said definition.

20. A Full Bench of the Allahabad High Court in **Engineering Traders v. State of U.P.** 31 STC 456 held 'machinery' as meaning instruments designed to transmit and modify the application of power, force and motion. 'Machinery' was held to include all appliances and instruments whereby energy or force is transmitted and transformed from one point to another.

21. A Division Bench of the Karnataka High Court in **D.B. Bhandari v. State of Mysore** MANU/KA/0069/1965 was called upon to decide whether handlooms were machinery, for spare parts of handlooms to fall as accessories to the machinery. It was held that the mode or manner in which power is fed or force is applied should not make any difference. Thus handlooms propelled by hand power were held to qualify as machinery.

22. Applying the aforesaid test, there can be no doubt that the Wire mesh manufactured by the petitioner even if sold to a poultry farmer for assembling of cages for poultry or battery of such cages cannot qualify as machinery under heading 84.36 and would be an article of iron and steel wire within the meaning of heading 7314.

23. We therefore even on merits do not find any merit in the

contention of the appellant.

24. The writ petition is accordingly dismissed. No order as to costs.

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RC. REV.

ANIL KUMAR VERMA ....PETITIONER

VERSUS

SHIV RANI & ORS. ....RESPONDENTS

(INDERMEET KAUR, J.)

RC. REV. NO. : 522/2011 & CM NOS. : 22570-72/2011 **DATE OF DECISION: 07.03.2012**

Delhi Rent Control Act, 1955—Section 14 (1) (e) & 25 B—Summary Eviction Petition on the ground of bonafide requirement—Petition filed by the landlords (six in number) against the tenant contending they are the owners of the suit premises, a shop Chehlpuri, Kinari Bazar, Delhi; monthly rent is Rs. 45/-—Petitioners inherited this property from Sham Sher Singh who had executed a registered Will dated 07.08.1976 in favour of his wife and two sons—Premises required bonafide for commercial use—Petitioner aged 75 years and fully dependent upon her children i.e. petitioners No. 2 to 6; she is a house wife and has no source of income—Petitioner No. 2 (Rajender Kumar) is her elder son and is married; his son is also married. Petitioner No. 3 has two married daughters and one married son Sidharth who is presently unemployed; he has experience in business; he needs the aforenoted shop to carry on his business. Petitioner No. 3 is the widow of

predeceased son; she has also got experience of boutique business as also of running a beauty parlour and she also requires the aforenoted suit premises to carry on commercial trade; petitioners No. 4 to 6 are the unmarried children of deceased Vijay Kumar; they are also not doing anything because of lack of space; they also require aforenoted shop. In fact, the requirement of the present petitioners is of at least six shops of which four are tenanted out to four persons; present eviction is qua one shop—Leave to defend filed contending Will of Sham Sher Singh does not disclose as to which property has been bequeathed to whom—No document of title of deceased or of Sham Sher Singh which would enable them to bequeath this property—Ownership denied on this count—Admitted petitioner No. 1 has been collecting rent from the respondent—Rent being paid to petitioner No. 1 under impression of the tenant that she was the owner/landlady but there is no such relationship between the parties as the petitioners are not the owners—Premises are not required petition filed malafide only to extract a higher rate of rent—Hence present second appeal. Held:- Petitioners claimed ownership of the suit premises by virtue of a registered Will—Tenants regularly paying rent to petitioner—While dealing with an eviction petition under Section 14 (1)(e) of the Act which is not a title suit, it is only a prima-facie title which has to be established by the owner—Registered Will of the deceased cannot be subject matter of challenge in such an eviction proceedings—This objection is clearly without any merit—As to the bonafide requirement—Many people start new businesses even if they do not have experience in the new business, and sometimes they are successful in the new business also—Unless and until a triable issue arises, leave to defend should not be granted in a routine and mechanical manner—If this is allowed, the very purpose and import of the

summary procedure as contained in Section 25 B of the Act shall be defeated and this was not the intention of the legislature—Impugned order thus decreeing the eviction petition of the landlord suffers from no infirmity. Petition is without any merit. Dismissed.

The Courts have time and again held that while dealing with an eviction petition under Section 14 (1)(e) of the DRCA which is not a title suit, it is only a prima-facie title which has to be established by the owner; in this context, the registered Will of the deceased cannot be subject matter of challenge in such an eviction proceedings. **(Para 7)**

The Courts time and again have held that unless and until a triable issue arises leave to defend should not be granted in a routine and a mechanical manner. If this is allowed, the very purpose and import of the summary procedure as contained in Section 25 B of the DRCA shall be defeated and this was not the intention of the legislature. **(Para 12)**

Important Issue Involved: While dealing with an eviction petition under Section 14 (1)(e) of the DRCA which is not a title suit, it is only a prima-facie title which has to be established by the owner—Registered Will of the deceased cannot be subject matter of challenge in such an eviction proceedings—Unless and until a triable issue arises, leave to defend should not be granted in a routine and a mechanical manner—If this is allowed, the very purpose and import of the summary procedure as contained in Section 25 B of the DRCA shall be defeated and this was not the intention of the legislature.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Ashutosh, Advocate.

FOR THE RESPONDENTS : Nemo.

CASES REFERRED TO:

1. *Ram Babu Agarwal* vs. *Jay kishan Das,* 2009(2) RCR 455.
2. *Nem Chand Daga* vs. *Inder Mohan Singh Rana* 94 (2001) DLT 683.
3. *Raghunath G. Panhale G. Panhale (D) by Lrs.* vs. *Chaganlal Sundarji and Co.* AIR 1999 SC 3864.
4. *Smt. Shanti Sharma & Ors.* vs. *Ved Prabha & Ors.* (1987) 4 SCC 193.
5. *Mattulal* vs. *Radhelal* [1975] 1 SCR 127.
6. *Arjan Dass* vs. *Madan Lal,* AIR CJ 1971 2.

RESULT: Appeal dismissed.

INDERMEET KAUR, J. (Oral)

1. Separate statement of the petitioner has been recorded. On the last date, his counsel had appeared in the Court and had made a statement that he is not pressing the petition on its merits; he had only sought extension of time for vacation of the suit premises. Today a statement has been made by the petitioner which has been affirmed by his counsel that the petition should be dismissed on merits in order that the petitioner can challenge this order before a higher Court; he does not want any time for vacation of the property. This statement was recorded in the Court today to the following effect.

> "Mr. Ranjan Kumar is my advocate. On the last date he had taken time on my behalf to get the suit premises vacated. I am finding it very difficult to find an alternate accommodation as I am doing the business of sale of Silver Utensils from this shop since 1947-1948 and an alternate accommodation at this rate would not be available in the market. I do not want any time for vacation of the suit property; my petition may be dismissed."

2. Arguments have been reheard.

3. Record shows that the present eviction petition has been filed by the landlords (six in number) against the tenant; contention is that they are the owners of the suit premises; the tenant is an old tenant; these

premises is a shop i.e. shop No. 2895 in premises No.2893-99, Chehlpuri, Kinari Bazar, Delhi; monthly rent is '45/-; the petitioners have inherited this property from Sham Sher Singh who had executed a registered Will dated 07.08.1976 in favour of his wife and two sons; the petitioners being the legal representatives of deceased Sham Sher Singh have filed the present eviction petition. It is contended that the premises are required bonafide by them for commercial use; petitioner No. 1 Shiv Rani is aged 75 years and is fully dependent upon her children i.e. petitioners No. 2 to 6; she is a house wife and has no source of income. Petitioner No.2 (Rajender Kumar) is her elder son and is married; his son is also married. Petitioner No. 3 has two married daughters and one married son Sidharth who is presently unemployed; he has experience in business; he needs the aforenoted shop to carry on his business. Petitioner No. 3 is the widow of predeceased son; she has also got experience of boutique business as also of running a beauty parlour and she also requires the aforenoted suit premises to carry on commercial trade; petitioners No. 4 to 6 are the unmarried children of deceased Vijay Kumar; they are also not doing anything because of lack of space; they also require aforenoted shop. In fact the requirement of the present petitioners is of at least six shops of which four are tenanted out to four persons; present eviction is qua one shop. These are the grounds which have been pleaded in the eviction petition.

4. Leave to defend has been filed; the averments made in the said application have been perused. Contention is that the Will of Sham Sher Singh does not disclose as to which property has been bequeathed to whom; in fact there are no document of title of deceased or of Sham Sher Singh which would enable them to bequeath this property; ownership had been denied on this count. It is however admitted that petitioner No. 1 has been collecting rent from the respondent; contention is that this rent was being paid to petitioner No. 1 under impression of the tenant that she was the owner/landlady but there is no such relationship between the parties as the petitioners are not the owners. The second submission that petitioner No. 6 is working with Ozone Pvt Ltd. Health Club, Safdargang Enclave; petitioner No. 4 is employed with M/s Home Appliance, Noida; petitioner No. 5 Sidharth (son of petitioner No. 2) who is also knonw as Gopal is running a shop under the name and style of M/s Uttam Collections in Kinari Bazar; petitioner No. 3 Veena is a house-

wife and the premises are not required for her; petitioner No. 2 Rajender Kumar is a drug edict; petition has been filed malafide. Further contention is that on 01.12.2008, the landlady had sold shop No. 2898; if the need of the petitioners is not bonafide, had it been bonafide she would not have sold this shop; present eviction petition has been filed only to extract a higher rate of rent.

5. Corresponding paras of the reply filed by the landlords have also been perused. It has been reiterated that the petitioners are the owners/ landlords of the suit premises; it is admitted that shop No.2898 was sold but this was because of a financial crunch and because of heavy debt on the petitioners; this shop as per the version of the tenant was sold on 01.12.2008; present eviction petition has been filed more than one year later i.e. January, 2009.

6. It is in this background that the contentions of the respective parties have to be considered. Record shows that the petitioners have claimed ownership of the suit premises by virtue of a registered Will which was executed by the deceased Sham Sher Singh stated to be the owner of the suit premises in favour of his legal heirs. It is also not in dispute that the tenants have been regularly paying rent to petitioner No. 1; submission is that they have been paying rent under the belief that petitioner is their landlord although there is no such relationship between the parties.

7. The Courts have time and again held that while dealing with an eviction petition under Section 14 (1)(e) of the DRCA which is not a title suit, it is only a prima-facie title which has to be established by the owner; in this context, the registered Will of the deceased cannot be subject matter of challenge in such an eviction proceedings.

8. A Bench of this Court in AIRCJ 1971 2 **Arjan Dass Vs. Madan Lal,** has in fact held, as follows:

> "a tenant has no locus standi to challenge the validity of the Will made by the landlord as he is not an heir of the landlord."

In (1987) 4 SCC 193 **Smt. Shanti Sharma & Ors. Vs. Ved Prabha & Ors.**

> "The word 'owner' has not been defined in this Act and the word 'owner' has also not been defined in the Transfer of Property Act. The contention of the learned Counsel for the appellant appears to be is that ownership means absolute ownership in the land as well as of the structure standing thereupon. Ordinarily, the concept of ownership may be what is contended by the counsel for the appellant but in the modern context where it is more or less admitted that all lands belong to the State, the persons who hold properties will only be lessees or the persons holding the land on some term from the Govt. or the authorities constituted by the State and in this view of the matter it could not be thought of that the Legislature when it used the term 'owner' in the provision of Section 14(1)(e) it thought of ownership as absolute ownership. It must be presumed that the concept of ownership only will be as it is understood at present. It could not be doubted that the term 'owner' has to be understood in the context of the background of the law and what is contemplated in the scheme of the Act."

This objection is clearly without any merit.

9. The only other objection raised by the tenant is that the petitioners do not require these premises bonafide as petitioners No. 1 & 3 are housewives; petitioner No. 2 is a drug edict and petitioners No. 4 & 5 are already employed at M/s Home Appliances, Noida and Uttam Collections, Safdarjung Enclave. There has been a categorical denied to this submission. Even assuming that petitioner No. 4 is working with M/ s Home Appliances and petitioner No. 6 is working with Ozone Pvt Ltd. Health Club; these employments of petitioners No. 4 & 6 are private jobs and it does not take away their bonafide need to start their own business from the shop which is owned by them and which is located in a highly viably commercial area of Delhi i.e. Kinari Bazar where even as per the submission made by petitioner on oath in Court today, the market rent of the premises has gone up substantially; because of this business viability earlier rents (in the year 1947-48 the rent of Rs. 45/- per month) being paid by the tenant were meager amounts and no such accommodation at this rate is now possible to be obtained by the tenant; contention being that the petitioners cannot be prevented from carrying out their business from this shop; their bonafide need has in fact been established.

10. In this context the Supreme Court in 2009(2) RCR 455 titled as **Ram Babu Agarwal vs. Jay kishan Das,** had observed as under:-

> "However, as regards the question of bonafide need, we find that the main ground for rejecting the landlord's petition for eviction was that in the petition the landlord had alleged that he required the premises for his son Giriraj who wanted to do footwear business in the premises in question. The High Court has held that since Giriraj has no experience in the footwear business and was only helping his father in the cloth business, hence there was no bonafide need. We are of the opinion that a person can start a new business even if he has no experience in the new business. That does not mean that his claim for starting the new business must be rejected on the ground that it is a false claim. Many people start new businesses even if they do not have experience in the new business, and sometimes they are successful in the new business also."

In **Mattulal v. Radhelal** [1975]1SCR127 the Apex Court had observed as follows:-

> "A like principle was laid down stating that the test was not subjective but an objective one and that the Court was to judge whether the need of the landlord was reasonable and bona fide. This Court held that the Additional District Judge in that case was wrong in thinking that the landlord who wanted to start iron and steel business, had to produce proof of preparations for starting his new business, such as making arrangements for capital investment, approaching the Iron and Steel Controller for the required permits etc. This Court held that the above circumstances were "wholly irrelevant" and observed."

In **Raghunath G. Panhale G. Panhale (D) by Lrs. v. Chaganlal Sundarji and Co.** AIR1999SC3864 the Supreme Court had inter alia held as follows:

> "It was not necessary for landlord to prove that he had money to invest in the new business contemplated nor that he had experience of it. It was a case for eviction on the ground of bona fide requirement of the landlord for non- residential purpose, as he wanted to start a grocery business in the suit premises to improve his livelihood."

On this count also, no triable issue has been raised.

11. The only other submission is that Shop No. 2898, has been sold by the landlord in the year 2008; this was admittedly more than one year prior to the filing of the present eviction petition; the reasons explained by the petitioner was that because of financial crunch and debt which has been incurred by the petitioners and to pay up his debts it had necessitated the sale of his shop. There is no dispute to this submission; as such this is a sufficiently justifiable submission. On this count also no triable issue has arisen.

12. The Courts time and again have held that unless and until a triable issue arises leave to defend should not be granted in a routine and a mechanical manner. If this is allowed, the very purpose and import of the summary procedure as contained in Section 25 B of the DRCA shall be defeated and this was not the intention of the legislature.

13. In **Nem Chand Daga Vs. Inder Mohan Singh Rana** 94 (2001) DLT 683, a Bench of this Court had noted as under:-

> "That before leave to defend is granted, the respondent must show that some triable issues which disentitle the applicant from getting the order of eviction against the respondent and at the same time entitled the respondent to leave to defend existed. The onus is prima facie on the respondent and if he fails, the eviction follows."

14. Impugned order thus decreeing the eviction petition of the landlord suffers from no infirmity. Petition is without any merit. Dismissed.

ILR (2012) III DELHI 413
CRL. REV. P.

DEEPAK KUMAR ....PETITIONER

VERSUS

STATE ....RESPONDENT

(MUKTA GUPTA, J.)

CRL. REV. P. NO. : 156/2011 DATE OF DECISION: 12.03.2012
& CRL. M.A. NO. : 4096/2011 (STAY)

Juvenile Justice (Care and Protection of Children) Rules, 2007—Rule 12—Juvenile Justice (Case & Protection Act) 2000—Section 7—Indian Penal Code, 1860—Section 376—Petitioner was arrested under Section 376 IPC—He raised plea of being juvenile as per School Leaving Certificate and Birth Certificate issued by MCD—His school records were got verified but his MCD certificate was not found available in MCD records—Thus, petitioner moved application under Section 7A of Act conducting ossification test to determine his juvenility—As per ossification test report his estimated age was between 19 to 20 years and on the basis of said report, learned trial Court held petitioner was not juvenile—Aggrieved by order, petitioner preferred revision urging learned Trial Court ought to have relied upon verified school certificate and should not have got conducted ossification test—Held:- Trial Court while holding age enquiry should summon and examine the Principal or the investigation officer who conducted the verification to ascertain the truth than from merely getting the school certificate verified from school—No enquiry regarding school certificate conducted by learned trial Court under Rule 12 of Rules.

In the present case though there is ample evidence on record to reject the MCD certificate produced by the Petitioner, however, no enquiry regarding the School Le ving Certificate has been conducted by the learned Trial Court. Neither the statement of the Headmaster nor any official of the school has been recorded by the learned Trial Court to discard the same. In fact, neither in the impugned order nor in the Trial Court file any reasoning has been rendered to discredit the School Leaving Certificate. In view of Rule 12, JJ Rules only after the School Leaving Certificate is found unreliable, the Trial Court could have considered the ossification test. **(Para 9)**

Important Issue Involved: Trial Court while holding age enquiry should summon and examine the Principal or the investigating officer who conducted the verification to ascertain the truth than from merely getting the school certificate verified from school.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. M.L. Sharma & Mr. P.S. Yadav Advocates.

FOR THE RESPONDENTS : Mr. Mukesh Gupta, APP for the State.

CASES REFERRED TO:

1. *Ravinder Singh Gorkhi* vs. *State of U.P.,* (2006) 5 SCC 584.
2. *Arnit Das* vs. *State of Bihar,* (2000) 5 SCC 488.

RESULT: Petition disposed of.

MUKTA GUPTA, J.

1. By the present petition, the Petitioner challenges the order dated 16th March, 2011 passed by the learned Addl. Sessions Judge declaring him not to be a juvenile on the date of alleged incident and thus dismissing

the application of the Petitioner seeking the benefit of juvenility according to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007(in short 'JJ Rules).

2. Learned counsel for the Petitioner contends that in view of the school certificate having been verified, the learned Trial Court ought to have relied the same in terms of Rule 12 of the J.J. Rules and should not have got the ossification test of the Petitioner conducted.

3. Learned APP for the State on the other hand contends that the Petitioner had given two certificates. As regards the certificate issued by the Municipal Corporation of Delhi (MCD), no entry was found. Thus, the birth certificate No. 920 dated 30th December, 1993 filed by the Petitioner was a forged document. Further the Petitioner was admitted in Shri Bhopal Singh Public Junior High School, Bagpat, Uttar Pradesh directly in the fifth standard where his date of birth was mentioned as 4th December, 1993. This date of birth was mentioned without any corresponding municipal record and hence the learned Trial Court rightly rejected the same and got the ossification test conducted. As per the ossification test, the age of the Petitioner was opined to be between 19 to 20 years and hence on the date of incident, the Petitioner was over 18 years of age.

4. I have heard learned counsel for the parties. Briefly, the facts of the case are that FIR No. 121/2010 under Section 376 IPC was registered at PS Bhalswa Dairy. The offence allegedly took place in the intervening night of 8th-9th August, 2010 and the Petitioner is in judicial custody since 1st September, 2010. According to the Petitioner, he is a juvenile. As per the school leaving certificate and the birth certificate issued by the MCD, the Petitioner was born on 4th December, 1993, so on the date of alleged incident he was 16 years and 9 months old and thus entitled to the benefit of juvenility. The Petitioner filed an application on 12th January, 2011 seeking directions to verify the school leaving certificate as well as the date of birth certificate issued by the MCD. The investigating officer verified the school leaving certificate from the first attended school. The date of birth was found to be correct. However in the MCD no such record was found available and thus the Trial Court directed Petitioner's father to place on record the original birth certificate issued by the MCD. Since Petitioner's father could not bring the original MCD certificate, the Petitioner filed another application dated 19th February, 2011 under Section

7(A) of the Juvenile Justice (Care and Protection) Act, 2000 (in short J.J. Act) and Rule 12 of the J.J. Rules for conducting the ossification test to determine the juvenility. The medical board of Babu Jagjivan Ram Hospital examined the Petitioner on 25th February, 2011 and opined that the estimated age of the Petitioner was between 19 to 20 years.

5. By the impugned order, the learned Trial Court held that in view of the ossification test, the Petitioner was not a juvenile and hence dismissed the application. No doubt, the Petitioner has not produced the original MCD certificate. Moreover, from the verification it was found that the purported photocopy of the MCD certificate relied upon by the Petitioner was an incorrect document as no record was found in this regard. However, the moot question in the matter is whether the learned Trial Court conducted a proper enquiry to determine the age of the Petitioner or not. It may be noted that the learned Trial Court only called for a verification report from the school where the Petitioner studied. No enquiry in regard to this certificate was conducted. No statement of the concerned Principal or the investigating officer, who conducted the verification, was recorded to ascertain the truth. In a case like this where the MCD certificate was found to be incorrect, the learned Trial Court ought to have summoned and examined the Principal or the concerned officer of Shri Bhopal Singh Public Junior School to come to the conclusion whether the school leaving certificate submitted by the Petitioner can be relied upon or not. In terms of Rule 12 of the J.J. Rules, only after the school leaving certificate was found to be not genuine or could not be relied upon, the learned Addl. Sessions Judge could have adopted the procedure of getting the ossification test done.

6. Rule 12 of the JJ Rules provides:-

> "12. Procedure to be followed in determination of Age.. (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.
>
> (2) The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile

or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the Court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and

these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law"

7. In **Arnit Das v. State of Bihar,** (2000) 5 SCC 488, the Hon'ble Supreme Court held that while dealing with a question of determination of the age of an accused, for the purpose of finding out whether he is a juvenile or not, a hyper-technical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he is a juvenile and if two views may be possible on the same evidence, the Court should lean in favour of holding the accused to be juvenile in borderline cases.

8. In **Ravinder Singh Gorkhi v. State of U.P.,** (2006) 5 SCC 584 with regard to the entries made in School Leaving Certificate, their Lordship's observed as under:-

"17. The school-leaving certificate was said to have been issued in the year 1998. A bare perusal of the said certificate would show that the appellant was said to have been admitted on 1-8-1967 and his name was struck off from the roll of the institution on 6-5-1972. The said school-leaving certificate was not issued in the ordinary course of business of the school. There is nothing on record to show that the said date of birth was recorded in a register maintained by the school in terms of the requirements of law as contained in Section 35 of the Evidence Act. No statement has further been made by the said Headmaster that either of the parents of the appellant who accompanied him

to the school at the time of his admission therein made any statement or submitted any proof in regard thereto. The entries made in the school-leaving certificate, evidently had been prepared for the purpose of the case. All the necessary columns were filled up including the character of the appellant. It was not the case of the said Headmaster that before he had made entries in the register, age was verified. If any register in regular course of business was maintained in the school, there was no reason as to why the same had not been produced."

9. In the present case though there is ample evidence on record to reject the MCD certificate produced by the Petitioner, however, no enquiry regarding the School Leaving Certificate has been conducted by the learned Trial Court. Neither the statement of the Headmaster nor any official of the school has been recorded by the learned Trial Court to discard the same. In fact, neither in the impugned order nor in the Trial Court file any reasoning has been rendered to discredit the School Leaving Certificate. In view of Rule 12, JJ Rules only after the School Leaving Certificate is found unreliable, the Trial Court could have considered the ossification test.

10. In view of the facts and circumstances of the case, order dated 16th August, 2011 is set aside. The learned Trial Court is directed to conduct an enquiry in terms of Rule 12 of the J.J. Rules. Only after conducting an enquiry on the School Leaving Certificate and finding the same to be unreliable, the learned Trial Court will resort to the report of ossification test and come to the conclusion as to whether the Petitioner is a juvenile or not. The parties will appear before the learned Trial Court on 26th March, 2012.

11. Petition and application are disposed of. Trial Court record be sent back.

ILR (2012) III DELHI 420
CRL. M.C.

IRFAN & ORS. ....PETITIONERS

VERSUS

STATE & ANR. ....RESPONDENTS

(SURESH KAIT, J.)

CRL. M.C. NO. : 902/2012 DATE OF DECISION: 13.03.2012

Code of Criminal Procedure, 1973—Section 482—Petition for quashing FIR for offence under Section 452/387/323/34 IPC on the grounds of compromise opposed by the State on the grounds that offences under Section 452 and 387 IPC are not compoundable—Held, till the decisions of the cited cases referred to the larger bench of the Supreme Court are altered or set aside, the said cited decisions operate as binding precedent and in view of statement of the complainant that he is no more interested to pursue the case, trial would be wasteful exercise by the trial Court, as such FIR liable to be quashed.

Therefore, I feel that unless and until, the decisions which have been referred above, are set aside or altered, by the larger Bench of the Supreme Court, all the above three decision hold the field and are the binding precedents. **(Para 11)**

In the facts and circumstances of the case, as the parties are living in the same locality entered into compromise deed dated 22.1.2012 and keeping in view the statement of respondent No.2 who is no more interested in pursuing the case any further, the FIR mentioned above i.e. FIR No. 18/2012 dated 22.1.2012 registered at PS Bhajan Pura, is hereby quashed. **(Para 13)**

[Gi Ka]

APPEARANCES:

FOR THE PETITIONERS : Mr. Matloob Ahmed, Advocate.

FOR THE RESPONDENTS : Mr. Navin Sharma, APP with SI Vinay Kumar, PS Bhajan Pura Respondent No. 2 in person.

CASES REFERRED TO:

1. *Shiji @ Pappu & Ors.* vs. *Radhika & Anr* in Crl.Appeal No.2064/2011.
2. *Gian Singh* vs. *State of Punjab & Anr.* in SLP (Crl.) No.8989/2010.
3. *Nikhil Merchant* vs. *Central Bureau of Investigation & Anr.* (2008) 9 SCC 677.
4. *Manoj Sharma* vs. *State & Ors.* (2008) 16 SCC 1.
5. *B.S. Joshi* vs. *State of Haryana* (2003) 4 SCC 675.

RESULT: Petition allowed.

SURESH KAIT, J. (Oral)

Crl.M.A. 3134/2012

(Exemption) Exemption allowed, subject to just exceptions.

The application stands disposed of.

+ CRL.M.C. 902/2012

1. Notice.

2. Learned APP accepts notice on behalf of State/respondent No.1. Respondent No.2 is personally present in the Court.

3. With the consent of the parties, the instant petition is taken up for final disposal.

4. Vide the instant petition, the petitioners have sought to quash FIR No. 18/2012 dated 22.1.2012 registered at PS Bhajan Pura under Sections 452/387/323/34 Indian Penal Code, 1860 against the petitioners on the complaint of respondent No.2.

5. Learned counsel appearing on behalf of petitioners has submitted that the complainant and the petitioners are living in the same locality and with the intervention of common friends and the community members, respondent No.2 has settled all the issues qua the aforesaid FIR vide compromise deed dated 22.01.2012. Therefore, respondent No.2 is no more interested to pursue the case any further against the petitioners. He prays that in the circumstances, the instant petition may be allowed.

6. Respondent No.2 who is personally present in the court, is identified as respondent No.2 by SI Vinay Kumar, the I.O. of the case. It is submitted that he has settled all the issues qua the aforesaid FIR against the petitioners, therefore, he is no more interested to pursue the case any further and has no objection if the FIR mentioned above is quashed.

7. Learned APP on the other hand submits that due to the scuffle which took place between the petitioner and respondent No.2, respondent No.2 received injuries in the present FIR, whereas, petitioners also received injuries in the same scuffle and the case is registered against respondent No.2 along with other persons vide FIR No. 19/2012 dated 22.01.2012, under Sections 308/341/323/506/34 Indian Penal Code, 1860 at PS Bhajan Pura.

8. He further submits that the offence punishable under Sec. 452 and 387 is not compoundable in nature.

9. Learned APP referred the decision of Hon'ble Supreme Court in **Gian Singh v. State of Punjab & Anr.** in SLP (Crl.) No.8989/2010 wherein the Division Bench of the Supreme Court has referred three earlier decisions viz, **B.S. Joshi v. State of Haryana** (2003) 4 SCC 675, **Nikhil Merchant v. Central Bureau of Investigation & Anr.** (2008) 9 SCC 677 & **Manoj Sharma v. State & Ors.** (2008) 16 SCC 1 to the larger Bench for re-consideration whether the abovesaid three decisions were decided correctly or not. Therefore, she has prayed that till the matter is decided by the larger Bench of the Apex Court, instant petition may be adjourned sine-die. Alternatively, she prayed that in the event, the FIR is quashed, heavy costs should be imposed upon the petitioners, as the government machinery has been pressed into and precious public time has been consumed.

10. The Division Bench of Mumbai High Court in Nar**i Motiram**

Hira v. Avinash Balkrishnan & Anr. in Crl.W.P.No.995/2010 decided on 03.02.2011 has permitted for compounding of the offences of 'non-compoundable' category as per Section 320 Cr. P.C. even after discussing **Gian Singh** (supra).

11. Therefore, I feel that unless and until, the decisions which have been referred above, are set aside or altered, by the larger Bench of the Supreme Court, all the above three decision hold the field and are the binding precedents.

12. In addition, the Supreme Court in **Shiji @ Pappu & Ors. v. Radhika & Anr** in Crl.Appeal No.2064/2011 decided on 14.11.2011 that the cases of non-compoundable nature can be compounded, certainly not after the conviction observing as under:-

> '..... That being so, continuance of the prosecution where the complainant is not ready to support the allegations which are now described by her as arising out of some "misunderstanding and misconception"; will be a futile exercise that will serve no purpose. It is noteworthy that the two alleged eye witnesses, who are closely related to the complainant, are also no longer supportive of the prosecution version. **The continuance of the proceedings is thus nothing but an empty formality. Section 482 Cr.P.C. could, in such circumstances, be justifiably invoked by the High Court to prevent abuse of the process of law and thereby preventing a wasteful exercise by the Courts below'**.

13. In the facts and circumstances of the case, as the parties are living in the same locality entered into compromise deed dated 22.1.2012 and keeping in view the statement of respondent No.2 who is no more interested in pursuing the case any further, the FIR mentioned above i.e. FIR No. 18/2012 dated 22.1.2012 registered at PS Bhajan Pura, is hereby quashed.

14. I find force in the submission of learned APP on the part of costs. I, therefore, while quashing the FIR mentioned above impose cost of Rs. 10,000/- each on petitioner Nos. 3, 4 and 5 in this case, to be paid within two weeks from today in favour of 'Delhi High Court Legal Services Committee' with intimation to concerned SHO. Proof of the same also be placed on record. SHO shall ensure the timely deposition

of costs. However, I refrain from imposing cost on petitioner No.1 and 2, who are working and earning salaries on the lower side, keeping their financial positions into view.

15. Accordingly, CRL.M.C. 902/2012 is allowed in above terms.

16. Dasti.

ILR (2012) III DELHI 424
CM (M)

SURESH KUMAR AGARWAL & ORS. ....PETITIONER

VERSUS

VEER BALA AGGARWAL ....RESPONDENT

(INDERMEET KAUR, J.)

CM (M) NO. : 172/2007 & CM NO. : 14616/2009 **DATE OF DECISION: 20.03.2012**

Code of Civil Procedure, 1908—Order XXII Rule 10—Application for substitution in place of plaintiff filed by the petitioners, dismissed—Another application filed by three applicants—Contended that earlier purchasers sold their interest and right in the disputed property in their favour—Required to be impleaded in place of the plaintiff—This application dated 05.04.2004 had been dismissed on 13.12.2004 by the Civil Judge—First appellate Court reaffirmed the order of the trial Court and dismissed the application vide the impugned order dated 14.08.2006 holding that the suit had abated on the death of the plaintiff and the present application not having been filed during the pendency of suit, is not maintainable. Held—Even the first applicants never impleaded in place of the plaintiff—Their application

dated 24.04.1996 was filed but not pursued—Substitution of the second category of persons did not arise as they were admittedly claiming their rights only through first applicants who themselves had not been allowed to be substituted in place of the original plaintiff—Present petitioners had no right or interest in the suit property—They could in no manner be termed as 'necessary' or 'proper' parties—Provisions of Order XXII Rule 10 of the Code would apply only when the suit was pending—Present suit had been disposed of as having been abated on 27.01.2003 and as such the application filed by the present petitioners on 05.04.2004 which was admittedly much after the date of abatement; the question of applicability of order XXII Rule 10 of the Code did not apply—No application under Order XXII Rule 9 of the Code seeking setting aside of the abatement order dated 27.01.2003 was also ever filed—Present application filed under Order XXII Rule 10 (even presuming it to be an application under Order XXII Rule 9 of the Code) on 05.04.2004 is also much beyond the prescribed period of limitation—Impugned order suffers from no illegality, dismissed.

Moreover the provisions of Order XXII Rule 10 of the Code would apply only when the suit was pending; the present suit had been disposed of as having been abated on 27.01.2003 and as such the application filed by the present petitioners on 05.04.2004 which was admittedly much after the date of abatement; the question of applicability of order XXII Rule 10 of the Code did not apply. This provision permits the applicant in case of an assignment, creation or devolution of any interest to continue a suit; this is clear from the language of the aforenoted provision which reads as follows:-

> "10. Procedure in case of assignment before final order in suit.- (1) in other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved."
>
> **(Para 5)**

It is also not in dispute that Article 121 of the Schedule appended to the Limitation Act, 1963 would be the applicable provision seeking the setting aside of the an abatement order. Admittedly this suit stood abated on 27.01.2003; present application filed under Order XXII Rule 10 (even presuming it to be an application under Order XXII Rule 9 of the Code) on 05.04.2004 is also much beyond the prescribed period of limitation. In the instant case, the suit already having come to an end by the order of abatement on 27.01.2003 and there being no pendency of a suit at the time when the aforenoted application was filed; impugned order dismissing these applications of the petitioner suffers from no illegality. **(Para 7)**

Important Issue Involved: Code of Civil Procedure, 1908—Order XXII Rule 10—When the original applicants were not substituted, subsequent applicants claiming through them cannot be allowed to be substituted.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONERS : Mr. Aseem Mehrotra, Advocate.

FOR THE RESPONDENT : Mr. C. Mukund, Advocate.

RESULT: Petition dismissed.

INDERMEET KAUR, J. (Oral)

1. The impugned judgment is dated 14.08.2006. The impugned order was passed by the first appellate Court dismissing the appeal of the petitioner wherein the application filed by him under Order XXII Rule 10 of the Code of Civil Procedure (hereinafter referred to as the 'Code') as also another application filed under the same provision of law by the

three applicants i.e. Mahesh Kumar Gupta, Mulk Raj Gupta and Ashima Gupta seeking substitution in place of the plaintiff had been dismissed. The Court was of the view that the suit had abated on the death of the plaintiff and the present application under Order XXII Rule 10 of the Code not having been filed in that period when the suit was pending and the suit already having abated, this application was not maintainable.

2. The application filed by the present petitioners i.e. Suresh Kumar Aggarwal, Sushila Aggarwal and M/s Arpit Paper Pvt. Ltd as also Gajanand Aggarwal was based on the premise that the earlier purchasers i.e. Mahesh Kumar Gupta, Mulk Raj Gupta and Ashima Gupta had sold their interest and right in the disputed property in their favour; they were thus required to be impleaded in place of the plaintiff Krishan Lal Arneja. This application filed by the aforenoted applicants dated 05.04.2004 had been dismissed on 13.12.2004 by the Civil Judge. Against this order i.e. order dated 13.12.2004, the first appellate Court had reaffirmed the order of the trial Court and dismissed the application of the applicants vide the impugned order dated 14.08.2006.

3. The contention of the applicants was that valid documents of sale had been executed by the aforenoted persons Mahesh Kumar Gupta, Mulk Raj Gupta and Ashima Gupta in their favour; these documents prima-facie show that they are purchasers of this aforenoted property and as such they having got a valid assignment in their favour, they were liable to be impleaded in place of the plaintiff.

4. Record shows that the present suit filed by the original plaintiff Krishan Lal Arneja was a suit for specific performance; record shows that even the first applicants i.e. Mahesh Kumar Gupta, Mulk Raj Gupta and Ashima Gupta were never impleaded in place of the plaintiff; their application dated 24.04.1996 was filed but thereafter not pursued. As such the substitution of the second category of persons namely the present petitioners Suresh Kumar Aggarwal, Sushila Aggarwal, M/s Arpit Paper Pvt. Ltd and Gajanand Aggarwal did not arise; they were admittedly claiming their rights only through Mahesh Kumar Gupta, Mulk Raj Gupta and Ashima Gupta who themselves not having allowed to be substituted in place of the original plaintiff, the present petitioners had no right or interest in the suit property; they could in no manner be termed as 'necessary' or 'proper' parties.

5. Moreover the provisions of Order XXII Rule 10 of the Code

would apply only when the suit was pending; the present suit had been disposed of as having been abated on 27.01.2003 and as such the application filed by the present petitioners on 05.04.2004 which was admittedly much after the date of abatement; the question of applicability of order XXII Rule 10 of the Code did not apply. This provision permits the applicant in case of an assignment, creation or devolution of any interest to continue a suit; this is clear from the language of the aforenoted provision which reads as follows:-

> "10. Procedure in case of assignment before final order in suit.- (1) in other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved."

6. Admittedly no application under Order XXII Rule 9 of the Code seeking setting aside of the abatement order dated 27.01.2003 was also ever filed; the contention of the petitioner before this Court that the said application filed by him before this Court and may be considered by this Court is a mis-directed submission. The suit admittedly abated on 27.01.2003, the application having been filed almost one decade later before this Court which is not the original Court; this Court is sitting in its power of superintendence under Article 227 of Constitution of India cannot entertain such an application.

7. It is also not in dispute that Article 121 of the Schedule appended to the Limitation Act, 1963 would be the applicable provision seeking the setting aside of the an abatement order. Admittedly this suit stood abated on 27.01.2003; present application filed under Order XXII Rule 10 (even presuming it to be an application under Order XXII Rule 9 of the Code) on 05.04.2004 is also much beyond the prescribed period of limitation. In the instant case, the suit already having come to an end by the order of abatement on 27.01.2003 and there being no pendency of a suit at the time when the aforenoted application was filed; impugned order dismissing these applications of the petitioner suffers from no illegality.

8. Petition is without any merit. Dismissed.

ILR (2012) III DELHI 429
RFA

MOHINDER NATH SHARMA (DECD.) THR. LR'S **....APPELLANTS**

VERSUS

RAM KUMAR & ORS. **....RESPONDENTS**

(VALMIKI J. MEHTA, J.)

RFA NO. : 228/2008 **DATE OF DECISION: 22.03.2012**

Specific Relief Act, 1963—Section 12, Section 20—Agreement to sell—Place of land—Possession to be finally considered on making up of balance valuation and paying the same to respondents—Reason for uncertainty because rights of respondent over partial area of land was by general power of attorney—Hence, no title by regular sale deed—On one side of land remained no boundary wall but a partly dried pond—Valuation thus after possession gained—Respondents argued that discretionary relief not to be granted as appellant already had the complete area under the agreement to sale. Held:- No crystallisation of area or price and hence, appellant cannot be held liable to pay balance price and breach has arise—Further held:- Doctrine of clean hands inapplicable—No evidence that appellant ever had the amount of land averred—Dishonour of cheque calls for breach of contract and has no bearing on doctrine of clean hands. Denial of discretionary relief cannot be raised by respondents who are guilty of breach—Once clear that agreement to sale has been acted upon, Specific relief has to be granted—Specific performance of area in possession of appellant granted—Competent person appointed to measure

exact area of land in possession of appellant as to determine balance price—Balance multiplied by forty as rough appreciation of land price in Delhi in last 33 years.

I therefore set aside the findings and conclusions of the trial Court contained in para 29 of the impugned judgment and hold that there is no categorical admission, much less any clarity as to the appellant in fact having already received possession of 2000 sq. yds. of land. It is quite clear that there was never any specific joint measurement, by both the parties, at any stage delineating exact area, much less duly supported by a site plan signed by the parties, so that there could be clarity to the exact area of land of which possession was given to the appellant. All that emerges from the record is that parties intended to enter into an agreement to sell for approximately 2000 sq. yds.; certain area plus or minus; and, possession of certain portion of the land was given under the agreement to sell, thereafter certain more area was also given, however, even as on today, the appellant does not have the area of 2000 sq. yds. inasmuch as even the case of the respondents before this Court as per the statements made by their counsel is that the appellant has 1560 sq. yds. of land. **(Para 20)**

Learned counsel for the respondents finally argued that discretionary relief of specific performance should not be given in the facts of the present case where out of Rs. 1,60,000/- only Rs. 80,000/- is paid and the appellant already had with him complete area of 2000 sq. yds. under the agreement to sell. In fact, at one stage, it was sought to be argued on behalf of the respondents that not only 2,000 sq. yds. of land is with the appellant but, in fact, possession of 2300 sq. yds. of land was given to the appellant inasmuch as respondents were owners of 2300 sq. yds. of land and possession of total area of this 2300 sq. yds. of land was given to the appellant. In my opinion, in the facts of the present case, the issue of discretionary relief will not be an issue to be held against the appellant inasmuch as the

situation which has emerged in the present case of lack of clarity of the area, lack of clarity of the price, disputes with respect to a portion of land of which ownership was claimed by the respondents, handing over of further land after the agreement to sell was entered into, there being no wall on the fourth side and which was a pond and which was filled up by the respondents etc are all aspects which show that it cannot be said that there exist such clear cut circumstances that it was the appellant who had received a specific area of 2000 sq. yds. and he was refusing to pay the balance amount of Rs. 60,000/-. In fact, the present situation is of the making of the respondents who were seeking to blow hot and cold and avoid performance of their obligation under the agreement to sell. Also in my opinion, the issue of denial of discretionary relief cannot be raised by the respondents who are themselves guilty of breach of contract. Further, the discretion in granting or denying the specific performance is a judicial discretion to be exercised as per the facts of each case and once it is clear that agreement to sell has in fact been acted upon, substantial price i.e. over 60% of the price is paid, possession of the substantial portion of the land has been given to the appellant, it cannot be said that specific performance should be denied in the facts of the present case once we take note of Section 20(3) of the Specific Relief Act, 1963. Some of the instances of the Court being entitled to refuse the discretion of specific performance, are contained in Section 20(2) and the facts of the present case do not fit in any sub-provision of the said Section 20(2) inasmuch as so far as the scenarios falling under sub Sections (b) & (c) of Section 20(2) are concerned, I am in the later part of this judgment directing a forty times increase in the balance price payable, if of course there will remain any balance price payable. **(Para 22)**

Accordingly, while accepting the appeal and setting aside the impugned judgment of the Trial Court dated 25.1.2003, it would be required that a competent person be appointed to measure the exact area of land which is in the possession

of the appellant, so that the balance price which may be payable by the appellants to the respondent for specific performance of the subject agreement to sell can be decided. Today, no orders can be passed as to what is the balance amount which the respondents will be entitled to inasmuch as I intend to modulate the amount which would be payable to the respondents depending on the exact area which is found to be in possession of the appellant. However, I hold that whatsoever would be the balance price, which would be if payable, should be multiplied by 40 times inasmuch as I would take the rough appreciation of the prices in a city like Delhi in these last 33 years from 1979 till date at approximately 40 odd times. Of course the factor of 40 times is also taken not only with reference to the increase of prices from the date of the Agreement to Sell to today but also as per the facts of the case where I feel that multiplication of balance price by forty times will meet the ends of justice. I have also taken note of the fact that the subject land is not situated in the prime localities of Delhi such as the South Delhi and Central Delhi, and is situated in North Delhi which did not rapidly urbanise. That the Courts have the power to alter the price in order to promote equity, justice and good conscience is no longer res integra and direct judgment of the Supreme Court entitling Courts to suitably alter the price payable to a seller on account of passage of time is the judgment of the Supreme Court in the case of **Nirmala Anand vs. Advent Corporation (P) Ltd.** 2002(8) SCC 146. However, I may hasten to clarify that this observation with respect to multiplying the balance price by 40 times is made by me on the assumption that in fact considering the actual area with the appellant taken with the price already paid of Rs. 1,00,000/-, the price paid to the respondents is less than as compared to and as a proportion to the total price of Rs. 1,60,000/- i.e. there would be payable balance price by the appellants as they would be having proportionately larger area than the area which ought to be with the appellant when this area of which appellant is in possession is taken in proportion to the price paid being Rs.

1 lakh out of the total price of Rs. 1,60,000/-. **(Para 27)**

[Sa Gh]

APPEARANCES:

FOR THE APPELLANTS : Mr. P.V. Kapoor, Sr. Advocate with Mr. Indermeet Sharma & Mr. Aman Anand, Advocates.

FOR THE RESPONDENTS : Mr. B.R. Sharma, Advocate.

CASES REFERRED TO:

1. *M/s. Nehru Place Hotels Ltd.* vs. *Smt. Kanta Bala,* 2011(123) DRJ 148.
2. *M. Meenakashi and Others* vs. *Metadin Agarwal (dead) by LRS.* (2006) 7 SCC 470.
3. *Jai Narain Parasrampuria (dead) and Others* vs. *Pushpa Devi Saraf and Others* (2006) 7 SCC 756.
4. *Ram Kumar & Ors.* vs. *Mohinder Nath Sharma,* Suit No.209/2002 (originally Suit No.728/1982).
5. *Nirmala Anand* vs. *Advent Corporation (P) Ltd.* AIR 2002 SC 3396.
6. *Mohinder Nath Sharma* vs. *Ram Kumar & Ors.* suit No.210/2002 (originally Suit No.817/1982).
7. *K.S.Vidyanandam & Ors.* vs. *Vairavan,* AIR 1997 SC 1751.
8. *Kanshi Ram* vs. *Om Prakash Jawal and Others* (1996) 4 SCC 593.

VALMIKI J. MEHTA, J. (ORAL)

1. The challenge by means of this Regular First Appeal (RFA) filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the Trial Court dated 25.1.2003. By the impugned judgment, the Trial Court decided two suits. Suit No.209/2002 (originally Suit No.728/1982) titled as **Ram Kumar & Ors. vs. Mohinder Nath Sharma,** was a suit for possession, declaration and recovery of damages of Rs. 62,000/- filed by the proposed sellers (the respondents herein) against the proposed buyer (now represented by his legal heirs-the

appellants). The second suit was suit No.210/2002 (originally Suit No.817/1982) titled as **Mohinder Nath Sharma vs. Ram Kumar & Ors.** seeking specific performance of an Agreement to Sell and possession of balance land, filed by the proposed buyer against the proposed sellers. The impugned judgment dismisses the suit of the proposed buyer, Sh.Mohinder Nath Sharma for specific performance and decrees the suit filed by the proposed sellers for possession and damages. For the sake of convenience in this judgment, I will refer to the proposed sellers as the respondents and the proposed buyer as the appellant. The original proposed buyer, Sh. Mohinder Nath Sharma has expired, and he is now represented by his legal heirs as the appellants.

2. The disputes in the present case pertain to an agreement to sell dated 1.6.1979. The agreement to sell was entered into between the proposed sellers, Sh.Ram Kumar, Sh. Jai Prakash and Sh. Parmanand with the proposed buyer Sh. Mohinder Nath Sharma. The subject matter of the agreement to sell was a piece of land situated on property no.894 & 894/1, Alipur, Delhi-36 admeasuring 2,000 sq. yds. and having a boundary wall on three sides alongwith certain constructions on the same. The price which was agreed under the agreement to sell was Rs. 1,60,000/-. The agreement recites the receiving of Rs. 1,00,000/- by the respondents. There is also a separate receipt executed of the same date of agreement to sell showing the receipt of a sum of Rs. 1,00,000/- by the respondents.

3. The agreement to sell though apparently appeared to be clear with respect to the buyer, the sellers, the area of the land to be sold and the price at which it was sold, however, actually there was uncertainty qua the area and consequently the price, and which aspect emerges from para 3 of the agreement to sell which reads as under:-

> "3. That the party No.1 has delivered the actual physical possession of the above said property unto the party No.2 on the date of execution of this agreement but the possession shall be considered finally on making up the balance valuation and paying the same to the party No.1."

A reading of the aforesaid para 3 of the agreement to sell shows that the issue of possession was to be finally considered on making up of the balance valuation and paying the same to the party no.1, i.e. the respondents. This para therefore shows that though in the earlier part of

the agreement to sell there is certainty as to the area of land being 2,000 sq. yds. and the price at Rs. 1,60,000/-, however, in reality there was lack of certainty with respect to the area of 2,000 sq. yds. and consequently there was no crystallization of the price of the property. The reason for such uncertainty was on account of the facts stated hereinafter.

4. In order to appreciate para 3 of the agreement to sell, it is necessary to understand the ownership of the respondents with respect to the suit land. The respondents were undisputed owners/title-holders of a total of 1300 sq. yds. of land, and which area of 1300 sq. yds. of land was purchased by means of two sale deeds dated 22.6.1973, each sale deed being for 650 sq. yds.. The sale deeds were in favour of Sh.Ram Kumar/plaintiff no.1(in the suit of the proposed sellers)/respondent no.1 herein, and Sh. Jai Prakash-plaintiff no.2(in the suit of the proposed sellers), the respondent No.2 herein. Besides the area of 1300 sq. yds., there were also claimed rights by the respondents in a plot of 1000 sq. yds. under a general power of attorney dated 25.6.1973 executed in favour of the aforesaid plaintiffs no. 1 and 2/respondents no.1 and 2. Therefore, there was with the respondents a total area of 2300 sq. yds., of which, there was no doubt with respect to title/ownership of 1300 sq. yds., however, so far as the area of 1000 sq. yds. was concerned, there was no title by a regular sale deed, but, only a general power of attorney.

As referred to here-in-above, when under the agreement to sell possession of the subject land was given by the respondents to the appellant, there was boundary wall only on three sides, but, there was no boundary wall on the fourth side. This was because the portion, in which there was no boundary wall, was partly a dried-up pond. The fact that on the fourth side no wall was constructed also again brings to the fore the fact that there was uncertainty with respect to the area of which possession was actually transferred at the time of executing of the agreement to sell, and also as to finally what would be the area which will be transferred/sold.

5. As per the appellant at the time of the execution of the agreement to sell, possession of about 1000 sq. yds. was given. The possession of the balance area was to be made up subsequently. After the giving of the possession, which was possible finally, there would then take place the consequent correct valuation/price of the land which was to be sold.

6. The appellant pleaded that after entering into the agreement to sell, the respondents started filling up the pond with earth and thus subsequent to the Agreement to Sell gave certain additional area- in the evidence led on behalf of the appellant, this additional area is said to be around 500 sq. yds.. The appellant claimed that the respondents asked for additional payment of Rs. 20,000/- against the promise to give further possession, and consequently the appellant gave two cheques of Rs. 10,000/- each to the respondents on 29.8.1979. At the time of giving of these cheques of Rs. 10,000/- each totalling to Rs. 20,000/-, an endorsement was got made on the back of the agreement to sell which reads as under:

> "Both the parties have mutually agreed to extend the period upto the date 5-10-1977, under the same and similar terms of this agreement and the party No.1 and the party No.2 also shall be bound by the said agreement dated 1-6-1979;
>
> In token thereof both the parties have signed on this 29th day of Aug.1979 at Delhi.
>
> Party No.1
>
> Party No.2"

7. It appeared that the respondents had differences with the Gram Pradhan of the village where the suit land was situated, and the Gram Pradhan objected to filling up of the pond claiming that the said land belongs to Gram Sabha and whereupon disputes were stated to have arisen with respect to a portion of the land. As a result of disputes which arose, proceedings were initiated by the Gram Sabha under the Delhi Land Reforms Act, 1954 with respect to the suit land. In these proceedings before the Revenue Authorities, the appellant herein were also made as a party/respondent and in which proceedings the proposed sellers were the main respondents. Written statements were filed in those revenue proceedings on behalf of the respondents therein i.e. both the proposed sellers and the proposed buyer herein. The revenue proceedings culminated in dismissal of these proceedings in favour of the respondents herein vide the judgment of the Revenue Assistant in which it was held that not only the proceedings initiated by the Gram Sabha were barred by time, but also that the suit property was not owned by the Gram Sabha. I may state that the judgment in the case was passed by the

Revenue Assistant after the evidence was led by all the parties in that case. The subject suits for possession (filed by the respondents herein) and for specific performance (filed by the appellants herein) came to be filed during the pendency of the proceedings before the Revenue Authorities.

8. The basic case of the appellant/proposed buyer in the Court below was that there was lack of certainty as to the area of which possession was transferred and finally to be transferred at the time of entering into of the Agreement to Sell, the additional area transferred thereafter, and consequently, there was lack of crystallization of the area and thus also the consideration/price. It was also the case of the appellant that till there was actual measurement of the area of which possession was given (there being uncertainty about the same) , the price could not be decided, and there was hence no breach of contract on the part of the appellant. It was also the case of the appellant that two cheques of Rs. 10,000/- each given on 29.8.1979 were got dishonoured as the respondents failed to give further possession of the land which would have made up the total area of 2000 sq. yds. which was agreed to be sold. One of the further grounds pleaded as breach of contract on the part of the respondents was the issue of the cloud on the ownership of the suit land.

9. The case of the respondents was that under the agreement to sell only Rs. 80,000/- was paid and not Rs. 1,00,000/- as was written in the agreement to sell and the receipt of the same date. It was pleaded that two self cheques of Rs. 10,000/- each were given at the time of agreement to sell, and which were replaced by the two cheques of Rs. 10,000/- each on 29.8.1979, and which cheques were admittedly dishonoured and therefore, there was breach of contract on behalf of the appellant. It was also pleaded that the appellant had received the complete possession of 2000 sq. yds., and the appellant was unnecessarily backing out of the agreement to sell by refusing to pay the balance sale consideration and therefore again there was breach of contract on the part of the appellant. It was also pleaded that the appellant was not ready and willing to perform the contract and being guilty of breach of contract, was not entitled to specific performance, and therefore, the suit of the respondents for possession and mesne profits was to be decreed. It was also pleaded that the appellant had not come to the Court with clean hands in his suit for specific performance and therefore was disentitled to the discretionary

remedy of specific performance including because the ownership of the respondents of the suit land was wrongly denied by the appellant.

10. In the suit filed by the respondents, the following issues were framed:-

"1. Is the suit properly valued for the purpose of court fee and jurisdiction?

2. Is the suit not barred under Order 2 Rule 2 CPC, in view of the plaintiffs having filed suit No.494 of 1980 before the Subordinate Judge?

3. Is the suit barred on the principles of resjudicata in view of the decision in the said suit No.494 of 1980?

4. Is the suit barred under the provisions of Transfer of Property Act and/or Specific Relief Act?

5. Are the plaintiffs entitled to possession?

6. Whether in the fact and circumstances of the case the plaintiffs are entitled to a declaration for cancelling the agreement dated 1st June, 1979?

7. Are the plaintiffs entitled to these profits/damages? If so, at what rate and for which period?

8. Relief."

11. In the suit filed by the appellant for specific performance, the following issues were framed:-

"1. Is the plaintiff entitled to specific performance of the agreement to sell dt. 1st June, 1979?

2. Have the defendants not performed their obligations under the agreement as alleged?

3. Has the plaintiff been ready and willing to perform his obligations under the said agreement to sell?14.¸ elief."

12. Before this Court, the appeal was argued under the following heads:

(i) Who was guilty of breach of contract, i.e. whether the appellant/ proposed buyer was guilty of breach of contract or were the

respondents/proposed sellers guilty of the breach of contract?

(ii) Whether the appellant was ready and willing to perform his part of the agreement to sell?

(iii) Whether the appellant was entitled to the discretionary relief for specific performance inasmuch as he had not come to the Court with clean hands and also as to whether discretionary relief for specific performance ought to be declined on account of the delay in filing of the suit for specific performance and the subsequent delays which have taken place during the pendency of the suit?

13. With respect to the issue as to who is the person who is the guilty of breach of contract, there would be sub-issues as to whether at the time of entering into the agreement to sell actually only Rs. 80,000/- was allegedly paid as claimed by the respondents or was actually Rs. 1,00,000/- paid. Related aspect will be as to whether the cheques of Rs. 10,000/- each dated 29.8.1979 were, in fact, to substitute the self cheques of Rs. 10,000/- each given at the time of agreement to sell or were towards additional payment. On the aspect of breach of contract, the further issue will also be as to whether complete possession was given of the area of 2000 sq. yds. under the agreement to sell as is being argued on behalf of the respondents, and not less as was the case of the appellant.

14. Let me take up the different aspects with respect to the breach of the agreement to sell. So far as the issue that only Rs. 80,000/- was paid at the time of entering into agreement to sell and not Rs. 1,00,000/-, I am of the opinion that this point raised on behalf of the respondents is quite clearly false. This I say so because not only the agreement to sell recites the factum of the payment of Rs. 1,00,000/- having been received by the respondents, there is also a receipt of the same date of agreement to sell mentioning the receipt by the respondents of the sum of Rs. 1,00,000/-. There is no reference at all in either the agreement to sell or the receipt of an amount of Rs. 20,000/- being given by two self cheques of Rs. 10,000/- each. Not only there is no such mention in the agreement to sell and the receipt of Rs. 20,000/- being given by self cheques of Rs. 10,000/- each, even the subsequent endorsement dated 29.8.1979 does not at all mention that the two cheques of Rs. 10,000/- each given on 29.8.1979 are to substitute the alleged self cheques of Rs. 10,000/- each

given at the time of entering into the agreement to sell. I, therefore, hold that the plea of payment having been made of only Rs. 80,000/- and not of Rs. 1,00,000/- has been falsely raised by the respondents to avoid performance of their obligations under the agreement to sell. In fact, it was legally not open to the respondents to even raise this plea of having received only a sum of Rs. 80,000/- and not Rs. 1,000,00/- as stated in the Agreement to Sell inasmuch as, as per provisions of Sections 91 and 92 of the Evidence Act, 1872, once there is a contract in writing between the parties, there cannot be led parol evidence to contradict or vary the written terms of the agreement. Therefore, both factually and legally it is clear that the appellant did pay at the time of execution of the Agreement to Sell a sum of Rs. 1,00,000/- out of the total price of Rs. 1,60,000/-.

15. The agreement to sell in its para 3 also shows quite clearly that there was lack of clarity with respect to total area of land of which possession was to be finally given to the appellant and it is for that purpose para 3 of the agreement to sell clearly provided that the final valuation will be made of the land subsequently, i.e. the final price which is payable by the appellant to the respondents would be determined after final measurement. In fact this para 3 of the agreement to sell also shows that the parties proceeded on the assumption that strictly the exact area to be sold was not to be exactly 2000 sq. yds. but could be less or more and the final price would be accordingly determined when the area, which is to be sold, is determined and possession transferred. This the respondents seem to have done inasmuch as I have given the history of ownership of the subject land of the respondents, and which shows that there was clear title by means of sale deeds for only 1300 sq. yds. of land, and for the balance land of 1000 sq. yds., 'ownership' was only under a power of attorney besides the fact that it also appeared that part of the subject land was in fact part of a pond. I have already stated above that the area to be sold was not to be exactly 2000 sq. yds. is also clear from the fact that the plot was covered with boundary wall on three sides and there was no wall on the fourth side towards the pond. During the course of hearing in this Court, I note that whereas the appellants claimed that possession with them was of approximately 1360 sq. yds., the respondents claimed that possession with the appellant is approximately 1560 sq. yds.. It has also come in the deposition of the son of the appellant, Sh. Surinder Mohan Sharma (DW1) that an area of approximately

500 sq. yds. of land was given to the appellant subsequent to the agreement to sell after filling up of the part of the pond. Also, I tend to believe the stand of the appellant that the two cheques of '10,000/- each were given on 29.8.1979 were dishonoured inasmuch as the respondents failed to give possession of the complete balance land totalling to 1000 sq. yds. as was promised and they only gave possession of approximately 500 sq. yds. after the agreement to sell was entered into.

16. In sum and substance therefore at each stage, whether of the time of entering into the agreement to sell; subsequently when two cheques of Rs. 10,000/- each were given on 29.8.1979; when possession of further area of approximately 500 sq. yds. was given, there were always uncertainties and lack of finality with respect to the area of which possession was transferred and to be finally transferred, of the ownership, and consequently there was no final crystallization of the price of the property. In such a scenario, it cannot be said that the stage of performance by the appellant under the agreement had come, and therefore, there does not arise any issue of breach of contract on the part of the appellant as alleged. This aspect of breach will also cover the issue of readiness and willingness inasmuch as there is readiness and willingness if there is certainty as to the area as also the price, and once there is no certainty as to the area and the price it cannot be said that the appellant should still be held liable to pay the balance price. The balance price was to be payable only when the exact area, which the appellant was to have had, was determined, and a sale deed was executed with respect to that specific area.

17. At this stage, I must turn to the aspect, and which is an important aspect, on the basis of which trial Court has held that the appellant is guilty of breach of contract and setting up a false case that he only had with him about 1000 sq. yds. at the time of entering into agreement to sell whereas allegedly he actually always had 2000 sq. yds.. The trial Court has arrived at this finding from the alleged deposition of the appellant in the proceedings before the revenue authorities and the consequent judgment of Revenue Assistant on the basis of that said statement/deposition.

In my opinion, the finding of the trial Court in this regard borders on perversity. This I say so because when we read the statement of the appellant given in the proceedings before the Revenue Assistant all that

was said by the appellant was that the appellant was entitled, under the agreement to sell, to 2000 sq. yds. and that he could have been in possession of approximately 2000 sq. yds., however this statement nowhere shows the so called categorical admission of the appellant of being in possession of 2000 sq. yds. In order to appreciate the perversion in the findings of the trial Court in reading this statement, the relevant part of the deposition given on behalf of the appellant in proceedings before the Revenue Assistant can be read and the same reads as under:-

> ".....
>
> I cannot tell the area of my property and the measurement thereof. It is incorrect to suggest that the area in my occupation is more than 2000 sq ft. I cannot say that the measurement of the foundary property which is in my occupation the width and length. Even after the filling of the present suit by the G.S. I have not measured the area of the foundary in my occupation present. I did not measure the area of my property even when I filed a suit in the High Court.
>
> .....
>
> I am saying so approx 1000 sq yds is in my possession although I have not measured the same till now. This is just my presumption."

18. Surely, the aforesaid statements only compound the confusion and cannot be said to give any clarity with respect to the alleged fact that, in fact, 2000 sq. yds. of area of land was in possession of the appellant. I therefore do not find any reason to agree with the findings of the trial Court, and which is based on the following portion of the judgment of the Revenue Assistant, that the appellant had with him 2000 sq. yds., and which was a finding basically on the portions of the statement reproduced above:-

> "He admitted that he cannot tell the area of his property and its measurement. But he said that the area is not more than 2000 sq. yards under his possession. He admitted that he has not measured the area of his property in his occupation. He admitted that he cannot give the total area of the shed. He admitted that he had seen the Lal Dora Certificate in respect of the land in dispute at

the time of its purchase, which were in the name of the party No.2(respondent No.1). He admitted that he has given in writing the taking of the possession of 2000 sq. yards, at the time of execution of the agreement. He admitted that he does not know the correct area under his possession and is saying 1000 sq. yards in his possession just as his presumption."

19. The relevant findings and conclusions made by the trial Court in this regard are contained in para 29 of the impugned judgment, and which reads as under:-

"29. In view of such admissions made by the defendant before the SDM concerned and the certified copy of the statement being proved by the plaintiff, I find that the possession of 2000 sq. yards has been duly admitted by the defendant, that has been handed over at the time of execution of the agreement to sell. Therefore, there was no reason or justification for the defendant to raise the dispute by the telegram and the notice dt. 4.10.1979 and 5.10.1979, that the plaintiff had handed over 1000 sq. yards of land the plaintiff has also has to hand over the 1000 sq. yards of land. These flimsy grounds have been raised by the defendant in response to the letter dt. 15.9.1979 sent by the plaintiff after the said two cheques have been dishonoured. Had such plea been taken before the dishonour of the said cheques had been intimated to the defendant and defendant was called upon to make the payment of Rs. 80,000/- instead of Rs. 60,000/- being the balance amount for sale consideration at the time of execution of the sale consideration at the time of execution of the sale deed, the matter could be different. Thereafter, no payment had been offered and no letter has been sent for tendering the payment either in lieu of the sale consideration as well as in lieu of the dishonour of the cheques. Therefore, I find that the defendant had committed the breach of the contract in that regard and for the breach of the contract, the plaintiff was entitled to restore the possession as claimed in the suit."

20. I therefore set aside the findings and conclusions of the trial Court contained in para 29 of the impugned judgment and hold that there is no categorical admission, much less any clarity as to the appellant in fact having already received possession of 2000 sq. yds. of land. It is

quite clear that there was never any specific joint measurement, by both the parties, at any stage delineating exact area, much less duly supported by a site plan signed by the parties, so that there could be clarity to the exact area of land of which possession was given to the appellant. All that emerges from the record is that parties intended to enter into an agreement to sell for approximately 2000 sq. yds.; certain area plus or minus; and, possession of certain portion of the land was given under the agreement to sell, thereafter certain more area was also given, however, even as on today, the appellant does not have the area of 2000 sq. yds. inasmuch as even the case of the respondents before this Court as per the statements made by their counsel is that the appellant has 1560 sq. yds. of land.

21. Learned counsel for the respondents laid great stress, during the course of arguments, that the appellant has not come to the Court with clean hands and therefore he should be denied the relief of specific performance. I have, however, frankly failed to understand any of the arguments urged on behalf of the respondents as to how the appellant did not come to the Court with clean hands.

The first point under this head of unclean hands raised on behalf of the respondents was that there was contradiction between the pleadings and the evidence of the appellant because in the pleadings it was stated that possession of 1000 sq. yds. was given whereas there is actual possession of 2000 sq. yds. of land with the appellant. Besides the fact that the plaint only mentions the area of 1000 sq. yds. approximately as on only a specific day i.e. the date of the Agreement to Sell and not subsequently, I also do not find any admission in the evidence led on behalf of the appellant that the appellant has in his possession 2000 sq. yds. of land. Para 6 of the plaint mentions that at the time of entering into the agreement to sell about 1000 sq. yds. was given and this pleading cannot be confused so as to make out a case thereon that there is an alleged conflict that at one place it is stated that possession of 1000 sq. yds. was given and subsequently it is stated that 2000 sq. yds. is given.

Also, I find no merit that there is unclean hands on the ground that the appellant got dishonoured two cheques of Rs. 10,000/- each and therefore has committed breach of contract inasmuch as this aspect has more to do with breach of contract by the appellant and not to do with the issue of unclean hands.

Further, merely because at the time when the cheques given on 29.8.1979 were got dishonoured, no notice was sent by the appellant giving the reason for dishonouring them, cannot really be an issue of unclean hands as argued on behalf of the respondents. I may note that the appellant has already taken up a case and deposed accordingly that payment by the cheques was conditional upon giving complete possession and since complete possession was not given, these cheques were got dishonoured. Surely, in law it is not required that on each action and a reaction, a legal notice has to necessarily follow. This argument therefore raised on behalf of the respondents that legal notice ought to have been sent by the appellant after getting the cheques of Rs. 10,000/- each, given on 29.8.1979, dishonoured and is thus an issue of unclean hands, is wholly without merit.

22. Learned counsel for the respondents finally argued that discretionary relief of specific performance should not be given in the facts of the present case where out of Rs. 1,60,000/- only Rs. 80,000/- is paid and the appellant already had with him complete area of 2000 sq. yds. under the agreement to sell. In fact, at one stage, it was sought to be argued on behalf of the respondents that not only 2,000 sq. yds. of land is with the appellant but, in fact, possession of 2300 sq. yds. of land was given to the appellant inasmuch as respondents were owners of 2300 sq. yds. of land and possession of total area of this 2300 sq. yds. of land was given to the appellant. In my opinion, in the facts of the present case, the issue of discretionary relief will not be an issue to be held against the appellant inasmuch as the situation which has emerged in the present case of lack of clarity of the area, lack of clarity of the price, disputes with respect to a portion of land of which ownership was claimed by the respondents, handing over of further land after the agreement to sell was entered into, there being no wall on the fourth side and which was a pond and which was filled up by the respondents etc are all aspects which show that it cannot be said that there exist such clear cut circumstances that it was the appellant who had received a specific area of 2000 sq. yds. and he was refusing to pay the balance amount of Rs. 60,000/-. In fact, the present situation is of the making of the respondents who were seeking to blow hot and cold and avoid performance of their obligation under the agreement to sell. Also in my opinion, the issue of denial of discretionary relief cannot be raised by the respondents who are themselves guilty of breach of contract. Further,

the discretion in granting or denying the specific performance is a judicial discretion to be exercised as per the facts of each case and once it is clear that agreement to sell has in fact been acted upon, substantial price i.e. over 60% of the price is paid, possession of the substantial portion of the land has been given to the appellant, it cannot be said that specific performance should be denied in the facts of the present case once we take note of Section 20(3) of the Specific Relief Act, 1963. Some of the instances of the Court being entitled to refuse the discretion of specific performance, are contained in Section 20(2) and the facts of the present case do not fit in any sub-provision of the said Section 20(2) inasmuch as so far as the scenarios falling under sub Sections (b) & (c) of Section 20(2) are concerned, I am in the later part of this judgment directing a forty times increase in the balance price payable, if of course there will remain any balance price payable.

23. I have also had an occasion to consider this aspect in the judgment reported as **M/s. Nehru Place Hotels Ltd. vs. Smt. Kanta Bala,** 2011(123) DRJ 148, wherein after considering many Supreme Court judgments on this aspect, I have observed as under:

> 16(i). In my opinion, the argument as raised by the learned senior counsel for the appellant/defendant that instead of specific performance only the relief of damages ought to have been granted deserves rejection for the various reasons stated herein after. What has been argued before this Court is that there has been considerable rise in the price of the property and therefore specific performance should not be granted. Reliance for this proposition was placed on behalf of the appellant/defendant, on the judgments of the Supreme Court reported as **Kanshi Ram Vs. Om Prakash Jawal and Others** (1996) 4 SCC 593, **M. Meenakashi and Others Vs. Metadin Agarwal (dead) by LRS.** (2006) 7 SCC 470, **Nirmala Anand Vs. Advent Corporation (P) Ltd.** AIR 2002 SC 3396 and **Jai Narain Parasrampuria (dead) and Others Vs. Pushpa Devi Saraf and Others** (2006) 7 SCC 756.
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> .....
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> 17(i). Let me now assume that a ground was raised in the written statement and in the grounds of appeal that instead of

specific performance alternative relief of damages should be granted and deal with the same. Let us also assume that this has also been proved in evidence, though it has not been so proved and as noted in para 16(iii) above. There is no quarrel to this proposition that a Court can and does in the facts and circumstances of a particular case use its discretion, which is a judicial discretion, so as to deny the relief of specific performance and grant only the relief of damages. A reference to the decision of **Kanshi Ram** (supra) cited by the learned senior counsel for the appellant/defendant shows that the said decision is in the nature of an order and there is no discussion in the same as to what were the facts and circumstances due to which the Supreme Court granted the alternative relief of damages instead of specific performance. This becomes clear from para 5 of the said judgment which is relied upon by the learned counsel for the appellant/ defendant and which reads as under:-

> "5. Having regard to the facts of this case and the arguments addressed by the learned counsel, the question that arises for consideration is: whether it would be just, fair and equitable to grant the decree for specific performance? It is true that the rise in prices of the property during the pendency of the suit may not be the sole consideration for refusing to decree the suit for specific performance. But it is equally settled law that granting decree for specific performance of a contract of immovable property is not automatic. It is one of discretion to be exercised on sound principles. When the court gets into equity jurisdiction, it would be guided by justice, equity, good conscience and fairness to both the parties. Considered from this perspective, in view of the fact that the respondent himself had claimed alternative relief for damages, we think that the courts would have been well justified in granting alternative decree for damages, instead of ordering specific performance which would be unrealistic and unfair. Under these circumstances, we hold that the decree for specific performance is inequitable and unjust to the appellant."

The decisions in the cases of **M. Meenakashi and Others** (supra) and **Jai Narain Parasrampuria (dead) and Others** (supra) lay down the same ratio and holds that in certain cases once there is increase in prices during the pendency of the litigation or some increase in cost, instead of specific performance, the relief of damages can be granted. Reliance is also similarly placed on the decision of **Nirmala Anand** (supra) and para 6 whereof reads as under:-

> "6. It is true that grant of decree of specific performance lies in the discretion of the Court and it is also well settled that it is not always necessary to grant specific performance simply for the reason that it is legal to do so. It is further well settled that the Court in its discretion can impose any reasonable condition including payment of an additional amount by one party to the other while granting or refusing decree of specific performance. Whether the purchaser shall be directed to pay an additional amount to the seller or converse would depend upon the facts and circumstances of a case. Ordinarily, the plaintiff is not to be denied the relief of specific performance only on account of the phenomenal increase of price during the pendency of litigation. That may be in a given case, one of the considerations besides many others to be taken into consideration for refusing the decree of specific performance. As a general rule, it cannot be held that ordinarily the plaintiff cannot be allowed to have, for her alone, the entire benefit of phenomenal increase of the value of the property during the pendency of the litigation. While balancing the equities, one of the consideration to be kept in view is as to who is the defaulting party. It is also to be borne in mind whether a party is trying to take undue advantage over the other as also the hardship that may be caused to the defendant by directing the specific performance. There may be other circumstances on which parties may not have any control. The totality of the circumstances is required to be seen."

(ii) The proposition of law that relief of specific performance is

a discretionary relief is in fact statutorily provided in Section 20 of The Specific Relief Act, 1963 which contains various instances where specific performance is not granted but only damages are granted. Section 20 has been expounded upon by the Supreme Court in various decisions, including in the decisions which have been cited by the learned senior counsel for the appellant/ defendant. However, a reference to each of these cases shows that the discretion is a judicial discretion which is exercised in the facts of each case and increase in price (or cost) is only one of the factor which has to be considered in the totality of the facts of each case. For example, a buyer may have paid only a very nominal consideration of about 5% to 10% of the total price and in which circumstances, the Court may feel that instead of specific performance alternative relief of damages is to be granted. This is to be contrasted with the case where a buyer has paid most of the price or after paying the price has received actual possession of the property and in which cases the relief of specific performance is granted and not the alternative relief of damages. Further, there are many cases and circumstances where there is caused undue hardship or inequity on account of specific performance therefore instead of specific relief only the relief of damages is granted. In the present case, I do find it a very strained logic of the appellant/defendant to argue that as a builder since his property became more valuable, (inasmuch as the price has increased), instead of specific performance, damages should be granted. The argument in fact is totally without substance because if this argument is accepted every builder whose project is delayed, whether for genuine reasons or not, will come and say that now contemporary prices during the litigation are much higher and therefore instead of specific performance only damages must be granted. In fact, I may note that the decision of **Nirmala Anand** (supra) in fact goes against the appellant/defendant because what is held in that judgment is that ordinarily specific performance ought to be granted and only very rarely the relief of specific performance is to be denied. In the present case it is the appellant who is the defaulting party and who in any case is getting the requisite escalated cost. I have also in the subsequent part of this judgment not only granted interest (which was not

granted by the Trial Court) to the appellant/defendant but a very high one. I therefore reject this argument of the learned counsel for the appellant/defendant that only damages should have been granted and not specific performance. In fact, I have already noted above if there is any equity the same is towards the respondent because almost the entire basic price was paid and the dispute for the balance and additional payment became inextricably linked with the illegal and unreasonable action of the appellant/defendant in changing the prime location and also reducing the area which had been agreed to be sold. Further it is the appellant/defendant itself who started using the space which was constructed for being allotted to the respondent/plaintiff, as its own office, and as so noted by the trial Court in the impugned judgment. The injustice/prejudice/undue hardship will thus be to the respondent/plaintiff if specific performance is not granted."

I therefore hold that there are no valid reasons for denying the relief of specific performance in the facts of this case as detailed hereinabove.

24. The issue now boils down to the fact that should specific performance be granted because there is lack of clarity today as to the exact area in possession of the appellant and consequently lack of clarity in the price. The other argument raised on behalf of the respondents relying upon the judgment of the Supreme Court in the case of **K.S.Vidyanandam & Ors. Vs Vairavan,** AIR 1997 SC 1751 that on account of the delays in filing of the suit for specific performance and subsequent delays, the relief of specific performance should be denied as today the respondents cannot get a property of the equivalent value of the balance price of Rs. 60,000/- which could have been purchased by the respondents in the year 1979, will stand decided against the respondents in view of my observations made in the case of **Nehru Place Hotels Ltd.** (supra).

25. The facts of this case in fact, in my opinion are tailor-made, so to say, for invoking of the provision of Section 12 of the Specific Relief Act, 1963 and sub Sections 3 and 4 thereof. Under Section 12, specific performance can be granted even of a part of the contract. In the present case, sub section 3 of Section 12 squarely applies. In order to appreciate the reasoning on the basis of Section 12, I would like to reproduce the entire Section and which reads as under:-

"12. Specific performance of part of contract.-

(1) Except as otherwise hereinafter provided in this section the court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed by only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either-

(a) forms a considerable part of the whole, though admitting of compensation in money. oar

(b) does not admit of compensation in money, he is not entitled to obtain a decree for specific performance; but the court may, at the suit of other party, direct the partly in default to perform specifically so much of his part of the contract as he can perform, if the other party-

(i) In a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and a case falling under clause (b), the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stand on a separate and independent footing from another part of the same contract which

cannot or ought not to be specifically performed, the court may direct specific performance of the former part."

26. As per Section 12(3)(b), a party to a contract including the buyer can insist on specific performance of a part of the contract by proportionately reducing the consideration to the proportionately reduced area of the land of which ownership will have to be transferred under the agreement to sell. Learned senior counsel for the appellant states that the appellant relinquishes all other claims under the agreement to sell, and which is required of the appellant by virtue of Section 12(3)(b)(ii) of the Specific Relief Act, 1963. Accordingly, by virtue of the relevant part of Section 12(3) of the Specific Relief Act, 1963, specific performance in this case will have to be granted with respect to the area which is in possession of the appellant, being the land of which ownership vests with the respondents, and ownership of which area has to be transferred to the appellant by specific performance of the subject agreement to sell dated 1.6.1979. However, this cannot take place unless it is known as to what is the exact area of the land which is presently in possession of the appellant. The appellant claims there is an area of approximately 1360 sq. yds. with him, plus of course the area under the boundary walls, whereas the respondents on the other hand contend that the appellant has around 1560 sq. yds. of land in his possession.

27. Accordingly, while accepting the appeal and setting aside the impugned judgment of the Trial Court dated 25.1.2003, it would be required that a competent person be appointed to measure the exact area of land which is in the possession of the appellant, so that the balance price which may be payable by the appellants to the respondent for specific performance of the subject agreement to sell can be decided. Today, no orders can be passed as to what is the balance amount which the respondents will be entitled to inasmuch as I intend to modulate the amount which would be payable to the respondents depending on the exact area which is found to be in possession of the appellant. However, I hold that whatsoever would be the balance price, which would be if payable, should be multiplied by 40 times inasmuch as I would take the rough appreciation of the prices in a city like Delhi in these last 33 years from 1979 till date at approximately 40 odd times. Of course the factor of 40 times is also taken not only with reference to the increase of prices from the date of the Agreement to Sell to today but also as per the facts

of the case where I feel that multiplication of balance price by forty times will meet the ends of justice. I have also taken note of the fact that the subject land is not situated in the prime localities of Delhi such as the South Delhi and Central Delhi, and is situated in North Delhi which did not rapidly urbanise. That the Courts have the power to alter the price in order to promote equity, justice and good conscience is no longer res integra and direct judgment of the Supreme Court entitling Courts to suitably alter the price payable to a seller on account of passage of time is the judgment of the Supreme Court in the case of **Nirmala Anand vs. Advent Corporation (P) Ltd.** 2002(8) SCC 146. However, I may hasten to clarify that this observation with respect to multiplying the balance price by 40 times is made by me on the assumption that in fact considering the actual area with the appellant taken with the price already paid of Rs. 1,00,000/-, the price paid to the respondents is less than as compared to and as a proportion to the total price of Rs. 1,60,000/- i.e. there would be payable balance price by the appellants as they would be having proportionately larger area than the area which ought to be with the appellant when this area of which appellant is in possession is taken in proportion to the price paid being Rs. 1 lakh out of the total price of Rs. 1,60,000/-.

28. Appeal is therefore accepted. Impugned judgment and decree dismissing the suit of the appellant for specific performance and decreeing the suit of the respondents for possession and mesne profits is set aside. Suit of the respondents for possession, declaration, damages, etc. shall stand dismissed. Suit of the appellant for specific performance shall stand decreed. In order to pass further orders with respect to passing of the exact directions for specific pe``rformance, since the area of the land has to be measured, I direct both the parties to file in Court within four weeks an agreed name of an Architect, and who can be appointed to take the exact measurement of the area of the land in possession of the appellant. I am directing the giving of a common name in order to avoid further prolongation of litigation because if an Architect as suggested by one of the party is appointed or even if an independent Architect is appointed, parties may want to file objections even with respect to the measurement, seeing bitterness of the litigation.

29. List for further proceedings on 9th May, 2012 and on which date counsel for both the parties will give the name of the Architect

acceptable to both the parties who will be required to go to the spot and take actual measurement of the area in possession of the appellant and the land which was the subject matter of the agreement to sell dated 1.6.1979. Other related or consequential directions, will also, if so required, be passed on the next date of hearing.