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she was bathing—She immediately shouted for help: her mother, Smt. Dipali Dey Sarkar went outside and found nobody—It was alleged that the matter was immediately reported to the Chief Medical Officer, Dr. A.C. Karmakar over telephone; acting on his advice, she instructed the Gate Commander to stop the petitioner from leaving the BSF Campus—The BSF authorities thereafter investigated the matter and ultimately recorded the petitioner's admission; a written report was prepared and a proceeding was drawn-up against the petitioner under Rule 49 of the BSF Rules, 1969—In the course of the proceedings, it was alleged that the BSF authorities seized one Kodak Camera make EC-300 with a photo reel from the house of Constable Kunnu Thamaria, adjacent to the quarters of Dr. Sarkar—The seizure memo stated that the camera was used to take pictures of Dr. Sarkar—The petitioner was placed under open arrest on 20.06.2005 and taken into custody by the BSF the same day—By order dated 21.06.2005, the Commandant of 128 BN BSF issued an order for recording of evidence, directing that the proceedings in that regard should be completed by 29.06.2005—Petitioner nominated one Sh. Anil Kumar, Assistant Commandant as friend of the accused; this was also approved by the appropriate authority on 22.07.2005—It is stated that even though an Assistant was nominated to the petitioner to defend his case, the Security Court which held the proceedings on 23.07.2005, did not permit him to ask any questions during the trial, investigated under Section 157 of the BSF Act, 1968—It is alleged that the Court on 23.07.2005 recorded the guilt, allegedly admitted by the petitioner, without complying with the mandatory provisions of the Act and Rules and proceeded to pronounce him "guilty" and sentenced him to dismissal from service—This order was questioned by the petitioner in an appeal preferred to the concerned authority, i.e. the Deputy Inspector General (DIG), on 29.08.2005—This appeal was apparently rejected subsequently—Hence the present Petition—Petitioner contended inter alia that he was denied a fair trial on account of various infirmities which

obitiated the proceedings of the Security Force Court (Hereafter "the Court")—It was highlighted that the alleged confessional statement said to have been made by the accused whilst in custody could not be the basis of his guilt nor was it admissible in evidence against him—None of the witnesses had actually seen him using the camera or its flash, nor even witnesse him fleeing the spot—It was submitted that this deposition entirely undermined the prosecution case and furthermore, neither was the camera or its contents sent for examination nor was it proved in any manner known to the law that it belonged to the petitioner or was connected with him—Respondent contended inter alia that the procedure prescribed by law was duly followed before imposing the punishment of dismissal upon the petitioner. Held—Petitioner's arguments are two fold, i.e. procedural infirmities in regard to recording of evidence, and that the evidence on record did not implicate him—Records produced during the hearing reveal that in this case, the Court was both convened and presided over by, the petitioner/accused's Commanding Officer, i.e. Commandant Ghanshyam Puruswami—This serious infirmity would, in the opinion of this Court, invalidate the GSC proceeding—The absolute bar in regard to the participation of the Commandant of the accused, who also convened the Court, was prescribed apparently with a purpose, i.e. to eliminate all semblance of bias—Entire structure of Rules 60 and 61 is to ensure a degree of impartially, by requiring officials of different battalians to man the Courts—If the Commandant, who is in charge of the unit, and is expected to be in the know of such matters, is prohibited from participating in the Court, the rationale obviously is to ensure that bias—Real or perceived is eliminated altogether—The violation of this rule, in the opinion of the court, invalidates the proceedings. Entire finding of guilt was based on the confessional statement extracted under duress, and not given with due knowledge of the petitioner's rights—On the evidence led, there was no occasion for the petitioner to have reasonably given a confessional statement—A close analysis of the

evidence would highlight the following circumstances: (1) PW-1 noticed two camera flashes, whilst she was bathing, around 7-45 PM on 17th June, 2005, after she asked the petitioner to leave the premises. Despite her alert, no one was caught. PW-2 corroborated this. PW-3 who reached the spot, also could not see anyone (2)—The petitioner was asked to report back immediately; he did so. During the intervening period, he went to Const. Kunnu's house, and borrowed boots. This was verified from the latter's wife and sister in law (PW-9) the same day. PW-9 did not mention anything about any camera or the petitioner having asked her to hide it, when officials enquired from her (3) No incriminating object or article including the camera was seized from the petitioner's possession. It is unclear as to who owned the camera seized by the respondents (4) The petitioner was placed under open arrest the next day. He according to PW-7, PW-8 and another witness, confessed to having clicked with the camera and having hidden it with PW-9. The next day, PW-9 made another statement, leading to recovery of the camera. This internal contradiction between the version of PW-9 assumes importance because in her first statement, she never said anything about the camera. Her deposition in the Record of Evidence proceeding was over a week later, i.e. 25.06.2005 (5) No written record of the confession said to have been made on 18th June, 2005 exists; (6) Most importantly, the camera reel (though recovered on 18th June, 2005) was never developed. It was the best evidence of the petitioner's culpability.

CODE OF CRIMINAL PROCEDURE, 1973—Section 482—Inherent power—Quashing—Companies Act, 1956—Section 159—Section 162—Non compliance of the provisions of the Act—Liability of Director —Resignation before initiation of prosecution—Whether offences under Section 159 read with Section 162 continuing—M/s AKG Acoustics (India) Ltd. incorporated on 7.3.1988 as public limited company—

Petitioner inducted as director on 30.01.1997—Resigned on 28.07.1997—Notice dated 17.02.2000 issued by R2 Registrar of Companies (ROC) to AKG Acoustics and its director—for non compliance of some provisions of the Act—Notice also addressed to the petitioner showing him as a director—Petitioner replied on 25.04.2000 regarding his resignation—Petitioner sent another reply on 28.08.2000 enclosing the copy of resignation—ROC filed 6 cases on 05.07.2007 against AKG Acoustics and directors including petitioner—contended—Resignation was in the knowledge of respondent no.2—He could not have been prosecuted as director—Moved an application on 23.04.2009 in the Court of ACMM for dropping of the proceedings—R2 failed to respond to the application for more than three years—Approached the High Court—No counter affidavit filed—Deputy Registrar examined in respect of averment—Admitted the reply to the notice—R2 argued unless Form 32 is received—It is difficult to accept that the petitioner has resigned—Held—The resignation was intimated to ROC—ROC in two complaints not preferred to prosecute the petitioner as one of its directors accepting the averments of petitioner about resignation—Factum of resignation has come to the notice of ROC on 25.04.2000—Petitioner could not have been prosecuted for violation under Section 159 and Section 162 of the Act—Petition allowed—Prosecution quashed—However, the Court did not express any opinion whether the offence under Section 159 read with Section 162 are continuing offences or not.

— Section 482—Quashing of complaint—Negotiable Instruments Act, 1881—Sections 138 and 141—Complaint—Code of Criminal Procedure Section 251—Notice—Complaint under section 138 NIA—Sought to prosecute as partners—The firm prosecuted through its proprietor/partner and respondent no.2 prosecuted as proprietor/partner/authorised signatory—Averred that the firm is a partnership firm and accused no.2 to 5 were

Respondent contended complaint specifically states that rent agreement and rent receipts forget by the petitioner to make false ground—who has forget the documents is to be gone into during the trial—Held—It cannot be said that the allegations made in the FIR do not disclose commission of a cognizable offence—Plea of the petitioner cannot be accepted at this stage—Not able to show that FIR is an abuse of the process of the Court—Petition dismissed.

Sanagul v. *State NCT of Delhi & Anr.* *1514*

— Section 482—Inherent power—Quashing of FIR—Defence of the Accused—Negotiable Instrument Act—Section 138—Territorial Jurisdiction of Court at Delhi—Complaint filed by the R2 for dishonour of the cheque against petitioner—Petition filed for quashing of complaint—Contended—Cheque issued towards delivery of TATA safari car required to be returned on actual delivery—Cheque delivered in Lucknow drawn on ICICI Bank, Gomti Nagar, Lucknow—Presentation of the Cheque at Delhi Bank does not confer jurisdiction—Observed—complaint under S. 138 NI Act read with 420 IPC-averred-cheque for Rs. 9,70,000/- issued to R2 in discharge of petitioner's liability towards a friendly loan of Rs. 9,50,000/- doanoblained in Delhi in May, 2010—Cheque included amount of Rs. 20,000/- towards interest-handed over in Delhi—Held—Petitioner's averment—Cheque was towards the amount of TATA safari, won by R2 as a result of bonus point in respect of business deal and have no connection with Delhi could not be looked into—Further held—Power of quashing could be exercised where allegations made in the FIR—Even if taken on its face value and accepted in entirety—Do not prima facie constitute any offence—Petition dismissed.

Madhumita Kaur v. *Zile Singh* *1335*

CONSTITUTION OF INDIA, 1950—Article 227—R-3, incorporated as a foreign company provided loan to petitioner by taking recourse to bill discounting facility and by availing bank guarantee limits in 1990—Thereafter business of R-3 was

restructures and it got merged with another Japanese bank in 1995 and merger was approved on 01.04.1996 and hence new entity emerged with which another bank got merged, making the R-3 as per R-3, requisite filings were made before the concerned authority—Form 49 was filled as per R-3 with the RoC and requisite filings were done with RBI to bring on record change of name—RBI carried out change of name of R-3 and thereafter authorized R-3 to open a branch in Bombay as per R-3, Form 49 was filed with ROC on 05.08.1996 but this fact was denied by the petitioner contending that no filing was done by R-3 with the RoC on 05.08.1996 and that Form 49 was filed with ROC by R-3 on 03.04.02, that too in pursuance of an application filed in the recovery proceedings before DRT Bangalore—Petitioner also filed criminal complaint under Section 156(3) Cr.P.C. in which the Magistrate ordered investigation but the investigation conducted twice revealed that no cognizable offence was committed by R-3 or its officers, so the Magistrate dismissed the complaint, against which the petitioner filed revision petition which also was dismissed by way of present petition, petitioner sought writ of mandamus directing R-1 & R-2 to treat the filings of R-3 as null and void and writ of mandamus directing R-1 & R-2 to initiate prosecution against R-3 to R-5 under IPC and Companies Act—From records, it emerged that ROC seems to have no record of filings made by R-3 as contended on 05.08.1996; that non-compliance with Section 593 Companies Act was brought to the notice of R-3 by ROC vide letters dated 05.09.01 and 03.12.01; that thereafter R-3 realized that the filings made in the record of ROC were missing, so after satisfying the ROC that it had in fact originally filed Form 49 on 05.08.1996, officers of R-3 reconstructed the record of ROC alongwith various documents like forwarding letter, copy of E-receipt and copy of letter intimating name change—Held, in view of documents on record, it is quite possible that having received letter of ROC, a revised duplicate form was filed by R-3 and so long as there is nothing to suggest that Form-49 was not filed on 05.08.1996, the subsequent filings, which

were allowed by ROC by way of rectification and curing of deficiencies, would not carry the matter any further so far as petitioner is concerned, as such prayers sought by petitioner cannot be granted.

Klen & Marshalls Manufactures & Exporters Ltd. v. *Union of India and Ors.* *1265*

— Article 227—Indian Penal Code, 1860—Criminal Procedure Code, 1973—Section 482—Inherent power—Quashing of FIR—Defence of the Accused—Negotiable Instrument Act—Section 138—Territorial Jurisdiction of Court at Delhi—Complaint filed by the R2 for dishonour of the cheque against petitioner—Petition filed for quashing of complaint—Contended—Cheque issued towards delivery of TATA safari car required to be returned on actual delivery—Cheque delivered in Lucknow drawn on ICICI Bank, Gomti Nagar, Lucknow—Presentation of the Cheque at Delhi Bank does not confer jurisdiction—Observed—complaint under S. 138 NI Act read with 420 IPC-averred-cheque for Rs. 9,70,000/- issued to R2 in discharge of petitioner's liability towards a friendly loan of Rs. 9,50,000/- doanoblained in Delhi in May, 2010—Cheque included amount of Rs. 20,000/- towards interest-handed over in Delhi—Held—Petitioner's averment—Cheque was towards the amount of TATA safari, won by R2 as a result of bonus point in respect of business deal and have no connection with Delhi could not be looked into—Further held—Power of quashing could be exercised where allegations made in the FIR—Even if taken on its face value and accepted in entirety—Do not prima facie constitute any offence—Petition dismissed.

Madhumita Kaur v. *Zile Singh* *1335*

— Article 226—Recruitment Guidelines—Disciplinary Proceedings—Brief Facts—An advertisement issued in September 2000 for recruitment of Constables/General Duty (CT/GD) in the Central Reserve Police Force (CRPF)—Petitioner posted at Lucknow and was initially inducted as a

member of the Lucknow Recruitment Board—Petitioner assigned specific duties to the various members of the Lucknow Recruitment Board vide a communication dated 19th December, 2003—A merit list compiled by the Recruitment Board was sent on 29th February, 2004 to the ADIGP, CRPF for his scrutiny as per instructions—One day after the submission of the merit list, the ADIGP gave directions on 1st March, 2004 for dispersal of the Recruitment Board and returned the members to their respective units—Instant case raises a controversy with regard to the interpretation of Clause XV(C) of the Recruitment Guidelines issued by the Directorate General, CRPF on 9th September, 2000 and the implementation thereof—Clause (C) stipulated that the result of all the shortlisted candidates who were medically examined and interviewed shall be compiled on the last day of the recruitment programme by each center and category wise merit lists for each centre would be prepared by the recruitment board authority of the centre in a state designated by ADG Zone/IGP sector—Petitioner with Sh. C.M. Thomas had compiled such result of the Lucknow Recruitment Board which was sent to the ADIGP on 29th February, 2004—No objections were received with regard to the compilation submitted by the Lucknow Recruitment Board which was presided over by the petitioner—A charge sheet dated 18th May, 2007 was issued to the Petitioner whereby it was alleged that while posted and functioning as Presiding Officer of the rectt. Board of Ct/GD Male/Female at GC, CRPF, Lucknow centre held during December 2003 to February 2004, Petitioner committed an act of remissness in discharging his duties in that the while preparing and submitting the merit list of selected personnel for enlistment as Ct/GD, ignored the instructions issued in connection with preparation of merit list of short listed candidates, by the Directorate General, CRPF vide letter No. R.II-15/2000-Pers-II dated 09.09.2000, which resulted into inclusion of 23 unqualified candidates of SC/ST categories in the merit list and issue of offer of appointment to them—Respondents

suffering from behavioral disorder and had applied for transfer on recommendation of doctors—Yet he was transferred to different places in Orissa, Maharashtra, Punjab, etc.—Petitioner was also treated over this period at various Railway hospitals—On the 14th of September 2009, the Petitioner was sent to the 6th Battalion Dayabasti to undertake the punishment of extra fatigue duty—Medical Board Report of the examination of Petitioner stated that the patient suffers from paranoid schizophrenia—However he is asymptomatic currently and is fit to join duty without arms—He is also advised to continue treatment on OPD basis—No other medical record or opinion is forthcoming on record—Charges were framed against the petitioner vide charge sheet dated 30th September, 2009 which was served upon Petitioner on 4th October, 2009 directing him to appear before the inquiry officer on the 5th of October, 2009—Petitioner assails the disciplinary proceedings conducted against him pursuant to the charge-sheet; inquiry report and; the order of the disciplinary authority agreeing with the recommendations of the inquiry officer and holding that the petitioner was guilty of the charge and imposing the penalty of compulsory retirement upon him—Petitioner has claimed that he was suffering from behavioural disorder and had applied for transfer on recommendation of doctors—Charge-sheet was issued to him in regard to an alleged incident, in violation of Rule 153.5 of the RPF Rules, 1987—It was also contended that the respondents proceeded post haste with the inquiry proceedings and six witnesses were examined in support of the charges and also that the petitioner was not given any opportunity to engage the services of the defending officer—Held—In the instant case, on 4th October, 2009 the communication was served upon the petitioner enclosing the allegations against the petitioner as well as the charge sheet—By the same communication, the petitioner was informed of the commencement of the inquiry proceedings on the 5th of October 2009 thus giving the petitioner not even twenty hours to prepare his defence—This was not only in violation of the

well settled principles of natural justice but of the specific requirements of the provision of Rule 153.5 of the RPF Rules which goes to the root of exercise of jurisdiction by the respondents—The same is an illegality which would vitiate the conduct of the disciplinary proceedings against the petitioner—It is trite that in the disciplinary proceedings it is the duty of the disciplinary authority to ensure that adequate opportunity is given to the charged official to conduct his defence and that the same would include an opportunity to engage the defence officer—Given the facts and circumstances of the instant case, especially the mental condition of the petitioner, it is difficult to believe that the petitioner was conscious that he had a right to seek the assistance of a defence officer—In all fairness as well as to ensure compliance of the principles of natural justice, it was for the respondents to ensure that the petitioner was made aware of his rights as well as procedural safeguards—The same was essential to ensure that the petitioner had an adequate opportunity to defend the charges made against him—Failure to ensure such opportunity also vitiates the proceedings conducted against the petitioner—In this background, the recommendation dated 6th February, 2010 of the inquiry officer as well as the orders dated 10th August, 2010 passed by the Disciplinary Authority finding the petitioner guilty of the charge; 28th September, 2010 of the Appellate Authority and the order dated 18th March, 2011 of the Revisional Authority are not sustainable in law—Petitioner shall be reinstated in service by the shall not be entitled to any back wages.

Babu Khan v. *Union of India & Anr.*..... *1546*

— Article 226—Disciplinary proceedings initiated against the appellant by the respondent in June, 1997 with respect to some advertisement published in the Accountancy Journal in August, 1996—Disciplinary Committee appointed by respondent exonerated the appellant in January 2001—In the writ petition filed before this Ld. Single Judge, appellant

claimed that vide a communication dated 8/3/2013 the respondent is seeking to re-open the issue by causing further inquiry on the same allegations and prayed for a stay of the said communication pending the writ proceedings—Ld. Single Judge refused to stay the said communication on the ground that the appellant had suppressed a letter dated 18/4/2002 vide which he had been informed about the decision of the respondent for referring the matter back to the Disciplinary Committee for further inquiry. Held The document dated 18/4/2002 does not go to the root of the matter and given the unexplained delay in re-initiating the matter and the prejudice that would be caused to the appellant due to pendency of the disciplinary proceedings, respondent not to proceed with the inquiry till the pendency of the main writ petition.

Vipin Malik v. *The Institute of Chartered Accountant of India* *1583*

COMPANIES ACT, 1956—Winding up of a company—Section 433—Petition filed by two share holders for winding up of the Appellant company—Vide a single order dated 16/2/2009, the Ld. Single Judge (a) admitted the petition; (b) directed the company to be wound up; (c) appointed the liquidator and (d) directed the citation to be published in the newspapers—Appellant challenged the said order on the ground that the order of winding up could not have been passed before publishing of the citation. Held: An order for winding up of a company cannot be passed before getting published, the advertisement of the winding up petition. The impugned judgment has also denied the appellant company an opportunity to invoke the inherent powers of the Court, codified by Rule 9 of Companies (Court) Rules, 1959, to show to the company Court why an advertisement should not automatically follow the admission of the petition. The order of the learned Single Judge is set aside and the company application is remanded with the direction that it may be disposed of in accordance with law and with the further direction that in case an application is

moved by the company under Rule 9 within seven days from today, the same may also be decided in accordance with law.

Indo Rolhard Industries Ltd. v. *M.K. Mahajan and Anr.* *1282*

— Refund of share application amount—R1 company floated prospectus for public issue of 30 lakh equity shares of a face value of Rs. 10/- each, for cash at par aggregating to a total sum of Rs. 3 crore—Public Issue opened on 26.2.96 and closing date was 8.3.96 and by the closing date, R1 received 51,37,100 applications 23,13,800 share applications were withdrawn and 3,25,700 share applications were rejected by the Registrar—Thence, on closure date, public issue of R1 was over subscribed 1.71 times and if rejected applications taken into consideration, the public issue was over-subscribed by 1.60 times and taking both the rejected applications and withdrawal applications into consideration, the subscription to the public issue fell to 83% of the total public issue made by R1 company—SEBI directed refund of the entire share application amount, since as per SEBI, R1 company had failed to achieve the minimum subscription as provided in its prospectus—In appeal, the Securities Appellate Tribunal reversed the order of SEBI—Challenged—R1 company defended the order of SAT on the ground that prospectus constitutes offer and once application is made, contract is complete, so it cannot be revoked by seeking withdrawal of application and that withdrawal of share application money can only be accepted by the company concerned and not by the Registrar—Held, share application is like an offer and not acceptance of offer, and the contract is completed only on allotment of shares, which need not necessarily occur, therefore R1 is wrong to contend that on receipt of share applications, concluded contract came into existance and vide Rule 2(e)(i)(iii)(b) SEBi Rules the Registrar has power to finalise the list, which power has implicit in it the power to direct refund qua withdrawal requests—Further held, if minimum subscription amount is not reached, then surely no

REGISTRATION ACT, 1908—Section 52 (1) (c) Delhi Registration Rules—Rule 29—Probate was granted on Will executed by late Smt. Shakuntala Kapur on petition filed by respondents—Objections filed by appellants dismissed—Aggrieved appellants preferred appeal mainly alleging, certified copy of will did not satisfy requirements of Act. Held:- If a Will is prepared in duplicate either by using a carbon or by printing the same twice from a computer and signed in duplicate and then the carbon copy duly signed in original or the computer printout duly signed in original is pasted in the records of the Sub-Registrar, it would satisfy the requirements of both Section 52 (1) (c) of the said Act, 1908 and Rule 29 of the said Rules, Further, a Will is not compulsorily registerable under the said Act and, thus a mere irregularity in the certified copy would not render the original Will invalid.

Sushoban Luthra & Anr. v. *Major Ravindra Mohan Kapur & Ors.* *1590*

— Service Tax—Chapter V of Finance Act, 1994—Export of Service Rules, 2005—Appellant being in the business of rendering IT enabled services, through a Business Process Outsourcing (BPO) unit was exporting the said services by way of providing telephonic assistance to customers of overseas companies and was thus liable to pay service tax—Notification No. 12/2005-ST issued on 19/4/2005 in pursuance of Rule 5 of Export of Service Rules, 2005 granted rebate of the whole of the duty paid on excisable inputs or the whole of the service tax and cess paid on all taxable input services used in providing taxable service exported out of India—The notification also required filing of a declaration providing description, quantity, value, rate of duty and amount of duty payable on inputs actually required to be used in providing taxable service to be exported—Appellant in terms of notification claimed rebate in respect of service tax paid on input services used by it. However claiming that the nature of its business is such that it is not possible to predict the inputs actually required, the appellant did not file declarations

but provided complete details and documentation at the time of filing for refund—Both Dy. Commissioner, Service Tax and Commissioner of Central Excise (Appeals) rejected the claims for rebate holding that the requirement to file a declaration prior to the date of export of service was essential to prevent evasion of duty and since appellant had not filed such a declaration, the rebate would not be admissible—Further appeals filed before the CESTAT led to the matters being remanded back to the original adjudicating authority for *de novo* decision with Tribunal agreeing that the requirement to filed declaration could not be waived. Held: Nature of service of appellant is such that they are rendered on a continuous basis making it a seamless service. Unlike manufacture and export of physical products like bicycles, the nature of BPO services is such that it is impossible to anticipate the date of export and with precision demarcate the point in the prior to export and also determine the point in time when the export may be said to have been completed. Requirement to file declaration in advance is impossible to comply with. Further, no irregularity or inaccuracy of falsity alleged in rebate claims. Appeal allowed with clarification that the decision rests on the peculiar facts of the case and the peculiar nature of the appellant's business.

Wipro Limited v. *Union of India* *1374*

SERVICE LAW—Contributory Provident Fund (CPF) & Pension/General Provident Fund (GPF) Scheme—Office Memorandum No. F.4/1/87-PIC-I dated 01.05.1987—Brief Facts from WP (C) No. 8489/2011—Petitioner came to be appointed in the respondent National Council of Educational Research and Training (NCERT) on 08.02.1966—By an Office Memorandum No.F.4/1/87-PIC-I dated 01.05.1987 the Central Government on the recommendations of the Fourth Central Pay Commission notified that the Government employees subscribing to the existing Contributory Provident Fund (CPF) were being given an opportunity to switch over to the Pension/General Provident Fund (GPF) Scheme—Cut-

off date for exercising such an option was 30.09.1987—The terms also specified that in case an employee did not given any option he/she would be deemed to have opted for pension scheme—If an employee wanted to continue under the CPF scheme, he/she had to exercise the option for the CPF scheme—Petitioner exercised his option for continuing with the post retirement benefit under the CPF scheme—In the year 1993, in pursuance of the respondents' advertisement for recruitment to the post of Professor (Vocational Education) in Pandit Sunderlal Sharma Central Institute of Vocational Education (PSSCIVE) at Bhopal, petitioner along with other internal and external candidates applied for the said posts and were offered appointment for the said posts in Bhopal—By an order dated 26.04.1994, the NCERT issued a formal order of appointment w.e.f. 21.04.1994—In accordance with the terms and conditions of service, the petitioner along with other appointees, were to be on probation for a period of two years—On 10.04.2001 and 24.08.2001, petitioner made representations to the respondent for change over from CPF scheme to the pension scheme—However, the said representations were not responded to by the respondent—Petitioner retired in the year 2004 on attaining the age of superannuation—However, since the respondent considered the petitioner as having been bound by the option exercised by him before his appointment as a Professor in PSSCIVE, Bhopal, the petitioner challenged the action of the respondent—In the original application filed before the Tribunal the petitioner stated that it had come to his knowledge that one Ms M. Chandra had joined NCERT, respondent, as a Professor of Chemistry in the year 1989 through direct recruitment and had opted for CPF while working in her erstwhile organization—Since, after 01.05.1987 all employees who were appointed afresh were deemed to be covered by the notification dated 01.05.1987, she could not be placed in the CPF scheme. Therefore, Ms Chandra made a representation to the respondent for being granted GPF/Pension scheme. Pursuant to that, after seeking advice from

the Ministry of Human Resource Development, the respondent allowed Ms. Chandra to switch over from CPF scheme to GPF/Pension scheme—Similarly, the petitioner had urged in his application that one Ms. Pushplata Verma who was governed by CPF scheme while in her erstwhile department and similarly opted for being governed by the CPF scheme, was informed, that she would be entitled to get the benefit of pension-cum-gratuity as per the rules of the respondents—Plea of the petitioner for giving him benefit of the GPF/Pension scheme was rejected—Aggrieved by the said order of the competent authority dated 12.03.2010, the petitioner was constrained to file OA No.1160/2010—By the impugned order the Tribunal disposed of the said original application and held that the petitioner's service cannot be treated to have been begun afresh and there being only a technical break in his service, he will not be entitled to exercise the option of which over at this stage—Aggrieved by the said common judgment and order dated 10.11.2010 the petitioners have preferred the present petitions. Held—In view of the fact the the respondent NCERT has permitted similarly placed appointees to switch over to the GPF scheme after being selected through the same recruitment process, a legitimate expectation is raised in favour of the petitioners to be treated in a similar manner—The expectation is further accentuated when the said appointees were permitted to derive the benefit of GPF scheme despite having exercised the option of CPF scheme even after they were absorbed in the service of the respondent NCERT—Therefore, when similarly placed employees of the respondent have been extended the benefit, of the GPF/Pension scheme merely because they were earlier engaged in the service of the respondent NCERT—Petitioners had been put on probation for a period of two years subsequent upon their appointment to the relevant post in PSSCIVE, Bhopal—The Tribunal failed to appreciate that it is settled law that once a person is appointed to a substantive post through direct recruitment in an open selection after competing with internal and external candidates the appointment on the said post is a fresh

appointment—Petitioners have been subjected to hostile discrimination, although they were appointed by the same recruitment procedure as others, only because they were working with one of the establishments of the respondents earlier—Same constitutes unequal treatment amongst equals and is violative of Article 14 of the Constitution of India—Writ petitions are allowed and the order of the Tribunal is set aside—Consequently, the respondents are directed to extend all the benefits of the GPF/Pension Scheme after making necessary deductions to both the petitioners.

— Pension Regulations for the Navy—Regulation 23—Brief Facts—On 26th December, 1966, the Petitioner was granted regular commission in the Indian Navy and he sought voluntary retirement as he claimed that he had been wrongly superseded for the next higher rank of Commander in the navy—He was permitted to so retire on 31st March, 1983—Petitioner claims that he was permanently absorbed in the Shipping Corporation of India Ltd. on 30th November, 1982, when he had served for 16 years, 65 days in the Indian Navy—By way of this writ petition, the petitioner assails the order dated 22nd March, 2010 passed by the Armed Forces Tribunal in O.A. no.211/2009 rejecting the prayer of the petitioner for grant of pro-rata pension to him from the date of his discharge from the Indian Havy and a direction to the respondents to release service pension under Regulation 23 of the Pension Regulations for the Navy—Respondents contend that the petitioner had not joined the Shipping Corporation of India, the public sector undertaking, on deputation or otherwise with the consent of Naval authorities. Held—Petitioner places reliance on a circular dated 20th January, 1979 which shows that this circular only provided criteria for pre-mature retirement/resignation of Defence Services Officers and does not contain the mention of grant of pro-rata pension—Letter dated 20th January, 1979 or the

policy letter dated 12th July, 1982 were not placed before the Armed Forces Tribunal by the petitioner—Policy letter dated 12th July, 1982 which refers to orders issued by the Ministry of Finance read with memos of the Ministry of Defence to the effect that: "Officers who have been permitted to be absorbed in the Public Sector Undertakings on or after 8th November 1968, are deemed to have retired from service from the date of such absorption and are eligible to draw the pay of the post in the Public Sector Enterprise in addition to pro-rata pension from the date of absorption, subject to fulfillment of the eligibility conditions for this purpose laid down in the orders issued by the BPE regarding the period of option etc. Instant case does not relate to an officer who has been permitted by the respondents to be absorbed in the public sector undertaking—Respondents have placed reliance on a circular of the Government of India dated 19th February, 1987 which clarified the above noticed position—These communications and circulars were never placed before the Armed Forces Tribunal—Armed Forces Tribunal has found that the applicant was not entitled to pro-rata pension for the simple reason that the conditions mentioned in the circular dated 19th February, 1987 are not satisfied—Given the clear policy enunciation in the prior policy letter dated 12th July, 1982 noticed hereto before, which is relied upon by the petitioner, the position does not change whether reference is made to policy letter dated 12th July, 1982—Subsisting position has only been clarified by the letter dated 19th February, 1987—No fault in the order passed by the Armed Forces Tribunal—The present writ petition has no merit and is dismissed.

ILR (2013) II DELHI 1265
WP (C)

KLEN & MARSHALLS MANUFACTURES & EXPORTERS LTD. ....PETITIONER

VERSUS

UNION OF INDIA AND ORS. ....RESPONDENTS

(RAJIV SHAKDHER, J.)

WP (C) NO. : 668/2012 DATE OF DECISION: 03.01.2013
CM NO. 27/2013 (FOR DIRECTIONS)
\& CM NO. 9851/2012

Constitution of India, 1950—Article 227—R-3, incorporated as a foreign company provided loan to petitioner by taking recourse to bill discounting facility and by availing bank guarantee limits in 1990—Thereafter business of R-3 was restructures and it got merged with another Japanese bank in 1995 and merger was approved on 01.04.1996 and hence new entity emerged with which another bank got merged, making the R-3 as per R-3, requisite filings were made before the concerned authority—Form 49 was filled as per R-3 with the RoC and requisite filings were done with RBI to bring on record change of name—RBI carried out change of name of R-3 and thereafter authorized R-3 to open a branch in Bombay as per R-3, Form 49 was filed with ROC on 05.08.1996 but this fact was denied by the petitioner contending that no filing was done by R-3 with the RoC on 05.08.1996 and that Form 49 was filed with ROC by R-3 on 03.04.02, that too in pursuance of an application filed in the recovery proceedings before DRT Bangalore—Petitioner also filed criminal complaint under Section 156(3) Cr.P.C. in which the Magistrate ordered investigation but the investigation conducted twice

revealed that no cognizable offence was committed by R-3 or its officers, so the Magistrate dismissed the complaint, against which the petitioner filed revision petition which also was dismissed by way of present petition, petitioner sought writ of mandamus directing R-1 & R-2 to treat the filings of R-3 as null and void and writ of mandamus directing R-1 & R-2 to initiate prosecution against R-3 to R-5 under IPC and Companies Act—From records, it emerged that ROC seems to have no record of filings made by R-3 as contended on 05.08.1996; that non-compliance with Section 593 Companies Act was brought to the notice of R-3 by ROC vide letters dated 05.09.01 and 03.12.01; that thereafter R-3 realized that the filings made in the record of ROC were missing, so after satisfying the ROC that it had in fact originally filed Form 49 on 05.08.1996, officers of R-3 reconstructed the record of ROC alongwith various documents like forwarding letter, copy of E-receipt and copy of letter intimating name change—Held, in view of documents on record, it is quite possible that having received letter of ROC, a revised duplicate form was filed by R-3 and so long as there is nothing to suggest that Form-49 was not filed on 05.08.1996, the subsequent filings, which were allowed by ROC by way of rectification and curing of deficiencies, would not carry the matter any further so far as petitioner is concerned, as such prayers sought by petitioner cannot be granted.

Upon hearing arguments of learned counsels for the parties and perusing the records, what clearly emerges is, as follows :-

(i). The official respondents, in particular, the ROC seem to have no record of filings made by respondent no.3, as contended on 05.08.1996;

(ii). The fact that there was no compliance with the provisions of section 593 of the Companies Act, was brought to the

notice of respondent no.3, by the office of the ROC vide letters dated 05.09.2001 and 03.12.2001.

(iii). Respondent no.3 on receiving the aforementioned communication realized that filings made in the record of the ROC, were missing. Consequently, the officers of respondent no.3 attempted to reconstruct the record of the ROC after satisfying the ROC that it had in fact originally filed Form no.49, on 05.08.1996. For this purpose, the following documents were filed by respondent no.3 :- (i). a forwarding letter dated 22.07.1996 addressed to the ROC. To be noted, this letter apparently enclosed a copy of the original Form 49 dated 23.07.1996; (ii). A copy of the receipt by which fee of Rs.200/- was paid for registration of the said document. The said receipt evidently bore the following number i.e., 196989. A photocopy of the said document has been placed on record by respondent nos.1 and 2. The aforementioned receipt clearly indicates that there were two separate filings made on the said date for which two separate sets of fee of Rs.200/- each, was paid in cash. The first filing was of Form no.49, while the other was of Form no.54; and (iii). Respondent no.3 had also filed a letter dated 17.05.1996, addressed to the ROC informing the ROC with regard to the change in name. **(Para 35)**

This brings me to the last aspect of the matter i.e., the argument as to why yet another Form was filed on 05.04.2004. The conduct of respondent no.3 in this regard is explained by reference to ROC's letter dated 26.03.2004, whereby they were advised to file a revised duplicate Form by an authorised person to rectify the objections. It is quite possible that having received the said communication, respondent no.3 filed yet another Form on 05.04.2004. Therefore, in my view, as long as there is nothing to suggest that the original Form 49 was not filed on 05.08.1996, the subsequent filings would not carry the matter any further in so far as the petitioner is concerned. It is not as if the ROC cannot allow rectification or curing deficiencies, if any, in the information supplied by the applicant companies, to it. This power is

available to the ROC and therefore, that by itself cannot further the cause of the petitioner unless one could come to a conclusion that there was no filing made in the first instance by respondent no.3. **(Para 39)**

APPEARANCES:

FOR THE PETITIONER : Mr. Abhinav Vashisht, Sr. Advocate with Mrs. Mohan M. Lal, Mr. Ankit Pahar and Mr. Anuj Malhotra, Advocates.

FOR THE RESPONDENTS : Mr. Neeraj Chaudhari, CGSC, Mr. Ravjyot Singh and Mr. Aditya Chandra, Advocates for R-1 & R-2. Mr. Rajiv Nayar, Sr Advocate with Mr. Manu Nair and Mr. Sanjay Kumar, Advocates for R-3.

RESULT: Petition dismissed.

RAJIV SHAKDHER, J.

1. By this writ petition, the following substantive prayers have been sought :-

"(i). issue a Writ in the nature of mandamus directing Respondent nos.1 and 2 to treat the filings made by respondent no.3 under Registration No.F/202 as null and void and de-register all such filings; and

(ii). Issue a Writ in the nature of mandamus directing Respondent Nos.1 and 2 to initiate prosecution under the Indian Penal Code against the respondent No.3, 4 and 5; and

(iii). Issue a writ in the nature of mandamus directing Respondent Nos.1 and 2 to initiate action against Respondent no.3 and / or its Directors / Representatives / Employees / Officials etc. including Respondent no.4 and 5 under Sections 628 and 629 of the Companies Act, 1956; and

(a). Pass any or other order(s) as this Hon'ble Court deems fit and proper in the facts and circumstance of the case…"

2. It may be noted, however, at the outset that this is a second round of litigation in this court and a fresh attempt made at dragging respondent no.3, which is a foreign company, carrying on banking business in India, after adjudication by the Karnataka High Court and the resultant dismissal of the special leave petition both on the grounds of delay as well as on merits.

2.1 Though it is sought to be argued before me that, the petitioner by pressing the reliefs sought for in the present writ petition was seeking to trigger a criminal action against respondent no.3 and in a sense espousing a public duty; it is quite clear that the purport and the intent has been to inveigle respondent no.3 in criminal proceedings, so that, in the recovery proceedings instituted against the petitioner, it can leverage some advantage.

2.2 Therefore, let me examine the issue raised in the present writ petition de hors the aspects raised before other courts and Tribunals. However, in order to appreciate the issues raised in the present writ petition, one would briefly have to touch upon the facts and circumstances which have both preceded and followed the institution of the captioned writ petition.

3. Respondent no.3, it appears, was initially incorporated under the name and style: Bank of Tokyo Limited, under the laws of Japan. In 1952, Bank of Tokyo Limited came to be registered as a foreign company with the Registrar of Companies [in short, ROC], (presently NCT, Delhi and Haryana). For this purpose, a registration certificate was issued bearing no.F-202.

4. It appears, in 1990, the petitioner was provided funds, on loan, by the Bank of Tokyo Limited, by taking recourse to bill discounting facility and by availing bank guarantees limits.

5. It appears that the business of the Bank of Tokyo Limited was restructured upon, its merger being brought about with another Japanese Bank i.e., Mitsubishi Bank Limited, which is also a company incorporated under the laws of Japan.

6. For the aforesaid purpose, a Merger Agreement dated 19.05.1995 was executed between the Bank of Tokyo Limited and the Mitsubishi Bank Limited. An application to seek approval of the concerned authority in Japan was also filed on 11.03.1996.

7. By an order dated 22.03.1996, approval was granted to the merger of The Bank of Tokyo Limited with the Mitsubishi Bank Limited by the Ministry of Finance, Government of Japan.

8. It is not in dispute that the merger of the aforementioned two entities, was given effect to from 01.04.1996.

9. Consequent to the approval, the erstwhile entity i.e., the Bank of Tokyo Limited ceased to exist and a new entity emerged by the name of: Bank of Tokyo – Mitsubishi Limited.

10. I may also note here that at some stage, yet another bank merged with The Bank of Tokyo – Mitsubishi Limited; which is a bank by the name of UFJ Bank Limited. I am informed that presently respondent no.3 is carrying on his business under the name and style: Bank of Tokyo – Mitsubishi UFJ Limited. This fact is only mentioned to bring to fore the current name under which respondent no.3 is carrying on its business.

11. Continuing with the narrative, it is the case of respondent no.3 that in accordance with the provisions of the laws of India, requisite filings were made before the concerned statutory authorities. It is the case of respondent no.3 that Form 49 was filed with the concerned Registrar of Companies (in short ROC) under section 593 of the Companies Act, 1956 (in short Companies Act), as also the requisite filing was made with the Reserve Bank of India (in short RBI), to bring on record the factum of change of name.

11.1 In so far as the RBI was concerned, by a Gazette Notification dated 27.04.1996, an amendment was made to the Second Schedule to the RBI Act, 1934 whereby, the alteration in the change of name of respondent no.3 was carried out. This change of name by the RBI was followed by order dated 14.08.1996, whereby respondent no.3 was authorised to open a branch in Bombay (now Mumbai) under the name and style: Bank of Tokyo – Mitsubishi Limited.

12. As regards the ROC, it is the case of respondent no.3 that Form 49, referred to above was filed on 05.08.1996. The petitioner disputes this fact and it is this issue which is at the heart of the matter.

13. It is the case of the petitioner that as a matter of fact no filing was made by respondent no. 3 with the ROC on 05.08.1996. It is the case of the petitioner that Form 49 was filed with the ROC by respondent

no.3, only on 03.04.2002, and that too pursuant to an interlocutory application filed by respondent no.3 in the recovery proceedings taken out by it, before the Debt Recovery Tribunal at Bangalore under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (in short RDDBI Act).

14. It may, therefore, be pertinent to mention briefly the relevant facts pertaining to the recovery proceedings and the objection taken by the petitioner vis-à-vis the provisions of section 592, 593 read with section 599 of the Companies Act.

15. Respondent no.3 evidently has filed two petitions against the petitioner, under the RDDBI Act being OA No.326/2000 and 327/2000 before the Debt Recovery Tribunal, Bangalore (in short DRT). In the said petition, a preliminary objection was taken by the petitioner qua the maintainability of the recovery proceedings, on the ground that post the merger a "new bank" had come into existence – Bank of Tokyo – Mitsubishi Limited.

15.1 This according to the petitioner, had resulted in alteration in the name, charter, statute, memorandum, article of association and constitution, and consequently, required compliance with the provisions of section 593 of the Companies Act. Since, according to the petitioner, respondent no.3 had failed to comply with the provisions of Section 592, it could not be construed as a banking company within the meaning of section 5(c) and 5(d) of the Banking Regulation Act, 1949 read with Section 591 of the Companies Act and section 2(d), 2(e) and 2(h) of the RDDBI Act.

15.2 In other words, the petitioner called upon the DRT to determine: whether respondent no.3 was a banking company, and thus, entitled to institute and maintain recovery proceedings before it. This application was filed in and around 21.01.2002. In the application, an averment is made to the effect that the objection raised was based on a search report furnished to it by its Chartered Accountant, on 27.11.2001.

15.3 I may only note that during the course of the arguments when it was put to the learned counsel for the petitioner as to when the petitioner had become aware of the alleged failure of respondent no. 3 in filing Form 49 with the ROC, an attempt was sought to submit that this information was available with them since 1999, a fact which was

conveyed to respondent no.3 and therefore, steps were taken to cover up the lacuna by respondent no.3. Learned senior counsel for the petitioner, when probed further, conceded that there was no document on record which would establish the submission made at the bar.

16. Suffice it to say, the ROC appears to have issued two communications to respondent no.3 dated 05.09.2001 and 03.12.2001, wherein the non availability of the document which would show compliance with the provisions of section 593 of the Companies Act, was brought to fore.

17. It appears it was these communications which led to respondent no.3 filing a duplicate Form 49, with the ROC, on 03.04.2002.

18. It also appears that a second duplicate Form 49 was filed on 05.04.2004, which was received by the ROC, on 06.04.2004. Importantly, in the said form, reference is given of a receipt bearing no.196989 dated 05.08.1996, whereby a sum of Rs.200/- was deposited for processing the request made, evidently, for change of name of respondent no.3; which is also incidentally the receipt to which reference is made in the first duplicate Form no.49, filed on 03.04.2002, with the ROC.

19. In so far as the interlocutory application of the petitioner is concerned, to which I have made a reference above, regarding maintainability of the recovery proceedings before the DRT, Bangalore, an order was passed, on 14.05.2003. By virtue of the said order, the application of the petitioner was dismissed. It is not in dispute that the order dated 14.05.2003 was carried in appeal before the Debt Recovery Appellate Tribunal at Chennai (in short DRAT). The DRAT by an order dated 19.10.2005, reversed the order of the DRT. As a matter of fact, the DRAT held that respondent no.3 had "incurred the disqualifications as provided under section 599 of the Act", and hence, was incompetent to maintain an action before the DRAT.

20. Apparently, a review was filed before the DRAT, by respondent no.3, which was rejected on 07.08.2006.

21. Aggrieved by the decision of the DRAT, both in the appeal and in the review, two writ petitions being: WP No.12303/2006 and 12304/2006 were filed by respondent no.3, before the Karnataka High Court. By a judgment dated 02.07.2008, the said writ petitions were disposed of and the order of the DRAT dated 19.10.2005 as also its order in the

review petition dated 07.08.2006, were set aside. A direction was issued to the DRT to expedite hearing in the recovery proceedings and conclude the same expeditiously, at any rate within a period of six months of the said judgment.

22. It appears that a review petition being: RP No.492/2008 was filed qua the judgment dated 02.07.2008, which was dismissed as well on 23.07.2010. The petitioner filed a special leave petition being: CC No.21040-21042/2011 against the judgment of the Karnataka High Court, both in the writ petition as well as in the review petition, which were dismissed, on 05.01.2012. The Supreme Court noted that there was an initial delay of 700 days in filing the special leave petition followed by a delay of 410 days in re-filing qua which the explanation offered, was not found to be satisfactory. The order of the court went on to state that even on merits no case was made out to entertain the petitions, filed before it under Article 136 of the Constitution of India. Thus, the special leave petition was dismissed both on the ground of delay as well as on merits.

23. To complete the narration of facts, it may also be relevant to note that the petitioner had, in the interregnum filed a criminal complaint under section 156(3) of the Code of Criminal Procedure, 1973 (in short Cr.PC), for initiation of criminal proceedings after due investigation, under the provisions of section 120 (B), 465, 466, 468, 471 and 477-A of the Indian Penal Code, 1860 (in short IPC).

24. The Magistrate, apparently, had ordered investigation, not once, but twice into the allegations made by the petitioner. The investigation revealed that no cognizable offence was committed as alleged by respondent no.3 and / or its officers. Consequently, by an order dated 30.11.2010, the petitioner's application was dismissed by the Magistrate.

25. The petitioner challenged the order of the Magistrate dated 30.11.2010, by way of a criminal revision petition being: No.323/2011. By an order dated 05.09.2012, the Additional Sessions Judge, Greater Bombay dismissed the said revision petition with cost of Rs.5 Lakhs, out of which, Rs.4 Lakhs has been directed to be paid to respondent no.3, while Rs.1 Lakh was directed to be paid to the State Legal Aid Fund.

26. I may only note that, across the bar, the counsels for the petitioner informed me that a petition had been filed in the Bombay High

Court qua the issue of cost as ordered to be paid by order dated 05.09.2012. The counsels for the petitioner, however, were not able to furnish any details with regard to any number having been accorded to the said petition and the date on which it was likely to come up for hearing before court.

SUBMISSIONS BY COUNSELS

27. In the background of these facts, it was sought to be argued by Mr. Vashisht, learned senior counsel for the petitioner, that the entire purpose of pressing the present writ petition was to bring to the notice of this court that a criminal offence had been committed by respondent no.3 and / or its officers in respect of which no action was being taken by respondent nos.1 and 2 i.e., the official respondents. The alleged non-compliance was restricted to the provisions of Section 593 of the Companies Act.

28. In this regard, Mr. Vashisht made the following submissions:-

(i). respondent no.3 had never filed Form no.49 with the ROC on 05.08.1996, as was contended by them before this court and various other authorities;

(ii). the falsity of this stand of respondent no.3 was apparent on examination of the duplicate Form no.49, which was filed on 03.04.2002. The fact that interpolations were made has been admitted by Sh. Brij Mohan Chhabra, the then Dy. General Manager of respondent no.3 in his reply dated 04.01.2005 to the application filed on behalf of the petitioner before the DRT, Bangalore taking an objection to the maintainability of the recovery proceedings. In this regard, specific reliance was placed on the assertions made in paragraph 8(ii) of the aforementioned affidavit of Sh. Brij Mohan Chhabra;

(iii). If what, respondent no.3 says is correct, which is that, a duplicate Form 49 was filed on 03.04.2002 then, where was the need to file a second duplicate Form no.49, on 05.04.2004. The complaints / representations made by the petitioner dated 23.04.2005, followed by a communication sent by its advocate dated 27.12.2005 to the ROC, raised issues concerning interpolation and fabrication of the duplicate Form no.49, filed on 03.04.2004, which was rejected in a summary manner by the Regional Director vide order dated 14.06.2006.

(iv). Reliance was also placed on the letter dated 22.07.1996 apparently accompanying the purported original Form no.49 dated 23.03.1996, which clearly indicated that the filing if at all made, sought to inform the ROC with regard to the changes relevant under section 593 (d) and (c) of the Companies Act. It was contended that a perusal of the said document itself would show that respondent no.3 was seeking to inform the ROC with regard to the changes made qua its Board of Directors. In other words, there was no reference to the provisions of section 593 (a) of the Companies Act, which would have been so, if the filing related to the change in name, as is now sought to be contended.

29. On the other hand, Mr. Nayar, learned senior counsel for respondent no.3 argued that the petitioner was seeking to re-agitate the issue once again which was barred by the principles of res judicata in view of the fact that these very issues were raised before the Karnataka High Court, which were rejected by the said court vide its judgment dated 02.07.2008. Mr. Nayar in order to support his submission drew my attention, specifically to, paragraphs 59 to 62, 67 and 72 of the said judgment.

29.1 In order to support the aforesaid contention, he also referred to paragraph 5.14 of the special leave petition filed by the petitioner, wherein there is a specific averment to the alleged fraud committed by respondent no.3, by carrying out interpolations in the duplicate form filed.

30. Mr. Nayar further contended that, the present proceedings were a gross abuse of the process of court and the entire purpose in maintaining the present petition was to somehow impede the recovery proceedings. In this context, Mr. Nayar also drew my attention to the fact that the petitioner on an earlier occasion had filed a writ petition, on identical grounds, to which I have already made a reference, being WP (C) No.4745/2008, which was dismissed as withdrawn on 01.08.2008; albeit with a liberty to re-file a fresh petition. Mr. Nayar submits that the petitioner though given liberty has chosen to move this court after a delay of nearly four (4) years and hence, guilty of gross delay and latches.

31. Mr. Chaudhary, learned counsel who appeared for the official respondents has brought to court the photocopies of the original record, alongwith the original record, as directed by this court. Mr. Chaudhary argued that there was no interpolation or fabrication as contended by the

petitioner. Since, the original record of the respondent no.3 was lost, was not available in the record of the ROC, the said respondent was called upon by letters issued by it in September and December of 2001, to comply with the provisions of section 593 of the Companies Act. It is at this point in time that the petitioner had placed on record the relevant documents to establish that it had filed Form 49, with relevant enclosures including the amended articles of association, which adverted to the change in name. Since the petitioner had filed a criminal complaint with the Magistrate, the matter was investigated by the Economic Offences Wing of the Crime Branch, CID, Mumbai on two occasions. Pursuant to the investigation, the police authorities had come to the conclusion that no case was made out, based on which the Magistrate had dismissed the criminal complaint on 30.11.2010. The said order was confirmed, in revision, by the Additional Sessions Judge, by dismissing the petitioner's revision petition on 05.09.2012.

33. Mr. Chaudhary submitted that, as far as the official respondents are concerned i.e., respondent nos.1 and 2, they had indicated their view in the communication dated 14.06.2006, which is that, no action was required qua the complaint of alleged forgery made by the petitioner. I

34. In rejoinder, learned senior counsel for the petitioner sought to lay emphasis, once again, on the affidavit filed by Sh. Brij Mohan Chhabra; a copy of which has been filed by the petitioner alogwith CM No.9581/2012. Apart from this, submissions already made, in the opening by the learned senior counsel for the petitioner, were reiterated.

REASONS

34. To be noted, there are two interlocutory applications filed by the petitioner. The first one being: CM No.9851/2012 by which certain additional documents were sought to be brought on record. Even though six documents were filed, learned senior counsel for the petitioner sought to place reliance, during the course of the arguments, on two documents. The first one was the affidavit filed by Sh. Brij Mohan Chhabra. I have already made a reference to the said document, during the course of my narrative above. The other application being : CM No.27/2013, is filed to seek discovery and production of documents, which are in possession of the official respondents i.e., respondent nos. 1 and 2. At the very outset, in so far as, the second application is concerned, it was fairly conceded by the learned senior counsel for the petitioner that it had worked itself

out, as the original record had been brought to court by the official respondents. As a matter of fact, the counsels for the petitioners were given photocopies of the original record, which was shown to me, during the course of arguments by Mr. Chaudhary.

35. Upon hearing arguments of learned counsels for the parties and perusing the records, what clearly emerges is, as follows :-

(i). The official respondents, in particular, the ROC seem to have no record of filings made by respondent no.3, as contended on 05.08.1996;

(ii). The fact that there was no compliance with the provisions of section 593 of the Companies Act, was brought to the notice of respondent no.3, by the office of the ROC vide letters dated 05.09.2001 and 03.12.2001.

(iii). Respondent no.3 on receiving the aforementioned communication realized that filings made in the record of the ROC, were missing. Consequently, the officers of respondent no.3 attempted to reconstruct the record of the ROC after satisfying the ROC that it had in fact originally filed Form no.49, on 05.08.1996. For this purpose, the following documents were filed by respondent no.3 :- (i). a forwarding letter dated 22.07.1996 addressed to the ROC. To be noted, this letter apparently enclosed a copy of the original Form 49 dated 23.07.1996; (ii). A copy of the receipt by which fee of Rs.200/- was paid for registration of the said document. The said receipt evidently bore the following number i.e., 196989. A photocopy of the said document has been placed on record by respondent nos.1 and 2. The aforementioned receipt clearly indicates that there were two separate filings made on the said date for which two separate sets of fee of Rs.200/- each, was paid in cash. The first filing was of Form no.49, while the other was of Form no.54; and (iii). Respondent no.3 had also filed a letter dated 17.05.1996, addressed to the ROC informing the ROC with regard to the change in name.

36. This apart, reliance was also placed on the approval granted by the RBI, on 10.04.1996.

37. Based on the aforesaid, it appears that an office copy of Form no.49 was filed by respondent no.3, with the ROC. It appears that in the office copy, information under seriatim A was not filled-in. Seriatim A reads as follows :-

"..(A). Charter, Statute, Memorandum or Articles of Association or other instrument constituting or defining the constitution of the company.

A brief description of the alteration is given hereunder :-

"At an Extraordinary / General Meeting of the shareholders of the company held Tokyo (Japan) on 29th day of June, 1995 ordinary/special resolution was passed authorizing Change of Name / Articles of Association. Certified copy of the resolution and / or the copy of the amended document should be enclosed. If the resolution or document is not in the English language, a certified translation thereof must accompany this return)" w.e.f. 1st April, 1996…"

38. Evidently, the underlined part was written by hand by Sh. Brij Mohan Chhabra. In the affidavit filed before the DRT, this aspect is admitted by Sh. Chhabra. He, however, also avers with regards to other aspects, which is, the steps taken to satisfy the ROC that the original Form 49 had been filed, on 05.08.1996. Apart from anything else, Mr. Brij Mohan Chhabra in his affidavit of 04.01.2005, referred to the letters dated 17.05.1996 and 22.07.1996, to establish that a filing had been made on 05.08.2006.

38.1 As indicated above, admittedly, a receipt for a filing made qua Form no.49, was generated on the said date. Mr. Brij Mohan Chhabra in his affidavit also adverts to the fact that respondent no.3 had issued communication on 01.03.1996, to all its customers informing them about the change in name. That apart, a reference is also made to a communication dated 22.03.1996, addressed to the respondent no.3's Clearing House about the change in name. Similarly, there is a reference to the information carried in the Economic Times date lined : 06.04.1996, vis-a-vis the change in name.

38.2 Based on the above, Mr. Brij Mohan Chhabra had averred that there was no fabrication, which was, in a sense accepted by the DRT, while dismissing the petitioner's application.

38.3 Having regard to the averments made in the affidavit of Mr. Brij Mohan Chhabra and the documents placed on record, there is nothing to suggest that respondent no.3 had not filed Form no.49, as contended by it, on 05.08.1996.

38.4 Mr. Vashisht sought to contend that the said filing was not the one made to inform the ROC about the change in name but was made to inform the ROC about the change in the constitution of the Board of Directors. For this purpose, he sought to place on the covering letter dated 22.07.1996 filed by respondent no.3. It may be relevant to note the contents of the letter which reads as under :-

"The Bank of Tokyo – Mitsubishi, Ltd.

(Incorporated in Japan)
(Formerly the Bank of Tokyo Ltd.)

JEEVAN PRAKASH, SIR P. MEHTA ROAD, FORT. P.O. BOX No.1762, MUMBAI – 400 001 (INDIA)

Telephone : 288084, 288 0081, 288 2881, 288 0179, 288 2003 Tel: 011-82155 & 011-85008 Fax : 266-1787

BB/ADM/645

IN REPLY PH AB QUOTE Date: 22nd July 1996

The Registrar of Companies, Delhi and Haryana,
Kanchanganga Building, 9th Floor, 18, Barakhamba Road,
New Delhi- 110 001.

Dear Sirs,

Re: Change of Board of Directors as on 30th June, 1996

Under Section 593(d)(c) of the Indian Companies Act, 1956, we beg to submit herewith Form No.49 duly completed for changes in the set of our Board of Directors which please kindly acknowledge.

Thanking you,

Yours faithfully,

(K. KASHIMA)
ASSISTANT GENERAL MANAGER.."

38.5. A perusal of the aforesaid would show that the changed name was already reflected in the said letter. The reference to clause (d) of section 593 of the Companies Act was obviously a mistake; perhaps an

inadvertent one, which is ascribable to the fact that the covering letter was obviously signed by a person who was not obviously instructed in law. The mistake seems to have occurred on account of language of clause d of section 593, which reads as follows :-

"..593. Return to be delivered to Registrar by foreign company where documents, etc., altered – if any alteration is made or occurs in –

(a). the charter, statutes, or memorandum and articles of a foreign company or other instrument constituting or defining the constitution of a foreign company; or

(b). x x x

(c). The directors or secretary of a foreign company; or

(d). the name or address of any of the persons authorized to accept service on behalf of a foreign company; or

(e). the principal place of business of the company in India, the company shall, within the prescribed time, deliver to the registrar for registration a return containing the prescribed particulars of the alteration.."

38.6. It is possible that author of letter dated 22.07.1996 read first part of clause (d) of section 593 in a manner, which was disjunct from the latter part of clause (d). As would be noticed, the first part refers to the **"name"** and the second part refers to **"address"**. It is possible that the author of the letter was of the view that apart from the change in the constitution of Board of Directors which came within the ambit of the provision of clause (c) of section 593, the intimation with regard to the change in name fell within the first part of clause (d) of section 593. Admittedly, there was no change in the address of the entity, which was entitled to accept service on behalf of respondent no.3, which is a foreign company within the meaning of the Companies Act. Consequently, the reference ought to have been to clause (a) of section 593 and not clause (d) of the section 593. This was an obvious error, which was sought to be explained by Sh. Brij Mohan Chhabra in his affidavit of 04.01.2005. In my view, the averment to the effect, made by Sh. Chhabra that this was a typographical error can be accepted having regard to the aforesaid aspects. That apart, the accompanying documents, to which

reference has been made i.e., the receipt by which fee was deposited dated 05.08.1996, the letter addressed to the ROC dated 17.05.1996 and the permission granted by the RBI in April, 1996 is demonstrable of the fact that there was no good reason for respondent no.3 not to furnish requisite information of change of name to the ROC. There is no denying that respondent no.3 had also intimated this very information to its customers, its clearing agents and world at large between March and April, 1996. Therefore, in my opinion, even if it is assumed that information in the duplicate Form 49, which was filed on 03.04.2002, was inserted on the said date, will not, in my view, take away the body of material placed before me by the official respondents i.e., respondent nos.1 and 2 as also by respondent no.3, to establish that the original Form 49 was filed on 05.08.1996.

39. This brings me to the last aspect of the matter i.e., the argument as to why yet another Form was filed on 05.04.2004. The conduct of respondent no.3 in this regard is explained by reference to ROC's letter dated 26.03.2004, whereby they were advised to file a revised duplicate Form by an authorised person to rectify the objections. It is quite possible that having received the said communication, respondent no.3 filed yet another Form on 05.04.2004. Therefore, in my view, as long as there is nothing to suggest that the original Form 49 was not filed on 05.08.1996, the subsequent filings would not carry the matter any further in so far as the petitioner is concerned. It is not as if the ROC cannot allow rectification or curing deficiencies, if any, in the information supplied by the applicant companies, to it. This power is available to the ROC and therefore, that by itself cannot further the cause of the petitioner unless one could come to a conclusion that there was no filing made in the first instance by respondent no.3.

40. Having regard to the discussion above, I am unable to come to a conclusion that any of the prayers made in the petition ought to be granted. The petition is devoid of merits and is accordingly dismissed with cost of Rs.1 Lakh. Rs.50,000/- will be paid to respondent nos.1 and 2 while the balance sum of Rs.50,000/- will be paid to respondent no.3.

ILR (2013) II DELHI 1282
CO. APP.

INDO ROLHARD INDUSTRIES LTD. ....APPELLANT

VERSUS

M.K. MAHAJAN AND ANR. ....RESPONDENTS.

(S. RAVINDRA BHAT & R.V. EASWAR, J.)

CO. APP. NO. : 19/2009 DATE OF DECISION: 07.01.2013

Companies Act, 1956—Winding up of a company—Section 433—Petition filed by two share holders for winding up of the Appellant company—Vide a single order dated 16/2/2009, the Ld. Single Judge (a) admitted the petition; (b) directed the company to be wound up; (c) appointed the liquidator and (d) directed the citation to be published in the newspapers—Appellant challenged the said order on the ground that the order of winding up could not have been passed before publishing of the citation. Held: An order for winding up of a company cannot be passed before getting published, the advertisement of the winding up petition. The impugned judgment has also denied the appellant company an opportunity to invoke the inherent powers of the Court, codified by Rule 9 of Companies (Court) Rules, 1959, to show to the company Court why an advertisement should not automatically follow the admission of the petition. The order of the learned Single Judge is set aside and the company application is remanded with the direction that it may be disposed of in accordance with law and with the further direction that in case an application is moved by the company under Rule 9 within seven days from today, the same may also be decided in accordance with law.

Counsel for the appellant-company contends on the strength of the judgment of the Supreme Court in **National Conduits (P) Ltd. v. S'S. Arora,** (1967) 37 Com. Cases 786 that the procedure adopted by the learned company judge is unsustainable and that an order for winding up cannot be passed before publishing the advertisement. The contention appears to us to be sound. The judgment cited above lists the steps involved in ordering the winding up of a company under the supervision of the High Court. It was observed (@ page 788): -

> "When a petition is filed for winding up of a company under the supervision of the High Court, the High Court may: (i) issue notice to the company to show cause why the petition should not be admitted; (ii) admit the petition, fix a date for hearing and issue notice to the company before giving directions for advertising; or (iii) admit the petition, fix the date for hearing, order advertisement and direct service upon those who are specified in the order. A petition for winding up cannot be placed for hearing before the court, unless the petition is advertised; that is clear from the terms of rule 24(2)."

The judgment refers to Rule 96 of the Companies (Court) Rules, 1959 framed by the court which states that when an application for winding up is presented it shall be posted before the judge in Chambers for admission and fixing a date for hearing and *"for directions as to the advertisements to be published and the persons, if any, upon whom copies of the petition are to be served"* and that the judge, if he thinks fit, direct that notice be given to the company before giving directions as to the advertisement of the petition. There is thus an opportunity to be provided to the company as contemplated by the rule.

(Para 3)

The impugned judgment in which several directions are rolled-up, (vide paragraph 46) including the direction to

advertise the petition for winding-up, read in light of the judgments of the Supreme Court (supra), seems to have denied the appellant-company an opportunity to invoke the inherent powers of the court, codified by Rule 9, that the winding up petition should not be advertised on whatever grounds it would be advised to take. **(Para 5)**

Important Issue Involved: Companies Act, 1956—Winding up of a company—An order for winding up of a company cannot be passed before getting published the advertisement of the winding up petition and further an opportunity must be granted to the company to show as to why the advertisement should not automatically follow the admission of the petition.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. Sarat Chandra, Mr. Manoj Kumar Garg, Mr. Animesh Kumar Sinha and Mr. Abhinav Anand, Advocates.

FOR THE RESPONDENTS : Ms. Vibha Mahajan Seth, Advocate. Mr. Kanwal Chaudhary, Advocate for Official Liquidator.

CASES REFERRED TO:

1. *IBA Health Ltd.* vs. *Info-Drive Systems Sdn. Bhd.,* (C.A. No. 8230/2010, dated 23.09.2010).
2. *Cotton Corporation of India* vs. *United Industrial Bank,* AIR 1983 SC 1272.
3. *National Conduits (P) Ltd.* vs. *S. S. Arora,* (1968) 1 SCR 430 : (AIR 1968 SC 279).
4. *National Conduits (P) Ltd.* vs. *S'S. Arora,* (1967) 37 Com. Cases 786.
5. *Lord Krishna Sugar Mills Ltd.* vs. *Smt. Abnash Kaur,* (1961) 31 Comp. Cas. 587.

RESULT: Appeal Allowed.

R.V. EASWAR, J.

1. The short question that arises in this appeal is whether the company court can order winding up of a company without ordering the petition to be advertised.

2. The appellant is a company. A petition was filed by two shareholders for winding up of the company under section 433 of the Companies Act, 1956 before the company court. The company court (learned single judge) by the impugned order: (a) admitted the petition; (b) directed the company to be wound up; (c) appointed the official liquidator and directed him to take charge of the assets and records of the company and proceed in accordance with law and (d) directed the citation to be published in the "Statesman" (English) and "Jansatta" (Hindi) for 16.03.2009. All these directions were issued in a single order - impugned in the present appeal – passed on 16.02.2009; the relevant paragraph is quoted below:

> "46. I, accordingly, admit this petition and direct that the respondent company be wound up. The official liquidator attached to this Court is appointed as the liquidator in respect of the respondent company. He shall forthwith take over all the assets and records of the respondent company and proceed according to law. Citation shall be published in the 'Statesman'. (English) and 'Jansatta' (Hindi) for 16.03.2009. Petitioner may take steps accordingly."

3. Counsel for the appellant-company contends on the strength of the judgment of the Supreme Court in **National Conduits (P) Ltd. v. S'S. Arora,** (1967) 37 Com. Cases 786 that the procedure adopted by the learned company judge is unsustainable and that an order for winding up cannot be passed before publishing the advertisement. The contention appears to us to be sound. The judgment cited above lists the steps involved in ordering the winding up of a company under the supervision of the High Court. It was observed (@ page 788): -

> "When a petition is filed for winding up of a company under the supervision of the High Court, the High Court may: (i) issue notice to the company to show cause why the petition should not be admitted; (ii) admit the petition, fix a date for hearing and issue notice to the company before giving directions for advertising; or (iii) admit the petition, fix the date for hearing, order advertisement and direct service upon those who are specified in the order. A petition for winding up cannot be placed for hearing before the court, unless the petition is advertised; that is clear from the terms of rule 24(2)."

The judgment refers to Rule 96 of the Companies (Court) Rules, 1959 framed by the court which states that when an application for winding up is presented it shall be posted before the judge in Chambers for admission and fixing a date for hearing and *"for directions as to the advertisements to be published and the persons, if any, upon whom copies of the petition are to be served"* and that the judge, if he thinks fit, direct that notice be given to the company before giving directions as to the advertisement of the petition. There is thus an opportunity to be provided to the company as contemplated by the rule.

4. It can still be argued that the opportunity to the company is required to be given only if the judge thinks it fit to do so and that in the present case, having regard to the tenor of the impugned judgment, the learned judge did not consider it fit to give notice to the appellant-company before issuing directions as to the advertisement. Such an argument is taken care of adequately by Rule 9 of the aforesaid Rules – noticed by the Supreme Court in the judgment cited supra – which reads:

> "Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the court to give such directions or pass such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

The judgment of the Punjab High Court in **Lord Krishna Sugar Mills Ltd. v Smt. Abnash Kaur,** (1961) 31 Comp. Cas. 587 was approvingly noticed (subject to qualifications which are not relevant for our purpose) by the Supreme Court. In that judgment, the High Court had held that in an appropriate case the court has the power to suspend advertisement of a petition for winding up, pending disposal of an application for revoking the order of admission of the petition. The Supreme Court traced the power to entertain an application by the company that in the interest of justice or to prevent abuse of the process of the court, the petition for winding up be not advertised, to Rule 9 (supra), and observed that such an application may be made by the company even when there

is an unconditional admission of the petition for winding up. It was observed that the power to entertain such an application is inherent in the court and Rule 9 only reiterates that power. Similarly, in a later Supreme Court decision, in **Cotton Corporation Of India v. United Industrial Bank,** AIR 1983 SC 1272 it was held that: -

> "There is sufficient built- in safeguard in the provisions of the Companies Act and the Rules framed thereunder which would save the company from any adverse consequences, if a petitioner actuated by an ulterior motive presents the petition. This was taken notice of by this Court in **National Conduits (P) Ltd. v. S. S. Arora,** (1968) 1 SCR 430 : (AIR 1968 SC 279) wherein this Court set aside the order of the High Court of Delhi which was of the opinion that once a petition for winding-up is admitted to the file, the Court is bound to forthwith advertise the petition. This Court held that the High Court was in error in holding that a petition for winding-up must be advertised even before the application filed by the company for staying the proceeding for the ends of justice or to prevent abuse of the process of this court. This court held that the view taken by the High Court that the court must as soon the petition is admitted, advertise the petition is contrary to the plain terms of Rule 96 and such a view if accepted, would make the court an instrument, in possible cases, of harassment and even of blackmail, for once a petition is advertised, the business of the company is bound to suffer serious loss and injury."

5. The impugned judgment in which several directions are rolled-up, (vide paragraph 46) including the direction to advertise the petition for winding-up, read in light of the judgments of the Supreme Court (supra), seems to have denied the appellant-company an opportunity to invoke the inherent powers of the court, codified by Rule 9, that the winding up petition should not be advertised on whatever grounds it would be advised to take.

6. It was contended on behalf of the respondent who had succeeded before the learned single judge that the purpose of the advertisement is the protection of the creditors and the shareholders of the company which is the primary consideration and the fact that the company sought to be wound up was not heard before the advertisement was ordered

was not relevant. The answer to this contention is to be found in the judgment of the Supreme Court itself (supra). In the penultimate paragraph of the judgment (@ page 789), the court was examining the correctness of the view expressed by this court that the court must, as soon as the petition for winding up is admitted, advertise the petition. Rejecting the view, the Supreme Court observed:

> "Such a view, if accepted, would make the court an instrument, in possible cases, of harassment and even of blackmail, for once a petition is advertised, the business of the company is bound to suffer serious loss and injury."

Recently, the Supreme Court had occasion to examine the question of issue of advertisement from the point of view of the company which is sought to be wound up, in **IBA Health Ltd. v. Info-Drive Systems Sdn. Bhd.,** (C.A. No. 8230/2010, dated 23.09.2010) where it was held as follows: -

> "PUBLIC POLICY CONSIDERATIONS
>
> 26. A creditor's winding up petition, in certain situations, implies insolvency or financial position with other creditors, banking institutions, customers and so on. Publication in the Newspaper of the filing of winding up petition may damage the creditworthiness or financial standing of the company and which may also have other economic and social ramifications. Competitors will be all the more happy and the sale of its products may go down in the market and it may also trigger a series of cross-defaults, and may further push the company into a state of acute insolvency much more than what it was when the petition was filed. The Company Court, at times, has not only to look into the interest of the creditors, but also the interests of public at large.
>
> 27. We have referred to the above aspects at some length to impress upon the Company Courts to be more vigilant so that its medium would not be misused. A Company Court, therefore, should act with circumspection, care and caution and examine as to whether an attempt is made to pressurize the company to pay a debt which is substantially disputed. A Company Court, therefore, should be guarded from such vexatious abuse of the

process and cannot function as a Debt Collecting Agency and should not permit a party to unreasonably set the law in motion, especially when the aggrieved party has a remedy elsewhere.

28. In the above mentioned facts and circumstances of the case, we are of the view that the order passed by the Company Court ordering publication of advertisement in the newspaper would definitely tarnish the image and reputation of the appellant company resulting in serious civil consequences and, hence, we are inclined to allow this appeal and set aside the order passed by the Company Court dated 17.09.2009 in Company Petition 41 of 2009 and the judgment of the Division Bench of the High Court of Karnataka dated 21.10.2009 passed in OSA No. 36 of 2009, and we order accordingly. However, we make it clear that the observations and findings rendered by this Court in this proceeding will not prejudice the parties in approaching the appropriate forum for redressal of their grievances and, in the event of which, that forum will decide the case in accordance with law."

This is sufficient justification for granting an opportunity to the company (appellant herein) to show to the company court why an advertisement should not automatically follow the admission of the petition. It can invoke the inherent powers of the court embodied in Rule 9 and it would then be for the company court to deal with the reasons shown and take a decision.

7. Counsel for the respondent however points out that there can possibly be no damage to the reputation or business of the company since its operations have been closed down as is evident from the letter dated 15.04.2009 written by its managing director, a copy of which was filed before us. One Anil Koshal has in the letter informed the official liquidator that the company has closed down its manufacturing activities since March, 2003 and subsequently all business activities have come to a standstill and that the office premises are being used by him in his personal capacity for his own business in which the records of the company are also kept. This is something which, if the company judge thinks fit and proper, needs to be answered by the company if and when it moves an application before the company court invoking the inherent powers to dispense with the requirement of issuing a citation. The question before us is one of opportunity and fair procedure to be followed by the

company court; we are not concerned with the merits of the claim of the company which would be for the company judge to decide. Moreover, the Supreme Court has observed in **National Conduits (P) Ltd.** (supra) that an application for dispensing with the citation may be made even when there is an unconditional admission of the petition for winding up. It appears to us that that right cannot be denied.

8. The appeal is allowed. The order of the learned single judge is set aside and the company application is remanded with the direction that it may be disposed of in accordance with law and with the further direction that in case an application is moved by the company under Rule 9 within seven days from today, the same may also be decided in accordance with law. There shall be no order as to costs.

ILR (2013) II DELHI 1290
ITA

COMMISSIONER OF INCOME TAX-XII ....PETITIONER

VERSUS

KAMAL WAHAL ....RESPONDENT

(BADAR DURREZ AHMED & R.V. EASWAR, JJ.)

ITA NO. : 4/2013 DATE OF DECISION: 11.01.2013

Income Tax Act, 1961—Section 54F—Respondent assessee sold an ancestral property which gave rise to proportionate capital gains in his hands and in computing the same, he claimed deduction u/s 54F on the grounds that the sale proceeds were invested in the acquisition of a vacant plot and the purchase of a residential house in the name of his wife—Assessing Officer did not allow the deduction on the ground that the investment in the residential house had been made in the name of the wife of the assessee and not

in his own name—On appeal, CIT (Appeal) and the Income Tax Tribunal both accepted the assessee's contention. Held: For the purposes of Section 54F new residential house need not be purchased by the assessee in his own name nor is it necessary that it should be purchased exclusively in his name, the Section being a beneficial provision enacted for encouraging investment in residential houses should be liberally interpreted.

It thus appears to us that the predominant judicial view, including that of this Court, is that for the purposes of Section 54F, the new residential house need not be purchased by the assessee in his own name nor is it necessary that it should be purchased exclusively in his name. It is moreover to be noted that the assessee in the present case has not purchased the new house in the name of a stranger or somebody who is unconnected with him. He has purchased it only in the name of his wife. There is also no dispute that the entire investment has come out of the sale proceeds and that there was no contribution from the assessee's wife. **(Para 9)**

Important Issue Involved: If a statutory tax provision is capable of more than one view then the view which favours the tax payer should be preferred.

[An Gr]

APPEARANCES:

FOR THE PETITIONER : Mr. N.P. Sahni, St. Counsel with Mr. Ruchesh Sinha, Advocate.

FOR THE RESPONDENT : None.

CASES REFERRED TO:

1. *CIT* vs. *Gurnam Singh* : (2014) 327 ITR 278.
2. *CIT* vs. *Ravinder Kumar Arora* : (2012) 342 ITR 38 (Del.).

3. *Director of Income-tax, International Taxation, Bangalore* : (2011) 203 Taxman 208.
4. *Prakash* vs. *ITO* : (2008) 173 Taxman 311.
5. *Commissioner of Income Tax* vs. *V. Natarajan* : (2006) 287 ITR 271.
6. *Late Gulam Ali Khan* vs. *Commissioner of Income Tax* : (1987) 165 ITR 228.
7. *CIT* vs. *Vegetable Products Ltd.* : 88 ITR 192.

RESULT: Appeal Dismissed.

R.V. EASWAR, J. (ORAL)

1. This is an appeal filed by the Commissioner of Income Tax-XII, New Delhi under Section 260A of the Income Tax Act, 1961 and it is directed against the order of the Income Tax Appellate Tribunal dated 20.07.2012 in ITA No.5064/Del/2011, for the assessment year 2008-2009.

2. The appeal is admitted and the following substantial question of law is framed:-

> "Whether on the facts and in the circumstances of the case and on a proper interpretation of Section 54F of the Income Tax Act 1961, the Tribunal was right in law in allowing the deduction of Rs. 51,25,100/- claimed by the assessee under that Section?"

3. The assessee is an individual. He retired from IOCL. His income consists of income by way of salary, from house property and other sources. He inherited 50% share in a residential house in E-2/13, Vasant Vihar, Delhi in 2003 from his father. This was in July 1968. The other half share was inherited by his brother. In the year which ended on 31.03.2008, both the brothers jointly sold the property which gave rise to proportionate capital gains in the assessee's hands. In computing the capital gains, the assessee claimed deduction under Section 54F on the ground that the sale proceeds were invested in the acquisition of a vacant plot for Rs. 31,25,100/- and the purchase of a residential house for Rs. 34,35,700/- in the name of his wife.

4. The assessing officer while completing the assessment, took the view that under Section 54F, the investment in the residential house

should be made in the assessee's name and in as much as the residential house was purchased by the assessee in the name of his wife, the deduction was not allowable. He reduced the deduction and computed the capital gains accordingly.

5. On appeal, the CIT (Appeal) accepted the assessee's contention based on the judgment of the Madras High Court in **Commissioner of Income Tax Vs. V. Natarajan** : (2006) 287 ITR 271 and that of the Andhra Pradesh High Court in **Late Gulam Ali Khan Vs. Commissioner of Income Tax** : (1987) 165 ITR 228.

6. The revenue preferred an appeal before the Tribunal questioning the decision of the CIT(Appeals). The Tribunal, however, by the impugned order, agreed with the decision of the CIT (Appeals) and in doing so followed the judgment of the Madras and Andhra Pradesh High Courts cited supra and also another judgment of the Karnataka High Court in **Director of Income-tax, International Taxation, Bangalore** : (2011) 203 Taxman 208. It also noted the judgment of the Bombay High Court in **Prakash Vs. ITO** : (2008) 173 Taxman 311 in which a contrary view was taken but preferred the view taken by the Madras and Karnataka High Courts adopting the rule laid down by the Supreme Court in **CIT Vs. Vegetable Products Ltd.** : 88 ITR 192 which says that if a statutory provision is capable of more than one view, then the view which favours the tax payer should be preferred. The Tribunal also observed that Section 54F being a beneficial provision enacted for encouraging investment in residential houses should be liberally interpreted.

7. We have no hesitation in agreeing with the view taken by the Tribunal. Apart from the fact that the judgments of the **Madras and Karnataka High Courts** (supra) are in favour of the assessee, the revenue fairly brought to our notice a similar view of this Court in **CIT Vs. Ravinder Kumar Arora** : (2012) 342 ITR 38 (Del.). That was also a case which arose under Section 54F of the Act. The new residential property was acquired in the joint names of the assessee and his wife. The income tax authorities restricted the deduction under Section 54F to 50% on the footing that the deduction was not available on the portion of the investment which stands in the name of the assessee's wife. This view was disapproved by this Court. It noted that the entire purchase consideration was paid only by the assessee and not a single penny was contributed by the assessee's wife. It also noted that a purposive

construction is to be preferred as against a literal construction, more so when even applying the literal construction, there is nothing in the section to show that the house should be purchased in the name of the assessee only. As a matter of fact, Section 54F in terms does not require that the new residential property shall be purchased in the name of the assessee; it merely says that the assessee should have purchased/constructed "a residential house".

8. This Court in the decision cited alone also noticed the judgment of the Madras High Court (supra) and agreed with the same, observing that though the Madras case was decided in relation to Section 54 of the Act, that Section was in pari materia with Section 54F. The judgment of the Punjab and Haryana High Court in the case of **CIT Vs. Gurnam Singh** : (2014) 327 ITR 278 in which the same view was taken with reference to Section 54F was also noticed by this Court.

9. It thus appears to us that the predominant judicial view, including that of this Court, is that for the purposes of Section 54F, the new residential house need not be purchased by the assessee in his own name nor is it necessary that it should be purchased exclusively in his name. It is moreover to be noted that the assessee in the present case has not purchased the new house in the name of a stranger or somebody who is unconnected with him. He has purchased it only in the name of his wife. There is also no dispute that the entire investment has come out of the sale proceeds and that there was no contribution from the assessee's wife.

10. Having regard to the rule of purposive construction and the object which Section 54F seeks to achieve and respectfully agreeing with the judgment of this Court, we answer the substantial question of law framed by us in the affirmative, in favour of the assessee and against the revenue.

The appeal is accordingly dismissed with no order as to costs.

ILR (2013) II DELHI 1295
WP (C)

THE SECURITIES & EXCHANGE BOARD OF INDIA ....PETITIONER

VERSUS

A.P.L. INDUSTRIES LTD. & ORS. ....RESPONDENTS

(RAJIV SHAKDHER, J.)

WP (C) NO. : 1261/2002 DATE OF DECISION: 14.01.2013

Companies Act, 1956—Refund of share application amount—R1 company floated prospectus for public issue of 30 lakh equity shares of a face value of Rs. 10/- each, for cash at par aggregating to a total sum of Rs. 3 crore—Public Issue opened on 26.2.96 and closing date was 8.3.96 and by the closing date, R1 received 51,37,100 applications 23,13,800 share applications were withdrawn and 3,25,700 share applications were rejected by the Registrar—Thence, on closure date, public issue of R1 was over subscribed 1.71 times and if rejected applications taken into consideration, the public issue was over-subscribed by 1.60 times and taking both the rejected applications and withdrawal applications into consideration, the subscription to the public issue fell to 83% of the total public issue made by R1 company—SEBI directed refund of the entire share application amount, since as per SEBI, R1 company had failed to achieve the minimum subscription as provided in its prospectus—In appeal, the Securities Appellate Tribunal reversed the order of SEBI—Challenged—R1 company defended the order of SAT on the ground that prospectus constitutes offer and once application is made, contract is complete, so it cannot be revoked by seeking withdrawal of application and that withdrawal of share

application money can only be accepted by the company concerned and not by the Registrar—Held, share application is like an offer and not acceptance of offer, and the contract is completed only on allotment of shares, which need not necessarily occur, therefore R1 is wrong to contend that on receipt of share applications, concluded contract came into existance and vide Rule 2(e)(i)(iii)(b) SEBi Rules the Registrar has power to finalise the list, which power has implicit in it the power to direct refund qua withdrawal requests—Further held, if minimum subscription amount is not reached, then surely no allotment can be made in view of Sec. 69, Companies Act and the minimum subscription has to be arrived at by taking into account the number of withdrawal applications, therefore order of SAT in this case not tenable.

If that be so a share application is like any other offer which would require acceptance of the offer made. The acceptance of an offer of this nature can only be brought about, inter alia by allotment of shares made in favour of the applicant by some overt method. Like in any other transaction between two individuals before an offer is accepted, the offerer is entitled to revoke the offer. This is precisely what happened in the present case. The minimum subscription clause is inserted in a prospectus to protect the interest of the investors, which is why Section 69 of the Companies Act provides that if minimum subscription is not achieved, a company issuing the prospectus cannot proceed to allotment of shares. The purpose being that it would be pointless to have investors provide capital to the recipient company unless the minimum amount is received by such a company for the purpose stated in the prospectus. The argument advanced on behalf of respondent no.1/company that on receipt of the share application form, a concluded contract came into existence, is a submission which is completely misconceived because if it was so the concerned company

would have to, as of necessity, allot to the applicant, without fail, the exact number of shares for which a request is lodged. As is well known, on very many occasions the opposite happens. This is legitimate since in law, a share application is only an offer. **(Para 9.1)**

Therefore, if the minimum subscription amount is not reached, which is the case in the present petition, then surely no allotment can be made. There can be no dispute about this position in view of the provisions of Section 69 of the Companies Act. The minimum subscription, therefore, would have to be calculated by taking into account the factum of number of withdrawal request rejections made qua share application received. Since the contract between the applicant and the company is concluded only on the allotment of shares the withdrawal request can be made by an applicant well before the said date. There is no dispute vis-a-vis the fact that withdrawal requests were made.

(Para 9.5)

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Ms. Maninder Acharya, Advocate.

FOR THE RESPONDENTS : None.

CASE REFERRED TO:

1. *Official Liquidator of Bellary Electric Supply Co. Ltd.* Vs. *Kanniram Rawoothmal and A. Sirkar* vs. *Parjoar Hosiery Mills Ltd.* 1933 (3) Comp.Cas 454]

RESULT: Petition allowed.

RAJIV SHAKDHER, J.

1. This writ petition has been filed to assail the order of the Securities Appellate Tribunal (in short SAT) dated 18.10.2010.

2. It may be pertinent to note that by the said order, SAT has reversed the order dated 22.05.1998 passed by the Chairman, Security and Exchange Board of India (in short SEBI).

3. The challenge arises in the background of the following facts, most of which are not in dispute :-

3.1 Respondent no.1/company had floated a prospectus for a public issue of 30 Lakhs equity shares of a face value of Rs.10/- each, for cash at par aggregating to a total sum of Rs.3 Crores. The public issue opened on 26.02.1996. The closing date for the issue was 08.03.1996.

3.2 Against the aforementioned public issue, respondent no.1/company received 51,37,100 applications by the date of closure i.e., 08.03.1996.

3.3 Evidently, there were certain withdrawals as well as rejection of the share applications filed with the Registrar to the Share Issue (in short the Registrar). Undisputedly 23,13,800 share applications were withdrawn, while 3,25,700 share applications were rejected on one ground or the other by the Registrar. Two important facts emerged by virtue of the aforesaid events.

3.4 First, that on the date of closure i.e., 08.03.1996, the public issue of respondent no.1/company was over-subscribed by almost 1.71 times. However, if the rejected share applications were taken into account which, as indicated above, numbered 3,25,700, on the date of closure i.e., 08.03.1996 the public issue was over-subscribed by 1.60 times as against 1.71 times, if all application forms were taken into account.

3.5 Second, if, however, the share applications in respect of which request for withdrawal had been received from the applicants were taken into account the subscription to the public issue of respondent no.1 fell to 94% of the total public issue. Similarly, if both the rejected share applications and the request for withdrawal of share applications was taken into account, the subscription to the public issue fell to 83% of the total public issue made by respondent no.1/company.

4. It is in the background of these undisputed facts that the issue which arises for consideration is whether the SEBI was right in directing refund of the entire share application amount since, according to SEBI, respondent no.1/company had not been able to achieve the minimum subscription as provided in its prospectus.

4.1 It may be relevant, therefore to, extract the minimum subscription clause as contained in the prospectus :-

"..MINIMUM SUBSCRIPTION

IF THE COMPANY DOES NOT RECEIVE THE MINIMUM SUBSCRIPTION AMOUNT OF 100% OF THE ISSUE AS APPLICATION MONEY TILL THE CLOSURE OF THE ISSUE, THE COMPANY SHALL FORTHWITH REFUND THE ENTIRE SUBSCRIPTIOON AMOUNT RECEIVED. IF THERE IS A DELAY IN REFUND OF THE AMOUNT COLLECTED, THE COMPANY AND THE DIRECTORS OF THE COMPANY SHALL BE JOINTLY AND SEVERELY LIABLE TO REPAY THE AMOUNT BY WAY OF REFUND WITH INTERST AT TEH RATE OF 15% PER ANNUM FOR THE DELAYED PERIOD BEYOND 78 DAYS FROM THE OPENING OF THE ISSUE..."

4.2 As would be evident respondent no.1/company was thus required to achieve a minimum subscription of 100% of the issue as the application money till the closure of the issue, failing which it was required to refund the entire subscription amount received from the applicants for allotment of shares.

4.3 Continuing with the narrative, the request for withdrawal of share application had been received by the Registrar between 08.03.1996 to 14.05.1996. Since the subscription had dropped to 83% of the total share issue, the lead Manager to the public issue, issued a certificate stating therein, inter alia, that respondent no.1/company had failed to achieve minimum subscription. It may be pertinent to note that the lead Manager to the Share issue was one, Allianz Capital and Management Services Limited.

4.4 Based on the aforesaid events, SEBI shot of a communication dated 07.06.1996, whereby it advised respondent no.1/company to immediately refund the share application money to the concerned applicants, and file a status report with it, latest by 12.06.2012. Respondent no.1/company was also put to notice that if it failed to do the needful, SEBI would be constrained to take action against it, in accordance with the provisions of the Securities & Exchange Board of India Act, 1992 and the Companies Act, 1956 (in short the Companies Act). It may also be pertinent to note that in this very communication of 07.06.1996, there was a discussion as to the applicability of the provisions of Section 72(5) of the Companies Act. SEBI seems to have indicated in the said communication that, the applicant(s) who were desirous of being allotted

shares, could withdraw their application after the expiry of the 5th day from the opening of the subscription list. A reference was also given to a previous precedent wherein SEBI had come to the same conclusion. A copy of the said appellate decision, in the case of Vishwalaxmi Petro Products Limited, was also, evidently furnished to respondent no.1/company.

4.4 It appears that being aggrieved, respondent no.1/company filed an appeal with SAT which, by an order dated 20.11.1996, rejected the appeal on the ground that the order impugned was not appealable as it was not an order passed under the provisions of the SEBI Act. Respondent no.1/company was thus permitted to approach the Chairman of the SEBI for redressal of its grievance.

4.5 Accordingly, respondent no.1/company approached the Chairman of the SEBI who by an order dated 22.05.1998 directed respondent no.1/company to refund the monies received from the applicants against the public issue.

4.6 It is this order which was assailed by respondent no.1/company before SAT. As indicated above, SAT by virtue of the impugned order dated 18.10.2000 reversed the order of the Chairman of SEBI dated 22.05.1998. It may only be recorded as a matter of fact that prior to approaching SAT respondent no.1/company had approached the High Court of Punjab and Haryana which in effect directed it to SAT, vide its order dated 14.10.1999 passed in CWP 10811/1998.

4.7 This resulted in SEBI being aggrieved by the order of SAT and hence chose to take recourse to a writ petition. For this purpose, a writ petition was filed in the Bombay High Court, wherein respondent no.1/company raised a preliminary objection with regard to the territorial jurisdiction, whereupon SEBI withdrew its writ petition, with liberty to approach the appropriate court. This order was passed on 09.01.2002.

4.8 Importantly, in the interregnum, the Bombay High Court had passed an order on 11.05.2001, whereby the bankers to the issue were restrained from making over moneys to respondent no.1/company.

5. It is in this background that the captioned writ petition has been filed in this court, by SEBI. The captioned writ petition was moved on 20.02.2002, when this court while issuing notice issued a similar ad interim direction, which was passed by the Bombay High Court, in

effect, restraining the bankers to the issue from releasing payment to respondent no.1/company.

6. Pleadings in the writ petition are complete. There is no appearance on behalf of respondent no.1/company today in court. However, in pursuance to the directions issued by this court, written synopsis have been filed on behalf of the parties including respondent no.1/company.

6.1 The sum and substance of the respondent no.1/company's defence is as follows :-

(i). the prospectus constitutes an offer for subscription of shares and once an application is made the contract is complete and hence, it cannot be revoked by seeking withdrawal of the share application money. In other words, what is contended is that even after the 5th day of the opening of the subscription list, there can be no unilateral withdrawal of the share application money;

(ii). the withdrawal of the share application money can only be accepted by the company i.e., in this case respondent no.1/company and not by the Registrar. It is evidently the stand of respondent no.1/company that on the date of closure the public issue was over-subscribed by 1.71 times which was well over the minimum subscription of 100% as per the requirement stipulated in respondent no.1/company's prospectus and therefore, the condition prescribed therein was met. The provisions of Rule 2(3) of the SEBI, Registrar to an issue and Share Transfer Agents Rules 1993 are sought to be invoked to establish that it was never within the remit of the Registrar to permit withdrawal of the share applications. It is sought to be submitted that power, if any, to permit withdrawal of the share application vested with the Board of Directors of respondent no.1/company, and that, the Registrar in that regard had no power to return the share application money to the subscribers.

7. On the other hand, learned counsel for the petitioner, Ms. Acharya has submitted that it is well settled that the prospectus is an invitation to offer and that an applicant desirous of applying for shares, if any, of a listed company or otherwise can withdraw his offer prior to its acceptance. Ms. Acharya submits that the offer of an applicant culminates into a contract only upon allotment of the shares. In this case, according to Ms. Acharya withdrawal of the share application(s) took place before the allotment and therefore, as a matter of fact, in effect, the Registrar was

only carrying out what is a ministerial act. Reliance was placed by her on the judgment of the Bombay High Court in the case of Vishwalakshmi Petro Products Ltd. vs Securities Exchange Board of India in WP(C) No. 728/1996 in the High Court of Judicature at Bombay.

7.1. In the alternative, Ms. Acharya argues that the Registrar is empowered to receive and permit withdrawal of the share applications. In this regard, Ms. Acharya places reliance on Rule 2(3)(i) and (iii)(b) of SEBI.

7.2 Furthermore, Ms. Acharya thus submits that, in terms of Section 69 of the Companies Act, the company which is respondent no.1 was prohibited from making an allotment if, it did not receive subscription equivalent to the minimum amount prescribed in the prospectus.

7.3. Mrs. Acharya also places reliance on Sub-Section (5) of Section 72 of the Companies Act, to contend that the prohibition on an applicant to withdraw his share application extends to the 5th day from the date of opening of the subscription list, and therefore, upon expiry of the said period, an applicant can make a request for withdrawal, in respect of which, neither the Registrar nor the company can have any say.

8. Having heard learned counsel for the petitioner and on perusal of pleadings, record and the written submissions filed on behalf of respondent no.1/company, what emerges is as follows :-

(i). That, on the date of closure of the share issue i.e., 08.03.1996, the public issue of respondent no.1/company was over-subscribed. The over subscription was to the extent of 1.17 times;

(ii). There were both rejections and withdrawals;

(iii). If, rejections are taken into account, the over-subscription dropped to 1.60 times of the total public issue;

(iv). If, however, the withdrawals were also taken into account, the subscription to the share issue dropped to a figure below the minimum subscription, which was equivalent to, in percentage terms 83% of the total issue.

9. The question, therefore, arises as to whether the date of closure is to be taken into account for determining whether or not the petitioner company achieved the minimum subscription. Undoubtedly, what can be

said in favour of respondent no.1/company that the clause pertaining to minimum subscription, as appearing in the prospectus, did indicate that respondent no.1/company was required to refund subscription amount received if it did not receive 100% of the total issue amount till the date of closure of the issue. However, this contractual clause has to be understood in the context of the transaction at hand. The transaction at hand concerns an application for shares which is made by an entity including an individual to a company, pursuant to a prospectus being issued, in this case by respondent no.1/company.

9.1. If that be so a share application is like any other offer which would require acceptance of the offer made. The acceptance of an offer of this nature can only be brought about, inter alia by allotment of shares made in favour of the applicant by some overt method. Like in any other transaction between two individuals before an offer is accepted, the offerer is entitled to revoke the offer. This is precisely what happened in the present case. The minimum subscription clause is inserted in a prospectus to protect the interest of the investors, which is why Section 69 of the Companies Act provides that if minimum subscription is not achieved, a company issuing the prospectus cannot proceed to allotment of shares. The purpose being that it would be pointless to have investors provide capital to the recipient company unless the minimum amount is received by such a company for the purpose stated in the prospectus. The argument advanced on behalf of respondent no.1/company that on receipt of the share application form, a concluded contract came into existence, is a submission which is completely misconceived because if it was so the concerned company would have to, as of necessity, allot to the applicant, without fail, the exact number of shares for which a request is lodged. As is well known, on very many occasions the opposite happens. This is legitimate since in law, a share application is only an offer.

9.2 Therefore, in my opinion, the minimum subscription clause appearing in the prospectus would have to yield to the right of an applicant to withdraw his offer before its acceptance. I may note here the argument of Ms. Acharya, learned counsel for the petitioner, made on the same lines, that the prospectus issued by a company was an invitation to offer and if the application for shares is made, pursuant to issuance of a prospectus, it was only an offer which could be withdrawn at any stage

before its acceptance. I am in agreement with this submission of the learned counsel for the petitioner. [See AIR 1933 Madras 320, **Official Liquidator of Bellary Electric Supply Co. Ltd. Vs. Kanniram Rawoothmal and A. Sirkar vs Parjoar Hosiery Mills Ltd.** 1933 (3) Comp.Cas 454]

9.3 Therefore, in my opinion, minimum subscription would have to be calculated after taking into account the requests made for withdrawal of share application.

9.4 There is another reason for coming to the same conclusion. Undoubtedly, in this case like in other public issues, there are rejections by a Registrar based on various technical grounds. If as per the clause of minimum subscription, the minimum subscription had to be calculated as on the date of closure, it would be well-nigh impossible to carry out that exercise as more often than not the rejections are made even after the date of closure.

9.5 Therefore, if the minimum subscription amount is not reached, which is the case in the present petition, then surely no allotment can be made. There can be no dispute about this position in view of the provisions of Section 69 of the Companies Act. The minimum subscription, therefore, would have to be calculated by taking into account the factum of number of withdrawal request rejections made qua share application received. Since the contract between the applicant and the company is concluded only on the allotment of shares the withdrawal request can be made by an applicant well before the said date. There is no dispute vis-a-vis the fact that withdrawal requests were made.

10. The other aspect of the matter which has come to fore is, does the request for withdrawal get triggered automatically or does it require acceptance. The stand of the respondent no.1/company which has been accepted by SAT is that the withdrawal can only take place if its is accepted by the company and since in the present case, the withdrawal request was accepted by the Registrar the order of the Chairman SEBI had to be reversed. As rightly argued by Ms. Acharya, the fallacy in this conclusion is that it is premised on the reasoning that a request for withdrawal of a share application requires acceptance. Once a request is triggered for withdrawal of a share application, in law, it requires no acceptance. The only bar which is statutorily introduced, is one, provided under section 72(5) of the Companies Act. The bar is also put in place

for a limited period of time i.e., till the closing of the 5th day of the opening of the subscription list. It is no one's case before the authorities below that withdrawal applications were not received after the expiry of the eclipse period, as provided in section 72(5) of the Companies Act.

11. Having regard to the aforesaid, I am of the view that the order of the SAT deserves to be set aside. It is ordered accordingly. In that view of the matter, the order of the Chairman SEBI dated 22.05.1998 would have to be sustained and the directions contained therein for refund of the money to the share applicants would have to be implemented. It is ordered accordingly. The SEBI shall ensure that refund is made to the share applicants, as expeditiously as possible, in accordance with law. Any interest earned on the interregnum amongst the applicants in accordance with law. Deficiency, if any, shall be recovered from respondent no.1/company, once again, by taking recourse to the relevant provisions of law.

12. Before I conclude, I may also notice that there is something to be said vis-a-vis the power of the Registrar to permit withdrawal of a share application and consequent refund. A reference in this regard may be made to Rule 2(e)(i)(iii)(b) of the SEBI Rules. It is quite clear if the Registrar has the power to finalise the list, implicit in that power is the power to order refund qua request for withdrawal of share application. Accordingly the order dated 20.02.2002 which was made absolute on 22.08.2005 is vacated.

13. The writ petition is, accordingly, disposed of.

ILR (2013) II DELHI 1306
WRIT PETITION (CIVIL)

COMMISSIONER OF VALUE ADDED TAX DELHI **....PETITIONER**

VERSUS

CARZONRENT INDIA PVT. LTD. **....RESPONDENT**

(S. RAVINDRA BHAT & R.V. EASWAR, JJ.)

ST. APPL. NO. : 4/2011, 5/2011, 6/2011, 7/2011, 8/2011, 9/2011, 16/2011 & C.M. APPL. NO. : 10492/2011 & CROSS APPEAL 13377/2012 **DATE OF DECISION: 17.01.2013**

Delhi Value Added Tax Act, 2004—Sections 9 and 12 (4)—Input tax credit—Schedule VII—Non creditable goods-assessee/dealers engaged in business of leasing cars/motor vehicles-transfer the right to use, control and possession of vehicles to their customers—Claim for refund of input tax credit (ITC) on cars used for making taxable sales—Rejected objections filed before objection hearing authority under the DVAT Act-rejected-appeal filed before the Tribunal-set aside the dismissal of objections-remanded the matter to concerned authority-directed to decided the objections afresh—Aggrieved revenue challenged the orders of the Tribunal cross objections also filed by one of the assessees-questions framed by the Court-revenue contended dealers not entitled to ITC on goods purchased for making a sale-motor

vehicles are non creditable goods ineligible for ITC-leasing activity does not qualify as rebate in unmodified form—sale price/purchase price include just the hiring charges and not the price of the goods involved-not eligible for ITC—ITC available only for purchase acquired in the form of a right-dealers contended-motor vehicles were not non-creditable goods-fall within the exception-release has to be construed according to the definition of sale-includes transfer of the right to use goods—ITC would be available in respect of leasing activity—Observation that eligibility and availment of LTC are two different concepts is erroneous-no such distinction drawn under the Act-Held-motor vehicles fall within Sr. No.1 of the list in Schedule VII-sale includes transfer of right to use goods-leasing activity included in sale-provision of section 9 (1) apply-leasing activity amounts to resale-entry no.1 in schedule VII is subject to entry no.2 the articles fall within entry no.2 are creditable goods—Theory of proportionality has no statutory basis dealers entitled to input tax credit appeals of the revenue dismissed cross appeal of the assessee allowed.

Important Issue Involved: The VAT Act, 2004, by virtue of Section 3(1) compels all dealers registered- or obligated to be registered under the Act- to pay tax in the manner provided, under its provisions.

—Each dealer has to pay tax at the rates specified in Section 4 and in respect of every sale of goods effected by him as a registered dealer on any date from which he was required to be registered.

—Section 9 entitles tax credit to a registered dealer in respect of turn-over of purchases granted during the tax period when the purchase earned in the course of his activities as a dealer of the goods are to be used by him directly or indirectly for making sales liable to tax under Section 3 or for making sales or which are not liable to tax under Section 7.

—Section 9(1) enables dealers to claim input tax credit. Section 9(2) lists situations when input tax credit cannot be allowed and non-creditable goods are listed in Scheduled VII.

—For the purposes of Section 2(1)(zc), the meaning of "sale" includes the transfer of the right to use goods; this includes leasing activity of the assessee-dealers. It clearly falls within the definition of "sale" because what is transferred is the right to use the car or motor vehicle-albeit for a limited duration.

—The "sale" and "re-sale" mean different kinds of transactions, qualitatively, The statute here used the extended definition of "sale" which comprehends the right to lease the car. Absent indication to the contrary- in the statute, either through express provisions or by necessary implication, it is not open to the court to artificially divide the concept.

—The concept of right to use would cover a wide spectrum of transactions; most certainly, a lease of the article, for a limited period, would be comprehended within the meaning of 'right to use'.

—Resale should be construed according to the definition of sale under the Act which includes the transfer of right to use goods. The fiction created in defining sale as including transaction which otherwise, in the ordinary sense, would not have been but for the deeming provision, must apply as respect the entire Act, its Schedules, and the Rules made under the Act. The fiction has been created with respect to the term sale and would definitely extend correspondingly to the word resale as well.

—Where the draftsman uses the same word or phrase in similar contexts, he must be presumed to intend it in each place to bear the same meaning.

—When a legal fiction is created, the Court while interpreting it must enquire the purpose for it is so created. After ascertaining the purpose, full effect must be given to the statutory fiction and it should be caused to its logical conclusion, and to that end it would be proper and even necessary to assume all those facts on which alone the fiction can operate.

—Learning activity carried on by the assessees do amount to re-sale.

—In the context of applicability of value added tax on goods, unmodified form would have to be mean that the goods remain in their original state. Mere change/modification by ordinary wear and tear would not amount to modification in form. Generally speaking, the opinion, form would remain unmodified as long as the basic functionality, structure, and configuration remain unchanged.

—A complete reading of the relevant entries of the seventh schedule would disclose that while facially, motor vehicles, per se are disentitled to input credit, significantly that entry (Sl. No.1) is subject to entry No. 2.

—An article purchased by a registered dealer cannot be denied input tax credit-

—Unless it falls within item (ii), (xiv) and (xv) of Entry 1- (no which case, tax credit is denied) As a corollary, all other articles including motor vehicles, which fall in item (i), are entitled to tax credit;

—The purchasing dealers acquisition of an article for resale in an unmodified form does not disentitle input tax credit for it unless it falls within item (ii),(xiv) and (xv).

—From the provisions it can be seen that:

—input tax means the proportion of the price paid by the buyer for the goods which represents tax for which the selling dealer is liable under the Act (according to Section 2 (r);

—sale price (Section 2 (zd) means in relation to transfer of the right to use any goods for any purpose (whether or not for a specified period) the valuable consideration of hiring charges received or receivable;

—The amount of the tax credit to which a dealer is entitled in respect of the purchase of goods is "the amount of input tax arising in the tax period" (Section 9 (3));

—Where a dealer has purchased goods and the goods are to be used partly for the purpose of making the sales referred to in sub-section (1) of this section and partly for other purposes, the amount of the tax credit shall be reduced proportionately.

—Tax credit is inadmissible where the purchase of goods is from an unregistered dealer or where purchase of goods are for use exclusively for the manufacture, processing or packing of goods specified in the First Schedule (Section 9 (7));

—Tax credit is admissible in a proportionate manner, only in respect of capital goods (Section 9 (9)).

—The entire regime of principles for granting input credit is contained in Section 9 (3), (4), (6) and (10). The general principle that tax credit is admissible, in respect of the input tax, is stated in Section 9(3). Section 9(4) visualizes a situation where credit is partly admissible, in respect of some transactions. It states that input credit would be proportionate to the extent the dealer is uses the goods for the purpose of sale under Section 9 (1). The allusion to proportion does not refer to the nature or type of sale. Section 9 (6) says that where a dealer purchases goods that are entitled to credit, the amount of tax credit shall be reduced by a prescribed percentage. Section 9 (9) enacts the principle of proportionate grant of input credit, in point of time, but only in respect of capital goods.

—Once the legislature entitles the assessee to a certain benefit – of input credit, and puts in place a mechanism for working it out, which expressly provides one kind of proportional input credit, to a class of transactions, i.e. in relation to capital goods, it is not permissible for the Court to read into the statute another such proportional rule, without statutory sanction.

—Section 12 (4) merely enables the Government to frame rules prescribing the time at which a dealer shall treat the (a) turnover; (b) turnover of purchases; and (c) adjustment of tax or adjustment to a tax credit; as arising for a class of transactions.

—The manner of grant of credit can be regulated by virtue of Section 12 (4). Rule 4 merely visualizes three situations in respect of the method of calculating the "amount of turnover or turnover of purchases arising in the tax period in the case of a sale or purchase occurring.." Its reference, to sale by transfer of right to use, is only in respect of the extent of sale for the concerned tax period. Credit is admissible in respect of different periods, spreading over, as it were, the credit which a dealer can so enjoy for the duration of the agreement proportionately staggering payment of the amounts of input tax deductible towards credit.

—When a dealer, who is involved in leasing business, purchases cars, the point at which credit can be claimed is the tax period when he makes the purchase. The amount of tax – on the purchase so made- can be claimed as a credit, in the turnover which he is obliged to declare to the VAT authorities. That turnover would be the total lease rental received by him, for the corresponding tax period (when the purchase is made by him) as well as any other VAT able transaction he may be engaged in. Thus, the question of spreading over his credit, proportionately or otherwise, is unfeasible and in any case not borne out by the VAT Act or the Rules. There is no warrant for such method. The presence of Section 9(9) and other clear terms is a pointer to the contrary.

[Vi Gu]

APPEARANCES:

FOR THE PETITIONER : Sh. Parag P. Tripathi, Sr, Advocate with Ms. Avnish Ahlawat and Ms. Monisha Handa, Advocates for VAT.

FOR THE RESPONDENTS : Ms. Prem Lata Bansal, Sr. Advocate with Sh. Ruchir Bhatia and Sh. Arnav Kumar, Advocates, Sh. Vineet Bhatia, Advocate.

CASES REFERRED TO:

1. *Jaishree Exports* vs. *Commissioner Trade & Taxes Department* (STA Nos.11-12/2011, decided on 23-2-2012).
2. *Vyasa Bank* vs. *Commissioner of Income Tax,* (2008) 17 VST 122 (Ori).
3. *Hamdard (Wakf)* vs. *Dy. Labout Commissioner:* (2007) 5 SCC 281.
4. *Commercial Taxation Officer Udaiput* vs. *Rajasthan Taxchem Ltd.:* (2007) 3 SCC 124.
5. *Bharat Sanchar Nigam Ltd. and Anr.* vs. *Union of India (UOI) and Ors.,* AIR 2006 SC 1383.
6. *Central Bank of India* vs. *Ravindra,* AIR 2001 SC 3095; pg. 310.
7. *I.T. C. Classic Finance and Services* vs. *Commissioner of Commercial Taxes,* 1995 (1) ALT 563.
8. *C.I.T., Delhi* vs. *S. Teja Singh,* AIR 1959 SC 352).
9. *Kayani & Co.* vs. *Sales Tax Commissioner,* AIR 1953 Hyd 252 at 253).
10. *State of Travancore* vs. *Shanmugha Vilas Cashewnut Factory,* AIR 1953 SC 333).
11. *State of Bombay* vs. *Pandurang Vinayak,* AIR 1953 SC 244.

RESULT: Appeals of Revenue dismissed-cross appeals of dealers allowed.

S. RAVINDRA BHAT, J.

1. The revenue assails, in Appeal Nos. STA 8-9/2011, the impugned order dated 14.12.1010 of the Appellate Tribunal Value Added Tax (the Tribunal, in short). Connected with these appeals are STA 4-6 of 2011 and STA 7 of 2011 where the revenue challenges the impugned orders dated 21.1.2011 and 27.1.2011 respectively, whereby the Tribunal had followed its earlier order (dated 14.12.2011). In STA 16 of 2011, the assessee-dealer challenges the Tribunal's order dated 21.1.2011 to the

extent that it holds that the dealer will avail input tax credit proportionately in accordance with Section 9(1) and Section 12(4) of the Delhi Value Added Tax Act, 2004 (in short, "the DVAT Act") read with Rule 4 of the Delhi Value Added Tax Rules, 2005 (hereafter, "the Rules"). Cross Objection No.13377/2012 (in STA No.7/2011) has also been filed by the assessee seeking the same relief.

2. This Court had framed questions "a"-"b" in the revenue's appeals, and question "c" in the assessee's appeal:

a. "Are the respondents/dealers entitled to claim input credit in terms of Section 9, regard being had to Entry (i) of Seventh Schedule to the Delhi Value Added Tax, 2004.

b. In any event, are the respondents/dealers at all entitled to claim input tax credit, having regard to Section 9 of the Delhi Value Added Tax, 2004."

c. Whether the Appellate Tribuanal - VAT grossly erred in law in holding that a leasing company shall avail the Input Credit available to them on proportionate basis?"

3. The facts are that assessee/dealers (hereafter "dealers") are engaged in the business of leasing cars/motor vehicles for which purpose they entered into contracts. Under the lease agreements, they are transfer the right to use, control and possession of the vehicles to their customers. Their claims for refund of input tax credit (ITC) under Section 9 of the Delhi Value Added Tax Act, 2004 (in short, "the Act") on cars used for making taxable sales were rejected; the objection hearing authority under the DVAT Act rejected their claims. They ultimately appealed to the Tribunal, which by the impugned orders set aside the orders dismissing the objections claiming refund of ITC, and remanded the appeals back to concerned authority with a direction to decide the objections afresh in accordance with its (the Tribunal's) order dated 14.12.2010 (one of the impugned orders) in Appeal Nos. 562/ATVAT/08-09 and 520/ATVAT/08-09. Act.

4. The revenue contended before this Court that the dealers involved in the present appeals are not entitled to ITC on goods purchased, for making a sale. It was contended that motor vehicles are non-creditable goods in respect of which no tax credit can be availed. In support, counsel relied on Section 9(2)(b) read with Serial No 1 of the List of Non-Creditable Goods as provided in the Seventh Schedule to the Act.

It was submitted that as motor vehicles fell within the ambit of Sl. No. 1, and did not fall within Sl. No. 2, it is ineligible for input tax credit. It was also argued that the leasing activity carried on by the assessees does not qualify as "resale in unmodified form"; as a result, Sl. No. 2 of the list in the Seventh Schedule is not attracted. Counsel relied on the definition of "form" from The Law Lexicon (1982 Edn., P. Ramanatha Iyer) to contend that the visible aspect is important, and stands changed during use of a motor vehicle.

5. It was argued by Mr. Parag Tripathi, learned Senior Counsel for the revenue that in terms of Section 2(1)(zc)(vi) "sale price" includes, in relation to transfer of the right to use goods for any purpose , valuable consideration or hiring charges received or receivable for such transfer. Therefore, "purchase price" (which is to be construed accordingly) for the purpose of Section 9(1) would include just the hiring charges paid or payable for the acquisition of the right to use. The purchase price, therefore, does not include the purchase price of the goods involved in such transfer; since the amount spent on the purchase of goods is not purchase price to arrive at the turnover of purchases, it is not eligible for input tax credit.

6. It was submitted that the object of providing input credit, under the DVAT is to provide relief where the underlying transaction of sale by the dealer comprehends some form of transformation, of the goods. In other words, if goods are not sold in modified form, there is no question of input credit. Reliance was placed on Section 105(2) of the Act to contend that under the Act, ITC is not available on goods used for the purpose of transfer, but is only available for purchases acquired in the form of a right. It was contended that this provision does not allow benefit of ITC in respect of goods transferred under right to use basis, rather it restricts the same.

7. Counsel for the dealers defended the impugned orders. It was argued that the Tribunal was correct in holding that cars/motor vehicles being dealt with by the dealers in the present appeals were entitled to claim credit, and were not non-creditable goods, as they fall within the exception, i.e. Sr. No. 2 of the List. It was contended that the word "resale" appearing in Serial No 2,- which embodies the exception to the rule specified in Serial No. 1- has to be construed according to the definition of the word "sale" in section 2(1)(zc); that includes transfer of the right to use goods too. Therefore, Section 9(2)(b) is not attracted,

and ITC would be available in respect of the leasing activity carried on by the assessee/dealers. Learned Senior counsel also relied on definition of "turnover of purchases" provided under section 2(zl).

8. As regards the finding in the impugned order- dated 14.12.2010- that ITC will be availed "in accordance with Section 9(1) and Section 12(4) r/w Rule 4 of the Act proportionately", counsel for the assessee-dealers, in challenge, contended that such a concept was not envisaged under the Act or the Rules; that it was a creation of the Tribunal. It was argued that the Tribunal's observation that eligibility and availment of ITC are two different concepts under the Act was erroneous as the Act nowhere draws such a distinction; when the legislature intended to make a distinction it would have expressly done so, like in the case of capital goods where a special provision has be enacted under Section 9(9) devising a complete mechanism.

9. It was argued that Rule 4(b) of the Rules was applicable only in cases of purchases occurring by way of transfer of a right to use goods; and that the Tribunal erred in invoking Rule 4(b). Consequently, when a dealer purchases an asset by way of acquiring the right to use the goods, he shall be entitled to only the tax credit which he has paid to the seller. Furthermore, urged counsel that in cases of outright purchases, the "turnover of purchase" would be the aggregate amount of purchase price paid or payable in a tax period.

10. The revenue, in response to the dealer's arguments in its appeal, defended the proportionately rule mandated by the Tribunal by placing reliance on the language of Section 9(1). Counsel underlined that this provision uses to expression "to the extent of proportion of the goods which have been put to sale" which manifests the proportionality rule. In spirit of this principle in section 9- and pursuant to Section 12, which empowers the government to prescribe the time at which a dealer shall declare turnover of purchases arising for a class of transactions, Rule 4(b) of the Rules again refers to the proportion of the sale price due and payable during the relevant tax period. Counsel further contended that the proportionality principle runs through the scheme of the Act. In this regard, he pointed out section 9(4), and Rule 6 made pursuant thereto - which prescribes that where purchased goods are partly used for the purposes of making sales under Section 9(1), and partly for other purposes, then tax credit is to be availed proportionately.

Re Question Nos 1 and 2: Are the cars in which the assessee-dealers deal non-creditable?

11. Before proceeding with the analysis of the rival contentions, it is relevant to note the Tribunal's reasoning on this issue from its impugned order dated 14.12.2010, which was followed in the later impugned orders. Its observations and findings are extracted as under:

> "23. A careful perusal of the definition of word "sale" as given in section 2(1)(zc) shows that this definition uses the word "and includes". Settled law is that when a definition clause uses the word "includes", it extends the definition of that word to that extent. When the word "include" is used in words or phrases, it has to be construed as comprehending not only such things as they signify according to their nature and impact but also those things which the interpretation clause declares they shall include. Thus by using the word "includes" the definition of the word "sale" gets a wider meaning. In this regard reference can be made to the judgments reported as **Hamdard (Wakf) v. Dy. Labout Commissioner:** (2007) 5 SCC 281 and **Commercial Taxation Officer Udaiput v. Rajasthan Taxchem Ltd.:** (2007) 3 SCC 124. Thus when transfer of goods on hire purchase or other system of payment of instalments covered by cl. (vi) of Section 2(1)(zc) is sale then the word "sales" occurring in section 9(1)(A) of the Act cannot be understood as covering only normal sales and not sales other than normal sales i.e. deemed sales. It is significant to note that the words used in section 9(1) of the Act are "in the course of his activities as a dealer and the goods are to be used by him directly or indirectly for the purpose of making sales". By using the words "directly or indirectly", the legislature has made its intention very clear that it is not distinguishing between normal sales or deemed sales so far as the provision contained in sec. 9 is concerned.
>
> 24... In our considered view appellants, will have to satisfy all the clauses of section 9(2) for claiming input tax credit. Clause (b) disallows input tax credit for the purchase of non-creditable goods, as contained in Schedule VII to the Act. A careful perusal of Schedule VII shows the restriction to claim input tax credit is on "goods" other than tradable goods. Schedule VII restricts

> the claim of input tax credit on the.
>
> 26. The term "resale" has not been defined in the Act. However, common parlance, it means to sell the purchased goods in unmodified form i.e. the contrition in which these goods were at the time of purchase. In a lease transaction, a vehicle or any other commercial goods after purchase are subjected to "sale" by way of transfer of right to use and so there can be no doubt that leasing of goods means nothing but "resale" in unmodified form and so goods cannot be treated as non-creditable goods for leasing activity. Thus though nomenclature wise, leased goods (such as vehicles, equipment and computers) are in the nature of capital goods, which are described in the definition of "capital goods", yet these cannot be considered as "capital goods" for the purposes of leasing activity because these goods are not "used" by the applicant in the process of trade or manufacture or works contract, which is an essential condition of the definition. Therefore, for the purposes of leasing under the Act, these goods are "trading goods" so far as the lessor is concerned; and might be termed as "capital goods" in the hands of the lessee in case he uses these goods in the process of trade or manufacture or works contract. We are fortified in our conclusion from the intention of the legislature expressed through sec. 105 of the Act...
>
> 27. A careful perusal of section 105(2) (b) clearly shows that input tax credit has been allowed also the lessee, who acquires transfer of right to use goods, which is nothing but a deemed purchase. Thus it is clear that this Act does not distinguish between a "purchaser" and a deemed "purchaser". When it is so, then to distinguish between a "sale" and a "deemed sale" would amount to taking a view not warranted by the Act. Further to allow the input tax credit to the lessee by virtue of section 105(2)(b), who is merely holding lawful possession without any title; and to restrict to the leasing company who is normal purchaser of the goods, will lead to unintended consequences.
>
> 32. In our considered view what appears from the reasoning of Ld. Commissioner is that her conception of "deemed sale" is only for the purpose of charging VAT on transactions which are

not sales in the traditional sense of the word "sale" and the purpose of creating "deemed sale" comes to end after collecting VAT. If it is so then the point arises for consideration is whether a transaction being other than a normal sale is deemed as a sale by virtue of 46th Amendment to the Constitution of India only for the purpose of levy of VAT and after this levy, this fiction comes to an end. In this regard it is useful to refer to a judgment reported as the Additional Income Officer, Circle 1, **Salem & Another vs. E. Alfred** : AIR 1962 SC 663. Facts of this case were than an assessee died intestate during his year of account. Legal representative of the deceased assessee was assessed to tax after notice u/s 24-B (2) of the Income Tax Act as if this LR was the assessee. This LR made a default in payment of tax and so a penalty was imposed upon him u/s 45(1) of the Act. The matter came up before the Apex Court. It was argued before Their Lordships that after the assessment was made on the LR, the legal fiction came to end and thereafter this LR remained a mere debtor to the department and therefore, penalty could not be imposed upon him u/s 46(1). Dealing with these arguments, Their Lordships held that when a thing is deemed to be something else, it is to be treated as if it is that thing, though, in fact it is not. It is in this sense that legal representative becomes an assessee by the fiction and it is this fiction, which has to be fully worked out without allowing the mind to boggle. In view of the principle of law laid down in this judgment, there can be no hesitation in holding that a transaction which in fact is not a sale, being not a traditional sale, but is a sale as it is so deemed by virtue of 46th Amendment of the Constitution of India which has been incorporated in the definition of word "sale" in cl. (i) to cl. (vii) of section 2(1)(zc) of the Act, is a deemed sale not for limited purpose as conceived by the Ld. Commissioner but for all the purposes that are available to a transaction constituting a normal sale.

12. The VAT Act, 2004, by virtue of Section 3(1) compels all dealers registered- or obligated to be registered under the Act- to pay tax in the manner provided, under its provisions. Each dealer (Ref. Section 3(2)) has to pay tax *"at the rates specified in Section 4"* and in respect of *"every sale of goods effected by him"* as a registered dealer on any

date from which he was required to be registered. Section 9 entitles tax credit to a registered dealer under the Act in respect of turn-over of purchases granted during the tax period when the purchase earned in the course of his activities as a dealer of the goods are to be used by him directly or indirectly *"for making sales liable to tax under Section 3" or "for making sales or which are not liable to tax under Section 7."* Section 9(1) enables dealers to claim input tax credit. During the assessment years, in respect of which appeals have been presented, section 9(1) read as follows:

> "9. Tax credit.- (1) Subject to sub-section (2) of this section and such conditions, restrictions and limitations as may be prescribed, a dealer who is registered or is required to be registered under this Act shall be entitled to a tax credit in respect of the turnover of purchases occurring during the tax period where the purchase arises in the course of his activities as a dealer and the goods are to be used by him directly or indirectly for the purposes of making –
>
> (a) sales which are liable to tax under section 3 of this Act; or
>
> (b) sales which are not liable to tax under section 7 of this Act."

This provision was amended by the DVAT (Amendment) Act, 2009 w.e.f. 1.4.2010 and the expression "where the purchase arises" was substituted by "to the extent of proportion of the goods which have been put to sale". By DVAT (Second Amendment) Act, 2011, sub-section (1) was again amended w.e.f. 1.10.2011; this time the original provision being restored. Thus, the provision, as it exists now uses the expression "where the purchase arises" instead of "to the extent of proportion of the goods which have been put to sale".

Section 9(2) lists situations when input tax credit cannot be allowed. It reads as follows:

> "(a) in the case of the purchase of goods for goods purchased from a person who is not a registered dealer;
>
> (b) for the purchase of non-creditable goods;
>
> (c) for the purchase of goods which are to be incorporated into the structure of a building owned or occupied by the person;

Explanation.- This sub-section does not prevent a tax credit arising for goods and building materials that are purchased either for the purpose of re-sale in an unmodified form, or for the performance of a works contract on a building owned or occupied by another;

(d) for goods purchased from a dealer who has elected to pay tax under section 16 of this Act;

(e) for goods purchased from a casual trader;

(f) to the dealers or class of dealers specified in the Fifth Schedule except the entry no.1 of the said Schedule

(g) to the dealers or class of dealers unless the tax paid by the purchasing dealer has actually been deposited by the selling dealer with the Government or has been lawfully adjusted against output tax liability and correctly reflected in the return filed for the respective tax period."

Non-creditable goods are listed in Schedule VII. The relevant entry from the list provided in Schedule VII reads as:

"1. Subject to clauses 2 and 3 of this Schedule, the following goods shall be "non-creditable goods" for the purposes of this Act:

i. All automobiles including commercial vehicles, and two and three wheelers and spares parts for repairs and maintenance and tyres and tubes thereof.

2. Any entry in clause 1 other than item (ii), (xiii), (xiv) and (xv) shall not be treated as non-creditable goods if the item is purchased by a registered dealer for the purpose of resale in an unmodified form or use as raw material for processing or manufacturing of goods, in Delhi, for sale by him in the ordinary course of his business." (emphasis supplied)

13. The goods in which the assessees-dealers deal are motor vehicles falling within Sr. No. 1 of the above-noted list. The question that therefore, arises is whether the leasing activity of motor vehicles as carried out by the assessee-dealers constitutes "resale in an unmodified form". The term "sale" is defined in section 2(1)(zc) as:

"sale" with its grammatical variations and cognate expression means any transfer of property in goods by one person to another for cash or for deferred payment or for other valuable consideration (not including a grant or subvention payment made by one government agency or department, whether of the central government or of any state government, to another) and includes-

*** *** ***

(vi) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;"

14. The term "re-sale" has not been defined. The dictionary meaning (of resale. Dictionary.com. *Collins English Dictionary - Complete & Unabridged 10th Edition;* Harper Collins Publishers -accessed on December 06, 2012. http://dictionary.reference.com/browse/resale) means the selling again of something purchased. It is therefore, clear that for the purposes of Section 2(1)(zc), the meaning of "sale" includes the transfer of the right to use goods; this includes leasing activity of the assessee-dealers. It clearly falls within the definition of "sale" because what is transferred is the right to use the car or motor vehicle- albeit for a limited duration. The argument of the revenue that "sale" here and "re-sale" mean different kinds of transactions, qualitatively, is unpersuasive. The statute here used the extended definition of "sale" which comprehends the right to lease the car. Absent indication to the contrary- in the statute, either through express provisions or by necessary implication, it is not open to the court to artificially divide the concept. It was held, in **East End Dwellings Co. Ltd. v. Finsbury Borough Council** (1952 AC 109) that:

" if you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of those in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs".

15. In the present case, once it is held that the leasing of a car results in transfer of its right to use, the provisions of Section 9(1) would apply, because the cars were purchased by him, for the purpose of making sales (within the extended definition, i.e. as leasing – or selling the right to use). The concept of right to use would cover a wide spectrum of transactions; most certainly, a lease of the article, for a limited period, would be comprehended within the meaning of "right to use". Therefore, the Court rejects the first submission of the revenue, and holds that Question No. 1 has to be answered in favour of the assessee, and against the revenue.

16. The question next to be considered is whether the Act makes a distinction for the purposes of section 9(2), and Sl. No. 2 of List of Non-Creditable Goods as provided in Schedule VII, between "deemed sale"- stipulated under Section 2(1)(zc) (i)-(vii) and sale as explained by the main body of the definition. This Court is of the opinion that there can be no doubt that "resale" should be construed according to the definition of *"sale"* under the Act which includes the transfer of right to use goods. The fiction created in defining "sale" as including transactions which otherwise, in the ordinary sense, would not have been but for the deeming provision, must apply as respect the entire Act, its Schedules, and the Rules made under the Act. The fiction has been created with respect to the term "sale", and in our opinion, would definitely extend correspondingly to the word "resale" as well. This, in our opinion, is a logical extension of the principle that *"where the draftsmen uses the same word or phrase in similar contexts, he must be presumed to intend it in each place to bear the same meaning"* (Ref. **Central Bank of India v. Ravindra,** AIR 2001 SC 3095; pg. 310, Principles of Statutory Interpretation, G.P. Singh, Tenth Edition.) The reasoning of the Tribunal, and its reliance on the **Hamdard** case (supra) is upheld. This Court is also of the opinion that according to settled authorities when a legal fiction is created, the Court while interpreting it must enquire the purpose for it is so created (**State of Travancore v. Shanmugha Vilas Cashewnut Factory,** AIR 1953 SC 333). After ascertaining the purpose, *"full effect must be given to the statutory fiction and it should be carried to its logical conclusion" and to that end "it would be proper and even necessary to assume all those facts on which alone the fiction can operate.* (**State of Bombay v. Pandurang Vinayak,** AIR 1953 SC 244 and **C.I.T., Delhi v. S. Teja Singh,** AIR 1959 SC 352).

17. Thus, leasing activity carried on by the assessees does amount to resale. The remaining part of the question would turn upon the construction of the term "unmodified form". The meaning of form from the **Law Lexicon** (supra) that the Revenue's counsel relied on is:

> "The word "form" connotes a visible aspect such as shape or mode in which a thing exists or manifests itself, species, kind or variety. Rice in all forms would mean all kinds or variety of rice by species of rice, such as broken rice, kichidi rice, pichodi rice or rice, flour, etc. In this view of the matter there is no justification in holding that rice. in item No. 1 of the exempted articles in Schedule I, Hyderabad General Sales Tax be interpreted as meaning cooked rice or biryani or pulao.
>
> (**Kayani & Co. v. Sales Tax Commissioner,** AIR 1953 Hyd 252 at 253)

18. The following dictionary meanings of "form" are also useful:

> "The outer shape or structure of something, as distinguished from its substance or matter" - The Black's Law Dictionary (7th Edn., Bryan A. Garner)
>
> "1. A way in which a thing exists or appears; 2. A type or variety of something." - Concise Oxford English Dictionary (10th Edn., Judy Pearsall)
>
> "1. The shape or configuration of something as distinct from its colour, texture, etc; 2. The particular mode, appearance, etc in which a thing or person manifests itself: water in the form of ice" – Dictionary.com, sourced from http://dictionary.reference.com/browse/form?s=t on 10.12.2012 at 6 PM.

19. Having considered the meaning of the term "form", this Court is of the view that in the context of applicability of value added tax on goods, "unmodified form" would have to be mean that the goods remain in their original state. Mere change/modification by ordinary wear and tear would not amount to modification in form. Generally speaking, in our opinion, form would remain unmodified as long as the basic functionality, structure, and configuration remain unchanged. The revenue's position here is that input credit can be availed only if the goods undergo

some physical change or transformation, and the concept of modification eliminates a transaction which amounts to *"right to use"*. In other words, any sale or deemed resale of a product, which dos not undergo some manufacture or process change, cannot claim input tax credit. A complete reading of the relevant entries of the seventh schedule in this case would disclose that while facially, motor vehicles, per se are disentitled to input credit, significantly that entry (Sl. No.1) is subject to Entry No. 2. Entry 1 (i) (motor vehicles) is thus, subject to Entry 2, which, in its controlling part says *"Any entry in clause 1 other than item (ii), (xiii), (xiv) and (xv) shall not be treated as non-creditable goods if the item is purchased by a registered dealer for the purpose of resale in an unmodified form."* Therefore, an article purchased by a registered dealer cannot be denied input tax credit-

(i) unless it falls within Item (ii), (xiv) and (xv) – of Entry 1- (in which case, tax credit is denied). As a corollary, all other articles – including motor vehicles, which fall in Item (i), are entitled to tax credit;

(ii) The purchasing dealers. acquisition of an article, for resale in an unmodified form does not disentitle input tax credit for it unless it falls within Item (ii),(xiv) and (xv).

20. Therefore, the articles in which the assessee deals with fall within the provisions of Sr. No 2 and are thus creditable goods. As a result of this discussion, it is held that the view taken by the Tribunal in favour of the assessee is correct; no interference is called for in regard to the impugned orders. Question Nos. (a) and (b) are answered against the revenue and in favour of the assessee dealer accordingly.

Question No. (c)

21. The assessee contended that the impugned orders of the Tribunal, to the extent they hold that input credit can be availed only in proportion to the tax paid, is not borne out by the statute, and there is no express limitation in that regard in Section 9, warranting such interpretation. Reliance was placed upon **Vyasa Bank v. Commissioner of Income Tax,** (2008) 17 VST 122 (Ori) to argue that when assessee leased out goods, it amounted to "deemed sale". The Court held that no tax can be imposed by way of subsequent lease rent in respect of the same goods under the Orissa Sales Tax Act; reliance was also placed on **I.T. C. Classic Finance and Services v. Commissioner of Commercial Taxes,**

1995 (1) ALT 563 and **Bharat Sanchar Nigam Ltd. and Anr. v. Union of India (UOI) and Ors.,** AIR 2006 SC 1383.

22. This Court in **Jaishree Exports Vs. Commissioner Trade & Taxes Department** (STA Nos.11-12/2011, decided on 23-2-2012) outlined the general scheme of the provisions of the DVAT Act, and the dealers, rights and obligations in filing returns and claiming credit, in the following terms:

"11. A conjoint and harmonious reading of the above provisions discloses the following position. A dealer is liable to pay tax at the prescribed rates on every sale of goods effected by him. There are certain sales, which are liable to tax but have been granted exemption from tax and these goods are listed in the First Schedule to the Act. There are certain sales which are not liable to tax at all under the Act and these are the sales mentioned in Section 7. There is a difference between sales that are not liable to tax and sales which are liable to tax, but which have been given exemption from the levy of the tax subject to the conditions and exceptions set out in the First Schedule. A dealer is entitled to tax credit under Section 9(1) in respect of the purchases made by him during the tax period, which are used by him, directly or indirectly for the purpose of making sales which are liable to tax under Section 3 of the Act and also to effect sales which are not liable to tax under Section 7. Section 3, which is the charging section, imposes tax on every dealer in respect of every sale of goods effected by him. Some of the goods which are listed in the First Schedule to the Act are granted exemption from the levy of sales tax under Section 6(1). The sales which are referred to in Section 7 are not liable to tax at all. Such sales are outside the purview of the Act and they cannot be brought under the purview of the Act at all. Section 9, however, allows tax credit in respect of inputs used to effect both types of sales, that is, sales which are liable to tax and which are not liable to tax. Ex-hypothesi, sales which are merely granted exemption under the provisions of Section 6(1) of the Act do not enjoy the benefit of input tax credit under Section 9(1) of the Act. The First Schedule to the Act lists several goods, the sale of which are merely exempted from tax subject to the conditions and exceptions set out therein. Therefore,

Section 9(7)(b) of the Act, when it says that no tax credit shall be allowed for the purchase of goods which are used exclusively for the manufacture, processing or packing of goods specified in the First Schedule, refers only to the sale of exempted goods within the meaning of Section 6(1) of the Act and does not refer to sales which are not liable to tax at all by virtue of the provisions of Section 7."

23. The relevant provisions of the Act are also reproduced hereunder:

Definitions:

(r) "input tax" in relation to the purchase of goods, means the proportion of the price paid by the buyer for the goods which represents tax for which the selling dealer is liable under this Act;

(zd) "sale price" means the amount paid or payable as valuable consideration for any sale,

including-

(i) the amount of tax, if any, for which the dealer is liable under section 3 of this Act;

(ii) in relation to the delivery of goods on hire purchase or any system of payment by installments, the amount of valuable consideration payable to a person for such delivery including hire charges, interest and other charges incidental to such transaction;

(iii) in relation to transfer of the right to use any goods for any purpose (whether or not for a specified period) the valuable consideration or hiring charges received or receivable for such transfer;

(iv) any sum charged for anything done by the dealer in respect of goods at the time of, or before, the delivery thereof;

(v) amount of duties levied or leviable on the goods under the Central Excise Act, 1944 (1 of 1944) or the Customs Act, 1962 (52 of 1962), or the Punjab Excise Act, 1914 (1 of 1914) as extended to the National Capital Territory of Delhi whether such duties are payable by the seller or any other person; and

(vi) amount received or receivable by the seller by way of deposit (whether refundable or not) which has been received or is receivable whether by way of separate agreement or not, in connection with, or incidental to or ancillary to the sale of goods;

(vii) in relation to works contract means the amount of valuable consideration paid or payable to a dealer for the execution of the works contract; less -

(a) any sum allowed as discount which goes to reduce the sale price according to the practice, normally, prevailing in trade;

(b) the cost of freight or delivery or the cost of installation in cases where such cost is separately charged;

and the words "purchase price" with all their grammatical variations and cognate expressions, shall be construed accordingly;

[***]

[PROVIDED that an amount equal to the increase in the price of petrol (including the duties and leviews charged thereon by the Central Government) taking effect from the 3rd June, 2012 shall not form part of the sale price of petrol sold on or after the date of the commencement of the Delhi Value Added Tax (Third Amendment) Act, 2012 till such date as the Government may, by notification in the official Gazette, direct or if the price of petrol falls below the sale price prior to 3rd June, 2012, whichever is earlier:

PROVIDED FURTHER that if the price of petrol further increases from the level of price as on 3rd June, 2012, the aforesaid proviso shall not have any effect on such further increase:

PROVIDED ALSO that if the price of petrol declines but remains above the price prevailing prior to 3rd June, 2012, the aforesaid proviso shall have effect to the extent to the remaining increase:

PROVIDED ALSO that the aforesaid proviso shall not take effect till the benefit is passed on to the consumers.]

Explanation.- A dealer's sale price always includes the tax payable by it on making the sale, if any;

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(zl) "turnover of purchases" means the aggregate of the amounts of purchase price paid or payable by a person in any tax period [excluding] any input tax;

(zm) "turnover" means the aggregate of the amounts of sale price received or receivable by the person in any tax period, reduced by any tax for which the person is liable under Section 3 of this Act;

(zn) "value of goods" means the fair market value of the goods at that time including insurance charges, excise duties, countervailing duties, tax paid or payable under the Central Sales Tax Act, 1956 (74 of 1956) in respect of the sale, transport charges, freight charges and all other charges incidental to the transaction of the goods.

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Section 9

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(3) The amount of the tax credit to which a dealer is entitled in respect of the purchase of goods shall be the amount of input tax arising in the tax period reduced in the manner described in sub-sections [(4) , (6) and (10)] of this section.

(4) Where a dealer has purchased goods and the goods are to be used partly for the purpose of making the sales referred to in sub-section (1) of this section and partly for other purposes, the amount of the tax credit shall be reduced proportionately.

(5) The method used by a dealer to determine the extent to which the goods are used in the manner specified in sub-section (4) of this section, shall be fair and reasonable in the circumstances:

PROVIDED that the Commissioner may -

(a) after giving reasons in writing, reject the method adopted by the dealer and calculate the amount of tax credit; and

(b) prescribe methods for calculating the amount of tax credit or the amount of any adjustment or reduction of a tax credit in certain instances.

Explanation.- A person may object in the manner referred to in section 74 of this Act to a decision of the Commissioner to reject a method of calculating a tax credit.

(6) [Notwithstanding anything contained to the contrary in sub-section (1), where -]

(a) a dealer has purchased goods (other than capital goods) for which a tax credit arises under sub-section (1) of this section;

(b) the goods or goods manufactured out of such goods are to be exported from Delhi by way of transfer to a -

(i) non-resident consignment agent; or

(ii) non-resident branch of the dealer; and

(c) the transfer will not be by way of a sale made in Delhi;

the amount of the tax credit shall be reduced by the prescribed percentage.

(7) For the removal of doubt, no tax credit shall be allowed for-

(a) the purchase of goods from an unregistered dealer;

(b) the purchase of goods which are used exclusively for the manufacture, processing or packing of goods specified in the First Schedule.

[(c) any purchase of consumables or of capital goods where the dealer is exclusively engaged in doing job work or labour work and is not engaged in the business of manufacturing of goods for sale by him and incidental to the business of job work or labour work, obtains any waste or scrap goods which are sold by him.]

(8) The tax credit may be claimed by a dealer only if he holds a tax invoice at the time the prescribed return for the tax period is furnished.

(9)(a) Notwithstanding anything contained to the contrary in sub-sections (1) and (3) and subject to sub-section (2), tax credit in respect of capital goods shall be allowed as follows: -

(i) 1/3rd of the input tax on such capital goods arising in the tax period, in the same tax period;

(ii) balance 2/3rd of such input tax, in equal proportions in two immediately successive financial years :

PROVIDED that, where the dealer sells such capital goods, the dealer shall be allowed as tax credit, the balance amount of the input tax, if any, in respect of such capital goods as has not been earlier availed as tax credit, such tax credit shall be allowed in the tax period in which such capital goods are sold and only after adjusting the output tax payable by him:

[PROVIDED FURTHER that where the dealer transfers such capital goods from Delhi otherwise than by way of sale before the expiry of three years from the date of purchase, he shall, after claiming the balance amount of input tax, if any, not availed earlier in respect of such capital goods, reduce the input tax credit by the prescribed percentage of the purchase price of such capital goods and make adjustments in the input tax credit in the tax period in which these capital goods are so transferred:

PROVIDED ALSO that where a dealer has purchased capital goods and the capital goods are to be used partly for the purpose of making sales referred to in sub-section (1) of this section and partly for other purposes, the amount of tax credit shall be reduced proportionately:

PROVIDED ALSO that no tax credit in respect of capital goods shall be allowed if such capital goods are used exclusively for the purpose of making sale of exempted goods specified in the first schedule:

PROVIDED ALSO that no tax credit in respect of capital goods shall be allowed on that part of the value of such capital goods which represents the amount of input tax on such capital goods, which the dealer claims as depreciation under section 32 of the Income Tax Act, 1961 (43 of 1961).

(b) If any capital goods in respect of which tax credit is allowed under clause (a) of this sub-section is transferred to any other person otherwise than by way of sale at the fair market value before the expiry of a period of five years from the date of purchase, the tax credit claimed in respect of such purchase shall be [reversed] in the tax period during which such transfer takes place.]

24. From the provisions reproduced above, it can be seen that:

(a) input tax means the proportion of the price paid by the buyer for the goods which represents tax for which the selling dealer is liable under the Act (according to Section 2 (r);

(b) sale price (Section 2 (zd) means in relation to transfer of the right to use any goods for any purpose (whether or not for a specified period) the valuable consideration or hiring charges received or receivable;

(c) The amount of the tax credit to which a dealer is entitled in respect of the purchase of goods is "the amount of input tax arising in the tax period" (Section 9 (3));

(d) Where a dealer has purchased goods and the goods are to be used partly for the purpose of making the sales referred to in sub-section (1) of this section and partly for other purposes, the amount of the tax credit shall be reduced proportionately.

(e) Tax credit is inadmissible where the purchase of goods is from an unregistered dealer or where purchase of goods are for use exclusively for the manufacture, processing or packing of goods specified in the First Schedule (Section 9 (7));

(f) Tax credit is admissible in a proportionate manner, only in respect of capital goods (Section 9 (9)).

25. The entire *regime* of principles for granting input credit is contained in Section 9 (3), (4), (6) and (10). The general principle that tax credit is admissible, in respect of the *input tax*, is stated in Section 9(3). Section 9(4) visualizes a situation where credit is partly admissible, in respect of some transactions. It states that input credit would be

proportionate to the extent the dealer is uses the goods for the purpose of sale under Section 9 (1). Clearly, the allusion to proportion does not refer to the nature or type of sale. Section 9 (6) says that where a dealer purchases goods that are entitled to credit, the amount of tax credit shall be reduced by a prescribed percentage. Section 9 (9) is by far the most important provision. It enacts the principle of proportionate grant of input credit, in point of time, but only in respect of capital goods. The omission to enact a similar provision in respect of different categories of sale transactions (such as, for instance, the sale of the right to use) on the one hand, and the enactment of Section 2 (zd) (iii) which specifically deals with sale price in respect of transfer of the right to use, coupled with Section 2 (zm) ("turnover") – which states that turnover is aggregate of sale price, point to legislative deliberation that the theory of proportionality, of the kind, sought to be propounded by the revenue, - and accepted by the Tribunal, has no statutory basis. Once the legislature entitles the assessee – as in this case, to a certain benefit – of input credit, and puts in place a mechanism for working it out, which expressly provides one kind of proportional input credit, to a class of transactions, i.e. in relation to capital goods, it is not permissible for the Court to read into the statute another such proportional rule, without statutory sanction.

26. The reference to Section 12 (4) in this context, is unhelpful to the revenue, because that provision merely enables the Government to frame rules prescribing the time at which a dealer shall treat the (a) turnover; (b) turnover of purchases; and (c) adjustment of tax or adjustment to a tax credit; as arising for a class of transactions.

27. Next to be considered is the impact of Rule 4, which states as follows:

> **"4. When turnover arises in a tax period** For the purposes of sub-section (4) of section 12, the amount of turnover or turnover of purchases arising in the tax period in the case of a sale or purchase occurring –
>
> (a) by means of an instalment sale or hire purchase of goods made in the tax period, is the total amount of the sale price that will be due and payable under the agreement, including the amount of any option fee paid or that may be payable;
>
> (b) by the transfer of a right to use goods, not being a hire purchase agreement or instalment sale agreement, is the proportion of the sale price that is due and payable during the relevant tax period;
>
> (c) by means of transfer of property in goods (whether as goods or in some other form) under a works contract executed or under execution in the tax period, is the consideration received or receivable by the dealer for such transfer of property in goods (whether as goods or in some other form) during the relevant tax period.

28. This Court is of the opinion that while the Tribunal was correct in holding that the manner of grant of credit can be regulated by virtue of Section 12 (4), it fell into error in holding that Rule 4 regulated the grant of credit. Rule 4 merely visualizes three situations in respect of the method of calculating the *"amount of turnover or turnover of purchases arising in the tax period in the case of a sale or purchase occurring.."* Its reference, to sale by transfer of right to use, again is only in respect of the extent of sale for the concerned tax period. However, it does not support the conclusion that credit is admissible in respect of different periods, spreading over, as it were, the credit which a dealer can so enjoy for the duration of the agreement proportionately staggering payment of the amounts of input tax deductible towards credit. This appears to be an innovation suggested by the revenue, accepted somewhat readily by the Tribunal. When a dealer, who is involved in leasing business, purchases cars, the point at which credit can b e claimed is the tax period when he makes the purchase. The amount of tax – on the purchase so made- can be claimed as a credit, in the turnover which he is obliged to declare to the VAT authorities. That turnover would be the total lease rental received by him, for the corresponding tax period (when the purchase is made by him), as well as any other VATable transaction he may be engaged in. Thus, the question of spreading over his credit, proportionately or otherwise, is unfeasible and in any case not borne out by the VAT Act or the Rules. There is no warrant for such method. On the contrary, as held earlier, the presence of Section 9(9) and other clear terms is a pointer to the contrary. This question, therefore, is answered in favour of the assessee, and against the revenue.

29. It is further clarified that the interpretation that has been put to the relevant provisions while deciding Question no. (c) would remain

same for both the versions of section 9(1). The original-unamended section 9(1) is applicable in the present case since first amendment [DVAT (Amendment) Act, 2009] came into effect from 1.4.2010, after the assessment years in all the appeals which are in adjudication before this Court. However, in this Court's opinion and for reasons already discussed above, the fate of these appeals would have been no different even if sub-clause (1) contained the words "to the extent of proportion of the goods which have been put to sale" instead of the expression "where the purchase arises".

30. In view of the above discussion, the revenue's appeals – STA Nos. 4-9/2011 fail and are dismissed. The appeal of the assessee, i.e. STA 16 and Cross Objection/Cross Appeal no 13377 of 2012 (presented by the assessee in STA 7/2011) are allowed. In the circumstances, there shall be no order as to costs.

ILR (2013) II DELHI 1335
CRL. M.C.

MADHUMITA KAUR ....PETITIONER

VERSUS

ZILE SINGH ....RESPONDENT

(G.P. MITTAL, J.)

CRL. M.C. NO. : 3008/2011 DATE OF DECISION: 31.01.2013

Constitution of India, 1950—Article 227—Indian Penal Code, 1860—Criminal Procedure Code, 1973—Section 482—Inherent power—Quashing of FIR—Defence of the Accused—Negotiable Instrument Act—Section 138—Territorial Jurisdiction of Court at Delhi—Complaint filed by the R2 for dishonour of the cheque against petitioner—Petition filed for quashing of complaint—Contended—Cheque issued towards delivery of TATA

safari car required to be returned on actual delivery—Cheque delivered in Lucknow drawn on ICICI Bank, Gomti Nagar, Lucknow—Presentation of the Cheque at Delhi Bank does not confer jurisdiction—Observed—complaint under S. 138 NI Act read with 420 IPC-averred-cheque for Rs. 9,70,000/- issued to R2 in discharge of petitioner's liability towards a friendly loan of Rs. 9,50,000/- doanoblained in Delhi in May, 2010—Cheque included amount of Rs. 20,000/- towards interest-handed over in Delhi—Held—Petitioner's averment—Cheque was towards the amount of TATA safari, won by R2 as a result of bonus point in respect of business deal and have no connection with Delhi could not be looked into—Further held—Power of quashing could be exercised where allegations made in the FIR—Even if taken on its face value and accepted in entirety—Do not prima facie constitute any offence—Petition dismissed.

At this juncture, it would be apposite to refer to the Complaint under Section 138 of the Act read with Section 420 IPC by the Complainant. The Complainant specifically averred that the cheque for Rs. 9,70,000/- was delivered to the Respondent no.2 in discharge of Petitioner's liability towards a friendly loan of Rs. 9,50,000/-. The loan was obtained by the Petitioner at Delhi in the last week of May, 2010. It is also stated in the Complaint that the cheque of Rs. 9,70,000/- which included Rs. 20,000/- towards interest was also delivered at Delhi. Thus, the Petitioner's averments that the cheque was towards the amount for Tata Safari won by Respondent No.2 as a result of bonus points in respect of the business deal between the parties which had no connection with Delhi, cannot be looked into at this stage in view of the judgments of the Supreme Court in Ch. Bhajan Lal. **(Para 7)**

It has to be borne in mind that this Complaint is not only under Section 138 of the Act but is also under Section 420 IPC. For the purpose of determining the jurisdiction, at this

stage, it has to be accepted that the Petitioner obtained a loan of amount of Rs. 9,50,000/- at Delhi and that the cheque for Rs. 9,70,000/-, which included interest of Rs. 20,000/- was delivered to Respondent No.2 at Delhi. Thus, part of cause of action did take place at Delhi. **(Para 8)**

In **Rajendra Ramchandra Kavalekar v. State of Maharashtra & Anr.** (2009) 11 SCC 286, the Supreme Court referred to its earlier judgment in **N. Majithia v. State of Maharashtra & Ors.,** (2000) 7 SCC 640 and held that the Court where part of cause of action took place would have jurisdiction to inquire into and try a Complaint. Paras 19 and 20 of the report in Rajendra Ramchandra Kavalekar are extracted hereunder:-

> 19. It is also relevant to state that in **Navinchandra N. Majithia** case (2000) 7 SCC 640 the Court at para 22 of the judgment has observed:
>
> "22. So far as the question of territorial jurisdiction with reference to a criminal offence is concerned the main factor to be considered is the place where the alleged offence was committed." The territorial jurisdiction of a court with regard to criminal offence would be decided on the basis of the place of occurrence of the incident and not on the basis of where the complaint was filed and the mere fact that FIR was registered in a particular State is not the sole criterion to decide that no cause of action has arisen even partly within the territorial limits of jurisdiction of another court. The venue of enquiry or trial is primarily to be determined by the averments contained in the complaint or the chargesheet.
>
> 20. Section 177 of the Criminal Procedure Code provides that:-
>
> **"177. Ordinary place of inquiry and trial.**—Every offence shall ordinarily be inquired into and tried by a

> court within whose local jurisdiction it was committed."

Reference can be made to the observations made by this Court in **Asit Bhattacharjee v. Hanuman Prasad Ojha** (2007) 5 SCC 786. This Court at para 23 has stated as under:

> "23. The necessary ingredients for proving a criminal offence must exist in a complaint petition. Such ingredients of offence must be referable to the places where the cause of action in regard to commission of offence has arisen. A cause of action as understood in its ordinary parlance may be relevant for exercise of jurisdiction under clause (2) of Article 226 of the Constitution of India but its definition stricto sensu may not be applicable for the purpose of bringing home a charge of criminal offence. The application filed by the appellant under Section 156(3) of the Code of Criminal Procedure disclosed commission of a large number of offences. The fact that major part of the offences took place outside the jurisdiction of the Chief Metropolitan Magistrate, Calcutta is not in dispute. But, even if a part of the offence committed by the respondents related to the appellant Company was committed within the jurisdiction of the said court, the High Court of Allahabad should not have interfered in the matter." **(Para 9)**

Important Issue Involved: (i) Under S. 482 Cr. P.C. for quashing of complaint or FIR, High Court cannot look into the defence of the accused (ii) the Court where part of cause of action took place would have jurisdiction to enquire into and try the complaint.

[Gu Si]

APPEARANCES:

FOR THE PETITIONER : Mr. Naushad Ahmed Khan, Advocate
Mr. Naseem Anwar, Advocate.

FOR THE RESPONDENT : Mr. Prashant Jain Advocate with Mr. Atul Rawat, Advocate.

CASES REFERRED TO:

1. *State of Orissa & Ors.* vs. *Ujjal Kumar Burdhan* (2012) 4 SCC 547.
2. *Rajendra Ramchandra Kavalekar* vs. *State of Maharashtra & Anr.* (2009) 11 SCC 286.
3. *Asit Bhattacharjee* vs. *Hanuman Prasad Ojha* (2007) 5 SCC 786.
4. *Shri Ishar Alloy Steels Ltd.* vs. *Jayaswals Neco Ltd.* (2001) 3 SCC 609.
5. *N. Majithia* vs. *State of Maharashtra & Ors.,* (2000) 7 SCC 640.
6. *State of Haryana & Ors.* vs. *Ch. Bhajan Lal & Ors.* AIR 1992 SC 604.
7. *State of W.B.* vs. *Swapan Kumar Guha* (1982) 1 SCC 561.
8. *State of West Bengal* vs. *Swapan Kumar Guha* (1982) 1 SCC 561.

RESULT: Petition dismissed.

G.P. MITTAL, J. (ORAL)

1. The Petitioner invokes the inherent powers of this Court under Article 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.) for quashing of a Complaint under Section 138 of the Negotiable Instruments Act, 1881 (the Act) filed by Respondent No.2 for dishonour of the cheque for `9,70,000/-.

2. The Petitioner's plea is that apart from the fact that cheque was issued only towards delivery of a Tata Safari car and since it was actually delivered, the cheque was required to be returned by Respondent No.2; on admitted averments, the cheque delivered to Respondent No.2 in Lucknow, was drawn at ICICI Bank Limited, Gomti Nagar, Lucknow. Thus, mere presentation of the cheque at the Delhi Bank would not confer any jurisdiction at Delhi Courts. Reliance is placed on a judgment of the Supreme Court in **Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd.** (2001) 3 SCC 609.

3. It is well settled that for the purpose of quashing of a Complaint or FIR, the High Court cannot look into the defence of the accused. The Court is only required to see whether on the basis of the averments and the evidence produced by the Complainant, prima facie, there are grounds for proceeding against the accused.

4. In a recent report of the Supreme Court in **State of Orissa & Ors. v. Ujjal Kumar Burdhan** (2012) 4 SCC 547, the investigation initiated by the Vigilance Department of the State Govt. of Orissa into allegations of irregularities in receipt of excess quota, recycling of rice and distress sale of paddy by one M/s. Haldipada Rice Mill, Proprietorship concern of the Respondent was quashed by the High Court. The Supreme Court reversed the order passed by the High Court and observed that extraordinary power under Section 482 of the Code has to be exercised sparingly with circumspection and as far as possible for extraordinary cases where allegations in the complaint or the FIR taken on its face value and accepted in their entirety do not constitute the offence alleged. The Supreme Court relying on its earlier decision in **State of West Bengal v. Swapan Kumar Guha** (1982) 1 SCC 561 held that the Court will not normally interfere with the investigation and will permit an inquiry into the alleged offence to be completed. Paras 8 and 9 of the report are extracted hereunder:-

> "8. It is true that the inherent powers vested in the High Court under Section 482 of the Code are very wide. Nevertheless, inherent powers do not confer arbitrary jurisdiction on the High Court to act according to whims or caprice. This extraordinary power has to be exercised sparingly with circumspection and as far as possible, for extraordinary cases, where allegations in the complaint or the first information report, taken on its face value and accepted in their entirety do not constitute the offence alleged. It needs little emphasis that unless a case of gross abuse of power is made out against those in charge of investigation, the High Court should be loath to interfere at the early/premature stage of investigation.
>
> 9. In **State of W.B. v. Swapan Kumar Guha** (1982) 1 SCC 561, emphasising that the Court will not normally interfere with an investigation and will permit the inquiry into the alleged offence,

to be completed, this Court highlighted the necessity of a proper investigation observing thus: (Paras 65-66)

> "65. … An investigation is carried on for the purpose of gathering necessary materials for establishing and proving an offence which is disclosed. When an offence is disclosed, a proper investigation in the interests of justice becomes necessary to collect materials for establishing the offence, and for bringing the offender to book. In the absence of a proper investigation in a case where an offence is disclosed, the offender may succeed in escaping from the consequences and the offender may go unpunished to the detriment of the cause of justice and the society at large. Justice requires that a person who commits an offence has to be brought to book and must be punished for the same. If the court interferes with the proper investigation in a case where an offence has been disclosed, the offence will go unpunished to the serious detriment of the welfare of the society and the cause of the justice suffers. It is on the basis of this principle that the court normally does not interfere with the investigation of a case where an offence has been disclosed. …
>
> 66. Whether an offence has been disclosed or not must necessarily depend on the facts and circumstances of each particular case. … If on a consideration of the relevant materials, the court is satisfied that an offence is disclosed, the court will normally not interfere with the investigation into the offence and will generally allow the investigation into the offence to be completed for collecting materials for proving the offence."

5. In **State of Haryana & Ors. v. Ch. Bhajan Lal & Ors.** AIR 1992 SC 604 the Supreme Court considered its earlier decision on quashing of the FIR and observed that it would not be possible to lay down any precise, clearly defined, sufficiently channelized and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised. Some of the cases where the powers to quash FIR could be exercised were enumerated 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 FIR 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 FIR 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."

6. On the strength of the judgment in Ishar Alloy Steels Ltd. it can very well be said that if cheque is presented by the Payee at a place other than the drawee Bank, the Court at the place of Payee's Bank simply on presentation of the cheque will not have jurisdiction to entertain a Complaint under Section 138 of the Act.

7. At this juncture, it would be apposite to refer to the Complaint under Section 138 of the Act read with Section 420 IPC by the Complainant. The Complainant specifically averred that the cheque for Rs. 9,70,000/- was delivered to the Respondent no.2 in discharge of Petitioner's liability towards a friendly loan of Rs. 9,50,000/-. The loan was obtained by the Petitioner at Delhi in the last week of May, 2010. It is also stated in the Complaint that the cheque of Rs. 9,70,000/- which included Rs. 20,000/- towards interest was also delivered at Delhi. Thus, the Petitioner's averments that the cheque was towards the amount for Tata Safari won by Respondent No.2 as a result of bonus points in respect of the business deal between the parties which had no connection with Delhi, cannot be looked into at this stage in view of the judgments of the Supreme Court in Ch. Bhajan Lal.

8. It has to be borne in mind that this Complaint is not only under Section 138 of the Act but is also under Section 420 IPC. For the purpose of determining the jurisdiction, at this stage, it has to be accepted that the Petitioner obtained a loan of amount of Rs. 9,50,000/- at Delhi and that the cheque for Rs. 9,70,000/-, which included interest of Rs. 20,000/- was delivered to Respondent No.2 at Delhi. Thus, part of cause of action did take place at Delhi.

9. In **Rajendra Ramchandra Kavalekar v. State of Maharashtra & Anr.** (2009) 11 SCC 286, the Supreme Court referred to its earlier judgment in **N. Majithia v. State of Maharashtra & Ors.,** (2000) 7 SCC 640 and held that the Court where part of cause of action took place would have jurisdiction to inquire into and try a Complaint. Paras 19 and 20 of the report in Rajendra Ramchandra Kavalekar are extracted hereunder:-

> 19. It is also relevant to state that in **Navinchandra N. Majithia** case (2000) 7 SCC 640 the Court at para 22 of the judgment has observed:
>
> > "22. So far as the question of territorial jurisdiction with reference to a criminal offence is concerned the main factor to be considered is the place where the alleged offence was committed." The territorial jurisdiction of a court with regard to criminal offence would be decided on the basis of the place of occurrence of the incident and not on the basis of where the complaint was filed and

> > the mere fact that FIR was registered in a particular State is not the sole criterion to decide that no cause of action has arisen even partly within the territorial limits of jurisdiction of another court. The venue of enquiry or trial is primarily to be determined by the averments contained in the complaint or the chargesheet.
>
> 20. Section 177 of the Criminal Procedure Code provides that:-
>
> > **"177. Ordinary place of inquiry and trial.**—Every offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed."

Reference can be made to the observations made by this Court in **Asit Bhattacharjee v. Hanuman Prasad Ojha** (2007) 5 SCC 786. This Court at para 23 has stated as under:

> "23. The necessary ingredients for proving a criminal offence must exist in a complaint petition. Such ingredients of offence must be referable to the places where the cause of action in regard to commission of offence has arisen. A cause of action as understood in its ordinary parlance may be relevant for exercise of jurisdiction under clause (2) of Article 226 of the Constitution of India but its definition stricto sensu may not be applicable for the purpose of bringing home a charge of criminal offence. The application filed by the appellant under Section 156(3) of the Code of Criminal Procedure disclosed commission of a large number of offences. The fact that major part of the offences took place outside the jurisdiction of the Chief Metropolitan Magistrate, Calcutta is not in dispute. But, even if a part of the offence committed by the respondents related to the appellant Company was committed within the jurisdiction of the said court, the High Court of Allahabad should not have interfered in the matter."

10. In view of the above discussion, without giving an opportunity to the parties as to where the transaction took place, it would be difficult to hold that Delhi Court did not have jurisdiction to try the complaint.

11. The Petition, therefore, has to fail; it is accordingly dismissed.

12. The observations made above were necessary for disposal of the Petition under Section 482 Cr.P.C. The same would not tantamount to expression of my opinion on the merits of the case. The learned 'MM' shall be at liberty to go into the question of jurisdiction at the appropriate stage when the evidence is led by the parties.

13. Crl.M.A.10583/2011 for stay also stands disposed of.

ILR (2013) II DELHI 1345
CRL. L.P.

FINCAP PORTFOLIO LTD. ....PETITIONER

VERSUS

STATE & ORS. ....RESPONDENTS

(G.P. MITTAL, J.)

CRL. L.P. NO: 484/2011, 485/2011, 486/2011, 487/2011, 488/2011, 489/2011 & 490/2011 **DATE OF DECISION: 01.02.2013**

Negotiable Instruments Act, 1881—Section 138—Limitation Act, 1963—Section 5—Condonation of Delay—Sufficient cause—Complaint under Section 138 N.I. Act dismissed on non appearance of the complainant—None appeared on 14.07.2010 and none appeared even on 12.11.2009—Petition for leave preferred alongwith application for condonation of delay of 404 days—Contended—Junior counsel appearing for the main counsel did not inform about the dismissal of the complaint—Petition contested—Contended—Sufficient cause must be shown with proper explanation—delay not properly explained—Certain right accrued in favour of opposite party—Cannot be taken away—Court observed— junior counsel noted wrong date as

15.07.2010 instead of 14.07.2010—Even if there was wrong noting of date by junior counsel there is not whisper as to why complainant would not appear on 15.07.2010—The application in the High Court filed on 21.10.2011 after about one year and four months of the said date—There is no whisper as to when complainant contacted the counsel—The certified copy of the order was prepared on 25.03.2011 yet the leave petition filed on 21.10.2011—No explanation given—Held—Petitioners failed to show sufficient cause for condonation of delay—Petitions dismissed.

Turning to the facts of the instant case, the Petitioner's plea is that there was wrong noting of the date as it was noted as 15.07.2010 instead of 14.07.2010. Even if, there was wrong noting of the date by the learned counsel, there is not even a whisper as to why the Complainant himself could not appear before the Court on 15.07.2010. Furthermore, the fact that this Leave Petition along with an Application for condonation of delay was filed in this Court only on 21.10.2011, that is, after about one year and four months of the alleged date of hearing, that is, 15.07.2010 which shows that the Complainant was totally unconcerned about the date of hearing or for his appearance on the date of hearing. Thus, even if, the Complainant also noted the date wrongly as 15.07.2010 instead of 14.07.2010 he would have asked his counsel to take immediate steps for setting aside of the order dated 14.07.2010. There is not even a whisper as to when the Complainant contacted the counsel. This is very material in view of the fact that the Complainant was expected to appear in the case on each and every date of hearing. **(Para 11)**

Further, as urged by the learned counsel for Respondents No.2 to 4 although certified copy of the order was prepared on 25.03.2011, yet this Leave Petition for setting aside of the order of dismissal in default of the complaint was instituted only on 21.10.2011. A plea is taken that there was delay on account of not passing the information of dismissal

in default by the junior counsel to the main counsel. No explanation whatsoever has been given as to why steps were not taken by the main counsel even when certified copy was available on 25.03.2011. **(Para 12)**

A Co-ordinate Bench of this Court in **National Small Industries Corporation Ltd. v. M/s Akriti Industries & Ors.,** 2012 (3) JCC (NI) 217, in the absence of sufficient cause declined to condone a delay of 28 days in filing leave to Appeal against dismissal of a complaint under Section 138 of the Act. **(Para 13)**

Important Issue Involved: (a) For the condonation of delay in filing the petition, petitioner must show sufficient cause for not filing the petition within the limitation.

[Gu Si]

APPEARANCES:

FOR THE PETITIONER : Mr. K.K. Manan with Mr. Nipum Bhardwaj, Advocates.

FOR THE RESPONDENTS : Ms. Rajdipa Behura, APP the State/ Respondent No.1. Mr. Vijay Aggarwal with Mr. Gurpreet Singh, Advocates for the Respondents No. 2 to 4.

CASES REFERRED TO:

1. *Udai Shankar Awasthi* vs. *State of U.P. & Anr.,* decided on 09.01.2013. Paras 6 to 9.
2. *Sudhir Kumar Anand* vs. *Dr.Vijay Kr.Anand & Ors.,* 189 (2012) DLT 774.
3. *National Small Industries Corporation Ltd.* vs. *M/s Akriti Industries & Ors.,* 2012 (3) JCC (NI) 217.
4. *Noida Entrepreneurs Association* vs. *Noida & Ors.,* AIR 2011 SC 2112).
5. *Sajjan Kumar* vs. *Central Bureau of Investigation,* (2010) 9 SCC 368.

6. *Balwant Singh* vs. *Jagdish Singh,* (2010) 8 SCC 685.
7. *Japani Sahoo* vs. *Chandra Sekhar Mohanty,* AIR 2007 SC 2762.
8. *State of Nagaland* vs. *Lipok Ao & Ors.,* (2005) 3 SCC 752.
9. *Hameed Joharan & Ors.* vs. *Abdul Salam,* AIR 2001 SC 3404.
10. *Associated Cement Company Limited* vs. *Keshvanand* (1998) 1 SCC 687.

RESULT: Petition dismissed.

G.P. MITTAL, J. (ORAL)

1. These seven Leave Petitions (Crl.L.Ps. 484/2011, 485/2011, 486/2011, 487/2011, 488/2011, 489/2011 & 490/2011) arise out of a similar order passed in seven Complaint Cases under Section 138 of the Negotiable Instruments Act, 1881 ('the Act') whereby the seven complaints were dismissed on account of the non-appearance on behalf of the Complainant and the accused, that is, Respondents No.2 to 4 were acquitted.

2. The order dated 14.07.2010 passed by the learned Metropolitan Magistrate, Patiala House, New Delhi is extracted hereunder:-

"14.07.10.
At 2 p.m.

Pr. None for Complaint

Counsel for accused

Case today is listed for disposal of the Application of Complainant for furnishing additional affidavit. There is no appearance on behalf of Complainant since morning despite repeated calls. Even on 12.11.09 there was no appearance on behalf of Complainant.

Case is dismissed in default as well as for non-prosecution. Accused is acquitted. File be consigned to Record Room."

3. Along with the Leave Petitions, an Application under Section 5 of the Limitation Act, 1963 has been moved for condonation of delay of 404 days in filing these Leave Petitions. The grounds set up in the

Applications are that the junior counsel appearing for the main counsel did not inform him (the main counsel) about the dismissal of the Complaint for non-appearance. Thus, the delay in filing the Appeal (Leave Petitions) is not intentional but on account of the reasons beyond the powers of the Petitioner.

4. The Application is opposed by Respondents No.2 to 4 by way of filing a written reply. It is stated that in fact there is a delay of 461 days in filing the Appeal (Leave Petition). The Respondents have acquired indefeasible right. It is stated that certified copy of the order was obtained on 25.03.2011 and even thereafter the Leave Petition was filed only on 21.10.2011, that is, after a gap of another 209 days. Even if, the case was dismissed in default on account of the wrong noting of the date, or, even if, the junior counsel could not inform the main counsel of the dismissal in default of the Complaint Case. The Petitioner has not given any explanation for this delay of 209 days.

5. Mr.K.K.Manan, learned counsel for the Petitioner urges that the Courts normally do not throw away meritorious lis on hypertechnical grounds. The primary function of a Court is to adjudicate the dispute between the parties and to advance substantial justice. The time-limit fixed for approaching the Court in different situations is not because on the expiry of such time a bad cause would transform into a good cause. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury.

6. Learned counsel contents that a criminal offence is considered as a wrong against the State and also the society and, therefore, the Court should be very liberal in condoning the delay in launching prosecution or, even if, in filing the Appeal. Learned counsel places reliance on a three Judges Bench decision of the Supreme Court in **Udai Shankar Awasthi v. State of U.P. & Anr.,** decided on 09.01.2013. Paras 6 to 9 of the Report of the Supreme Court are extracted hereunder:-

> "6. Section 468 Cr.P.C. places an embargo upon Court from taking cognizance of an offence after the expiry of the limitation period provided therein. Section 469 prescribes when the period of limitation begins. Section 473 enables the Court to condone the delay, provided that the Court is satisfied with the explanation

> furnished by the prosecution/ complainant, and where, in the interest of justice, extension of the period of limitation is called for. The principle of condonation of delay is based on the general rule of the criminal justice system which states that a crime never dies, as has been explained by way of the legal maxim, nullum tempus aut locus occurrit regi (lapse of time is no bar to the Crown for the purpose of it initiating proceedings against offenders). A criminal offence is considered as a wrong against the State and also the society as a whole, even though the same has been committed against an individual.
>
> 7. The question of delay in launching a criminal prosecution may be a circumstances to be taken into consideration while arriving at a final decision, however, the same may not itself be a ground for dismissing the complaint at the threshold. Moreover, the issue of limitation must be examined in light of the gravity of the charge in question. (Vide: **Japani Sahoo v. Chandra Sekhar Mohanty,** AIR 2007 SC 2762; **Sajjan Kumar v. Central Bureau of Investigation,** (2010) 9 SCC 368; and **Noida Entrepreneurs Association v. Noida & Ors.,** AIR 2011 SC 2112).
>
> 8. The Court, while condoning delay has to record the reasons for its satisfaction, and the same must be manifest in the order of the Court itself. The Court is further required to state in its conclusion, while condoning such delay, that such condonation is required in the interest of justice. (Vide: **State of Maharashtra v. Sharad Chandra Vinayak Dongre & Ors.,** AIR 1995 SC 231; and **State of H.P. v. Tara Dutt & Anr.,** AIR 2000 SC 297).
>
> 9. To sum up, the law of limitation prescribed under the Cr.P.C., must be observed, but in certain exceptional circumstances, taking into consideration the gravity of the charge, the Court may condone delay, recording reasons for the same, in the event that it is found necessary to condone such delay in the interest of justice."

7. Per contra, the learned counsel for Respondents No.2 to 4 argues that party seeking condonation of delay must show sufficient cause and give proper explanation for delay in filing an Appeal or a Petition, if the delay is not properly explained, the Court will not come to the rescue of

the litigant who is negligent and causes harassment to the opposite party. The learned counsel states that on expiry of period of limitation prescribed for seeking legal remedy certain rights accrue in favour of the opposite party which cannot be taken away without their being sufficient cause for condonation of delay. The learned counsel for Respondents No.2 to 4 places reliance on **Sudhir Kumar Anand v. Dr.Vijay Kr.Anand & Ors.,** 189 (2012) DLT 774 and **Hameed Joharan & Ors. v. Abdul Salam,** AIR 2001 SC 3404.

8. Section 256 of the Code of Criminal Procedure, 1973 ('the Code') empowers a Magistrate to stop proceedings or dismiss a complaint for non-appearance of the Complainant and pronounce a judgment of acquittal where evidence of principle witnesses has been recorded. Section 256 of the Code is extracted hereunder:-

> **"256. Non-appearance or death of complainant:-** (1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:
>
> **Provided** that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.
>
> (2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death."

9. In **Associated Cement Company Limited v. Keshvanand** (1998) 1 SCC 687 the Supreme Court observed that the provisions of Section 247 of the Code of Criminal Procedure, 1898 (Section 256 in the New Code) have been incorporated to provide some deterrence against dilatory tactics on the part of a Complainant who sets the law in motion through his complaint. An accused who per force has to attend the Court on all posting days can be put to much harassment by the Complainant by his absence.

10. The order dated 14.07.2010 reveals that there was no appearance on behalf of the Petitioner for the whole day. Learned Magistrate noted that even on 12.11.2009 none had appeared on behalf of the Complainant. The object of incorporation of Section 256 of the Code as stated earlier is that the Complainant after filing a complaint must not take process of the Court lightly and must not cause unnecessary harassment to a person who has been summoned to face trial as an accused. I will not dwell much on merits since at the moment I am only looking into the aspect whether there is sufficient cause for condonation of delay in filing the Leave Petition. It is true as held in **Udai Shankar Awasthi** (supra) that a criminal offence is a wrong against the State but at the same time the Supreme Court observed that the Court while condoning the delay has to record the reasons for its satisfaction. The instant case relates to dishonour of the cheque which was made a criminal offence by incorporation of Section 138 in the Act w.e.f. 01.04.1989. Although, the conviction under Section 138 of the Act entails substantive imprisonment which may extent to one year or with fine or with both, yet the nature of the offence is such that it can be mentioned as quasi criminal proceedings. The dishonour of the cheque is not an offence against the society but an offence against an individual. Therefore, it is all the more necessary that adequate explanation must be given. It is true that the expression 'sufficient cause' should be given a liberal interpretation so as to advance substantial justice between the parties. [**Balwant Singh v. Jagdish Singh,** (2010) 8 SCC 685]. It is not the length of delay which is material for condonation of delay in filing an Appeal but the acceptability of the explanation. There may be cases where a few months' delay may not be condoned as an Applicant has no reasonable explanation to offer for the same, yet there are cases where the delay of several years has been condoned. [**State of Nagaland v. Lipok Ao & Ors.,** (2005) 3 SCC 752]. The law that each day must be explained has mellowed down yet it has to be shown by the Applicant that there was neither any gross negligence, nor any inaction, nor want of bona fides.

11. Turning to the facts of the instant case, the Petitioner's plea is that there was wrong noting of the date as it was noted as 15.07.2010 instead of 14.07.2010. Even if, there was wrong noting of the date by the learned counsel, there is not even a whisper as to why the Complainant himself could not appear before the Court on 15.07.2010. Furthermore, the fact that this Leave Petition along with an Application for condonation

of delay was filed in this Court only on 21.10.2011, that is, after about one year and four months of the alleged date of hearing, that is, 15.07.2010 which shows that the Complainant was totally unconcerned about the date of hearing or for his appearance on the date of hearing. Thus, even if, the Complainant also noted the date wrongly as 15.07.2010 instead of 14.07.2010 he would have asked his counsel to take immediate steps for setting aside of the order dated 14.07.2010. There is not even a whisper as to when the Complainant contacted the counsel. This is very material in view of the fact that the Complainant was expected to appear in the case on each and every date of hearing.

12. Further, as urged by the learned counsel for Respondents No.2 to 4 although certified copy of the order was prepared on 25.03.2011, yet this Leave Petition for setting aside of the order of dismissal in default of the complaint was instituted only on 21.10.2011. A plea is taken that there was delay on account of not passing the information of dismissal in default by the junior counsel to the main counsel. No explanation whatsoever has been given as to why steps were not taken by the main counsel even when certified copy was available on 25.03.2011.

13. A Co-ordinate Bench of this Court in **National Small Industries Corporation Ltd. v. M/s Akriti Industries & Ors.,** 2012 (3) JCC (NI) 217, in the absence of sufficient cause declined to condone a delay of 28 days in filing leave to Appeal against dismissal of a complaint under Section 138 of the Act.

14. The Petitioner has failed to show sufficient cause for condonation of delay. Rather, it is apparent that there was gross negligence on the part of the Petitioner in perusing the complaint and filing leave to appeal.

15. In the circumstances, the delay of more than 400 days in filing leave to Appeal cannot be condoned. Leave Petitions are accordingly dismissed.

16. Pending Applications stand disposed of.

ILR (2013) II DELHI 1354
CRL. M.C.

GANESH KRISHNAMURTHY ....PETITIONER

VERSUS

THE STATE (NCT OF DELHI) & ANR. ....RESPONDENTS

(G.P. MITTAL, J.)

CRL. M.C. NO. : 878, 879-882, 886/2012 DATE OF DECISION: 07.02.2013

Code of Criminal Procedure, 1973—Section 482—Inherent power—Quashing—Companies Act, 1956—Section 159—Section 162—Non compliance of the provisions of the Act—Liability of Director — Resignation before initiation of prosecution—Whether offences under Section 159 read with Section 162 continuing—M/s AKG Acoustics (India) Ltd. incorporated on 7.3.1988 as public limited company—Petitioner inducted as director on 30.01.1997—Resigned on 28.07.1997—Notice dated 17.02.2000 issued by R2 Registrar of Companies (ROC) to AKG Acoustics and its director—for non compliance of some provisions of the Act—Notice also addressed to the petitioner showing him as a director—Petitioner replied on 25.04.2000 regarding his resignation—Petitioner sent another reply on 28.08.2000 enclosing the copy of resignation—ROC filed 6 cases on 05.07.2007 against AKG Acoustics and directors including petitioner—contended—Resignation was in the knowledge of respondent no.2—He could not have been prosecuted as director—Moved an application on 23.04.2009 in the Court of ACMM for dropping of the proceedings—R2 failed to respond to the application for more than three years—Approached the High Court—No counter

affidavit filed—Deputy Registrar examined in respect of averment—Admitted the reply to the notice—R2 argued unless Form 32 is received—It is difficult to accept that the petitioner has resigned—Held—The resignation was intimated to ROC—ROC in two complaints not preferred to prosecute the petitioner as one of its directors accepting the averments of petitioner about resignation—Factum of resignation has come to the notice of ROC on 25.04.2000—Petitioner could not have been prosecuted for violation under Section 159 and Section 162 of the Act—Petition allowed—Prosecution quashed—However, the Court did not express any opinion whether the offence under Section 159 read with Section 162 are continuing offences or not.

There is no gainsaying that the powers under Section 482 Cr.P.C. for quashing any criminal proceedings are to be exercised sparingly and with circumspection where the High Court is satisfied that the continuance of the proceedings would be abuse of process of any Court. As held in Iridium India Telecom Limited, the inherent powers ought not to be exercised to stifle legitimate prosecution but at the same time, when there is documentary evidence in possession of the Complainant or from the facts proved it is established that the accused is not liable to be prosecuted at all, the High Court in the exercise of its power under Section 482 Cr.P.C. must come forward to put an end to unnecessary harassment of a person who has been prosecuted without any basis. **(Para 11)**

The learned Single Judge of this Court in **B.N. Kaushik** relied on an earlier judgment of the coordinate Bench of this Court in **Luc Auto Ancillary (India) Ltd. (In Liquidation) v. Laxmi Narain Raina & Ors.** 1999 (50) DRJ 101; and a judgment of the Division Bench of Bombay High Court in **Saumil Dilip Mehta v. State of Maharashtra** (2002) 39 SCL 102 and held that Registrar of Public Limited Company or a Private Limited Company can tender his resignation

unilaterally and without filing the Form 32 and without sending a notice to the ROC. Paras 5 to 7 of the report are extracted hereunder:-

"5. In the instant case, the learned counsel for the petitioner submitted that the complaint initiated on behalf of the respondent is ex-facie contrary to the facts deposed by the respondent before the High Court in CA No.606/1984 in CP No.109/1984, that is, in the proceedings for winding up of the company titled Ram Kishore Sharma vs. Toyo Lamps Pvt. Ltd. In the said proceedings, an affidavit had been filed by the respondent categorically admitting the receipt of the resignation letter dated 27.07.1971 from the petitioner No.1. Paragraph 12 of the said reply by way of affidavit clearly admits that the petitioner addressed the said resignation letter to the Board of Directors and a copy was forwarded to the office of the respondent, which reads as follows:-

"The averments made in para 16 are admitted to the extent that Shri B.N. Kaushik, Secretary of the company addressed a letter dated 27th July, 1971 to the Board of Directors and copy forwarded to the O ice of the respondent stating his inability to remain as honorary Secretary of the Company w.e.f. 27-7-1971. However, Form No.32 has not been filed by the company in respect of the resignation of Sh. B.N. Kaushik as Secretary of the company w.e.f. 27-7-1971 and the other averments made in the aforesaid para are denied for want of knowledge."

6. Reliance is placed by the learned counsel for the petitioner upon the judgment of a learned Single Judge of this Court (Hon'ble Mr. Justice D.K. Jain as His Lordship then was) in **Luk Auto Ancillary (India) Ltd. (In Liquidation) vs. Laxmi Narain Raina & Ors.,** 1999 (50) DRJ 101, the relevant portion of which reads as follows:-

"I have heard Mr. Sharma, learned counsel for the applicant, respondent No.4 herein and Mr. Luthra, learned counsel for OL. In addition to what has been pleaded in the application,

it is also pointed out by Mr. Sharma that at the time of recording of evidence of the parties, when Mr. M.C. Saxena, Junior Technical Assistant, O ice of the Registrar of Companies, North Zone, was examined on 18 July, 1986, he categorically admitted that an intimation about the resignation of the applicant was received in the Office of Registrar of Companies. Further, the attention of the Court has also been invited to a circular issued by the Department of Company Affairs, stating that where Registrar receives a communication from any Director about his resignation, Registrar should enquire whether the resignation of such Director is or is not bonafide and if he finds that Director has resigned bonafide from the Directorship of the company, he should not start prosecution against such Director, irrespective of the fact whether such resignation was or was not accepted by the company. It is pleaded by Mr. Sharma that no communication was received from the Office of Registrar of Companies, rejecting his letter of resignation. It is also contended that, thereafter, no prosecution was launched against the applicant by the Registrar of Companies for a default on the part of the company, which shows that his resignation was deemed have been accepted.

Mr. Luthra, on the other hand, has pointed out that in the statement of Mr. M.C. Saxena, it was stated that on receipt of intimation regarding the resignation by the applicant, he was asked to file Form No.32 and the balance sheet etc. of the company in liquidation but it was done and, therefore, it could not be said that the applicant's resignation had been accepted.

In view of the fact that letter of resignation, as sent to the Registrar of Companies was not rejected and the fact that after the receipt of the said letter no prosecution is stated to have been launched against him, presumably in terms of the aforesaid circular issued by the Department of Company A airs, the non-furnishing of Form No.32 by applicant No.2 is of no consequence.

Accordingly, for the foregoing reasons, the application is allowed and the applicant is discharged in Crl.O.2/82."

7. Reliance is also placed by the learned counsel for the petitioner upon a Division Bench Judgment of the Bombay High Court in **Saumil Dilip Mehta vs. State of Maharashtra** reported in (2002) 39 SCL 102 (Bom.), wherein, in paragraph 6, it has been held as follows:-

"6. The submissions advanced by the litigating parties are touching an important point involved in this matter which make us to express our views on the point whether a director of a public or private limited company can resign unilaterally and that too by writing a letter to the chairman of the said company or its secretary. It is necessary for such a director to fill up Form No.32 and is obliged to give a notice or intimation to that effect to the Registrar of Companies ('ROC')? The question arises for our Adjudication is whether that particular director is obliged to give such information to the ROC and whether he cannot retire without complying with the said requirement. Keeping in view the provisions of the Companies Act, 1956, the relevant articles of the Constitution of India, we come to the conclusion that a director of the public limited company or private limited company can tender his resignation unilaterally and without filling in Form 32 and without sending a notice to the Registrar of Companies. It is clear that the filling in of the said Form and the giving of due intimation and information to the Registrar of Companies is the duty of the company secretary and not of an individual director. Suffice it to say that what he has to do is to send in writing a letter informing either the chairman or the secretary of the company, as the case may be, his intention to resign from the post of the director of the said company. Thereafter the said letter has to be moved in the meeting of the directors of the company, it may be ordinary meeting or may be extraordinary or special meeting, as the case may be, and the board of directors have to take a decision whether the Board is accepting his resignation or not. An intimation should be

sent to such director and after such resolution is passed, the company secretary is under the obligation to comply with the legal formalities for giving a finishing touch to the resolution which has been passed in the said meeting of the board of director. It is for the company secretary to fill in the forms as prescribed and to give due information and intimation to the ROC, as the law requires. Thereafter, it has to be so mentioned in all prescribed registers of the company, accounts and balance sheet of the company and thereafter the said fact is to be brought to the notice of the members of the company as early as possible and at the latest in annual general meeting." **(Para 14)**

Important Issue Involved: (i) Powers under Section 482 Cr. P.C. are to be exercised sparingly and with circumspection to be exercised only, if the Court is satisfied that continuance of proceeding would be abuse of process of law (ii) director of a company can tender his resignation unilaterally without filing the Form 32 and without sending notice to ROC.

[Gu Si]

APPEARANCES:

FOR THE PETITIONER : Ms. Jyoti Singh, Sr. Advocate with Ms. Shahila Lamba, Advocate Mr. Sudershan Rajan, Advocate.

FOR THE RESPODENTS : Ms. Rajdipa Behura, APP for the State. Mr. Saqib, Advocate for R-2.

CASES REFERRED TO:

1. *Iridium India Telecom Limited* vs. *Motorola Incorporated & Ors.* (2011) 1 SCC 74.
2. *M.L. Gupta* vs. *DCM Financial Services Limited* 167 (2010) DLT 428.
3. *B.N. Kaushik* vs. *The Registrar of Companies* (2009) 150 CompCas 97 (Delhi).

4. *B.N. Kaushik, Shalini Marwah and Anr.* vs. *The Registrar of Companies, Delhi and Haryana,* MANU/DE/0822/2005.
5. *Saumil Dilip Mehta* vs. *State of Maharashtra & Ors.,* AIR 2002 Bom. 194.
6. *Saumil Dilip Mehta* vs. *State of Maharashtra* reported in (2002) 39 SCL 102 (Bom.).
7. *Luk Auto Ancillary (India) Ltd. (In Liquidation)* vs. *Laxmi Narain Raina & Ors.,* 1999 (50) DRJ 101.
8. *Anita Chadha* vs. *The Registrar of Companies* 74 (1998) DLT 537.
9. *Sugga Engineering Works (P) Ltd. & Ors.* vs. *State & Anr.* Crl.M.(M) No.576-577/1987.

RESULT: Petition allowed.

G.P. MITTAL, J. (ORAL)

1. In these six Petitions, the Petitioner invokes the inherent powers of this Court under Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.) for quashing of the six complaints filed under Sections 159/162 of the Companies Act, 1956 (the Act) filed against him.

2. The Petitioner's case as set up in the Petitions is that M/s. AKG Acoustics (India) Ltd. (AKG Acoustics) was incorporated on 07.03.1988 and was registered as a Public Limited Company under Registration No.05-033134 under the Companies Act. The Petitioner was inducted as a Director in the said Company on 31.01.1997. However, he (the Petitioner) resigned from his post of Directorship on 28.07.1997 vide a letter of resignation of even date (Annexure P-2).

3. The Petitioner alleges that a notice dated 17.02.2000 was issued by Respondent No.2 Registrar of Companies (ROC) to AKG Acoustics and its Directors for non compliance of some of the provisions under the Act. The said notice was also addressed to the Petitioner showing him as one of its Directors. The Petitioner sent a reply dated 25.04.2000 (Annexure P-3) to the ROC through his Chartered Accountant informing the ROC about his resignation w.e.f. 28.07.1997. The said reply was duly received in the office of ROC on 25.04.2000 itself. The Petitioner sent another reply dated 28.08.2000 under his own signatures (Annexure P-4) again intimating the ROC about his resignation from the Directorship

w.e.f. 28.07.1997. According to the Petitioner a copy of the resignation letter was also enclosed with the reply submitted by him.

4. According to the Petitioner, Respondent No.2 filed two complaints against AKG Acoustics for not filing its annual return for the year ending 31.03.2003 under Sections 159/162 of the Act and for not placing the balance sheet for profit and loss account of the Company as on 31.03.2002 in its Annual General Meeting (AGM) within the stipulated period. In the said complaints, the Petitioner was not prosecuted as one of its Directors presumably on the premise that Respondent No.2 (ROC) acknowledged that the Petitioner had ceased to be its (AKG Acoustics) Director.

5. It is the case of the Petitioner that on 05.07.2007 Respondent No.2 filed six cases against AKG Acoustics and its Directors including the Petitioner for violation of various provisions of the Act. His grievance is that since the factum of his resignation was in the knowledge of Respondent No.2, he could not have been prosecuted as a Director of the Company, particularly in view of its own circular No.42 (400)-CL-II-59 dated 29.12.1959. The Petitioner, therefore, moved an application dated 23.04.2009 (Annexure P-6) in the Court of learned ACMM who was seized of the Complaints for dropping the proceedings against him. Respondent No.2 in spite of repeated adjournments failed to responsd to the said application for a period of more than three years. The Petitioner, therefore, approaches this Court for quashing of the Complaints.

6. The Counter Affidavit to the Petitions was not filed by Respondent No.2. During the course of arguments on 05.02.2013 while perusing the complaint case Nos.818 and 819, it transpired that there were some contradictions in Para 4 of the Complaints in as much as in Complaint Case No.818 of 2003, the title of the Complaint contained only two accused whereas in Para 4 it was stated that accused Nos. 2 to 5 were being prosecuted as Directors/officers of the Company. This Court, therefore, directed the learned counsel for Respondent No.2 to examine this aspect. Deputy Registrar of ROC was also required to appear along with the record with respect to AKG Acoustics.

7. The record of AKG Acoustics was produced by Mr. Krishna Shanker Pradhan, Deputy Registrar, in the Office of ROC. A perusal of the record reveals that these are loose papers and the record has not been properly maintained. Since no counter affidavit was filed, the Deputy Registrar was examined in respect of some of the averments made in the

Petition with regard to the record of Respondent No.2. The Deputy Registrar in the office of ROC admitted that the reply dated 25.04.2000 to the notice dated 17.02.2000 was received in the office of ROC whereby the Petitioner had informed the ROC that he (the Petitioner) had resigned from the company w.e.f. 28.07.1997.

8. The submissions raised on behalf of the Petitioner are twofold. First, the filing of Form 32 to the ROC is not the responsibility of the Director, it being the responsibility of the Company. Thus non-filing of Form 32 is immaterial and as soon as the information regarding resignation is received by ROC, it is expected to make an inquiry in terms of the Circular No. 42 (400)-CL-II-59 dated 29.12.1959 and also make an inquiry whether the resignation from the Directorship is bonafide or not. Once the resignation is communicated and is not disputed by the ROC, such a Director cannot be prosecuted for any violation being a Director of the Company after the date of receipt of resignation. Reliance is placed on a judgment of a coordinate Bench of this Court in **B.N. Kaushik v. The Registrar of Companies** (2009) 150 CompCas 97 (Delhi). Second, the offences punishable under Sections 159/162 of the Act are punishable with fine only. Since these offences are not continuing offences, the Complaint could have been filed against an accused only within a period of six months, the Court was debarred from taking cognizance beyond the period of six months. Reliance is placed on **B.N. Kaushik, Shalini Marwah and Anr. v. The Registrar of Companies,** Delhi and Haryana, MANU/DE/0822/2005; and **Saumil Dilip Mehta v. State of Maharashtra & Ors.,** AIR 2002 Bom. 194.

9. On the other hand, learned counsel for Respondent No.2 argues that unless Form 32 is received, it is difficult to accept that the Petitioner has resigned. The learned counsel points out that as per Form 32 received in the year 2000 Mr. S. Raja Gopalan had resigned from the post of Managing Director of M/s. AKG Acoustics (India) Ltd. If the Petitioner had also resigned, Form 32 in this regard would have been sent by the Company. Learned counsel urges that in exercise of its jurisdiction under Section 482 Cr.P.C., the High Court is not to go into the disputed questions of facts and the allegations made in the complaint will have to be accepted at its face value and its truth or falsity cannot be gone into by the Court at this stage. Reliance is placed on **Iridium India Telecom Limited v. Motorola Incorporated & Ors.** (2011) 1 SCC 74.

10. On the issue of limitation, the learned counsel for Respondent No.2 relies on earlier judgments of this Court in **Anita Chadha v. The Registrar of Companies** 74 (1998) DLT 537; and **Sugga Engineering Works (P) Ltd. & Ors. v. State & Anr.** Crl.M.(M) No.576-577/1987, decided on 17.11.1987 wherein a learned Single Judge of this Court had held that offence punishable under Sections 159/162 & 220/162 of the Act for failure of filing Annual Returns and balance sheet within the time are continuing offences and will be governed by the provision of Section 472 Cr.P.C. in the matter of limitation for lodging prosecution.

11. There is no gainsaying that the powers under Section 482 Cr.P.C. for quashing any criminal proceedings are to be exercised sparingly and with circumspection where the High Court is satisfied that the continuance of the proceedings would be abuse of process of any Court. As held in Iridium India Telecom Limited, the inherent powers ought not to be exercised to stifle legitimate prosecution but at the same time, when there is documentary evidence in possession of the Complainant or from the facts proved it is established that the accused is not liable to be prosecuted at all, the High Court in the exercise of its power under Section 482 Cr.P.C. must come forward to put an end to unnecessary harassment of a person who has been prosecuted without any basis.

12. In **M.L. Gupta v. DCM Financial Services Limited** 167 (2010) DLT 428 in spite of the allegations made in the Complaint that the Petitioner was the Director and in charge and responsible to the company for the conduct of its business on the date of the dishonour of the cheque, the criminal proceedings were initiated against him in spite of the fact that Form 32 filed by the company indicated that the Petitioner was no longer the Director of the Company on the alleged date of commission of the offence. The High Court quashed the proceedings in exercise of its powers under Section 482 Cr.P.C. Thus, if from the admitted documents, the Petitioner is able to show that he was not the Director of AKG Acoustics, he cannot be held responsible for filing the Annual Returns or for placing the balance sheet in the AGM of the Company, etc. Admittedly, an application dated 23.04.2009 (Annexure P-6) was moved by the Petitioner before the Trial Court for dropping the proceedings on the ground that he resigned from the Directorship w.e.f. 28.17.1997. He also stated that two letters with regard to his resignation were also written to the ROC. It is very intriguing that the ROC preferred not even to respond to this application for a period of almost three years compelling

the Petitioner to approach this Court for quashing of the Complaint. The Petitioner had placed before the Trial Court not only the copy of his resignation letter but also the copies of letters through which he informed the ROC about his resignation.

13. According to the averments made in the Petition, a notice dated 17.02.2000 was issued by ROC to the Petitioner requiring him to show cause as to why he should not be prosecuted as a Director. The Petitioner avers that he submitted a reply dated 25.04.2000 through his CA (Annexure P-3) which was duly received in the office of ROC on 25.04.2000. The receipt of this reply is admitted by the Deputy Registrar office of ROC who appeared in the Court today. In the circumstances, it is established that the ROC was very much aware of the resignation tendered by the Petitioner, and, therefore, ROC was under obligation to hold an inquiry as envisaged by the Circular dated 29.12.1959.

14. The learned Single Judge of this Court in **B.N. Kaushik** relied on an earlier judgment of the coordinate Bench of this Court in **Luc Auto Ancillary (India) Ltd. (In Liquidation) v. Laxmi Narain Raina & Ors.** 1999 (50) DRJ 101; and a judgment of the Division Bench of Bombay High Court in **Saumil Dilip Mehta v. State of Maharashtra** (2002) 39 SCL 102 and held that Registrar of Public Limited Company or a Private Limited Company can tender his resignation unilaterally and without filing the Form 32 and without sending a notice to the ROC. Paras 5 to 7 of the report are extracted hereunder:-

> "5. In the instant case, the learned counsel for the petitioner submitted that the complaint initiated on behalf of the respondent is ex-facie contrary to the facts deposed by the respondent before the High Court in CA No.606/1984 in CP No.109/1984, that is, in the proceedings for winding up of the company titled Ram Kishore Sharma vs. Toyo Lamps Pvt. Ltd. In the said proceedings, an affidavit had been filed by the respondent categorically admitting the receipt of the resignation letter dated 27.07.1971 from the petitioner No.1. Paragraph 12 of the said reply by way of affidavit clearly admits that the petitioner addressed the said resignation letter to the Board of Directors and a copy was forwarded to the office of the respondent, which reads as follows:-

"The averments made in para 16 are admitted to the extent that Shri B.N. Kaushik, Secretary of the company addressed a letter dated 27th July, 1971 to the Board of Directors and copy forwarded to the O ice of the respondent stating his inability to remain as honorary Secretary of the Company w.e.f. 27-7-1971. However, Form No.32 has not been filed by the company in respect of the resignation of Sh. B.N. Kaushik as Secretary of the company w.e.f. 27-7-1971 and the other averments made in the aforesaid para are denied for want of knowledge."

6. Reliance is placed by the learned counsel for the petitioner upon the judgment of a learned Single Judge of this Court (Hon'ble Mr. Justice D.K. Jain as His Lordship then was) in **Luk Auto Ancillary (India) Ltd. (In Liquidation) vs. Laxmi Narain Raina & Ors.,** 1999 (50) DRJ 101, the relevant portion of which reads as follows:-

"I have heard Mr. Sharma, learned counsel for the applicant, respondent No.4 herein and Mr. Luthra, learned counsel for OL. In addition to what has been pleaded in the application, it is also pointed out by Mr. Sharma that at the time of recording of evidence of the parties, when Mr. M.C. Saxena, Junior Technical Assistant, O ice of the Registrar of Companies, North Zone, was examined on 18 July, 1986, he categorically admitted that an intimation about the resignation of the applicant was received in the Office of Registrar of Companies. Further, the attention of the Court has also been invited to a circular issued by the Department of Company Affairs, stating that where Registrar receives a communication from any Director about his resignation, Registrar should enquire whether the resignation of such Director is or is not bonafide and if he finds that Director has resigned bonafide from the Directorship of the company, he should not start prosecution against such Director, irrespective of the fact whether such resignation was or was not accepted by the company. It is pleaded by Mr. Sharma that no communication was received from the Office of Registrar of Companies, rejecting his letter of resignation. It is also

contended that, thereafter, no prosecution was launched against the applicant by the Registrar of Companies for a default on the part of the company, which shows that his resignation was deemed have been accepted.

Mr. Luthra, on the other hand, has pointed out that in the statement of Mr. M.C. Saxena, it was stated that on receipt of intimation regarding the resignation by the applicant, he was asked to file Form No.32 and the balance sheet etc. of the company in liquidation but it was done and, therefore, it could not be said that the applicant's resignation had been accepted.

In view of the fact that letter of resignation, as sent to the Registrar of Companies was not rejected and the fact that after the receipt of the said letter no prosecution is stated to have been launched against him, presumably in terms of the aforesaid circular issued by the Department of Company A airs, the non-furnishing of Form No.32 by applicant No.2 is of no consequence.

Accordingly, for the foregoing reasons, the application is allowed and the applicant is discharged in Crl.O.2/82."

7. Reliance is also placed by the learned counsel for the petitioner upon a Division Bench Judgment of the Bombay High Court in **Saumil Dilip Mehta vs. State of Maharashtra** reported in (2002) 39 SCL 102 (Bom.), wherein, in paragraph 6, it has been held as follows:-

"6. The submissions advanced by the litigating parties are touching an important point involved in this matter which make us to express our views on the point whether a director of a public or private limited company can resign unilaterally and that too by writing a letter to the chairman of the said company or its secretary. It is necessary for such a director to fill up Form No.32 and is obliged to give a notice or intimation to that effect to the Registrar of Companies ('ROC')? The question arises for our Adjudication is whether that particular director is obliged to give such information to the ROC and whether he cannot retire without complying with the said requirement. Keeping in view the provisions of the Companies Act,

1956, the relevant articles of the Constitution of India, we come to the conclusion that a director of the public limited company or private limited company can tender his resignation unilaterally and without filling in Form 32 and without sending a notice to the Registrar of Companies. It is clear that the filling in of the said Form and the giving of due intimation and information to the Registrar of Companies is the duty of the company secretary and not of an individual director. Suffice it to say that what he has to do is to send in writing a letter informing either the chairman or the secretary of the company, as the case may be, his intention to resign from the post of the director of the said company. Thereafter the said letter has to be moved in the meeting of the directors of the company, it may be ordinary meeting or may be extraordinary or special meeting, as the case may be, and the board of directors have to take a decision whether the Board is accepting his resignation or not. An intimation should be sent to such director and after such resolution is passed, the company secretary is under the obligation to comply with the legal formalities for giving a finishing touch to the resolution which has been passed in the said meeting of the board of director. It is for the company secretary to fill in the forms as prescribed and to give due information and intimation to the ROC, as the law requires. Thereafter, it has to be so mentioned in all prescribed registers of the company, accounts and balance sheet of the company and thereafter the said fact is to be brought to the notice of the members of the company as early as possible and at the latest in annual general meeting."

15. In this case, not only that the factum of resignation was intimated to the ROC; the ROC in Complaint Nos. 818/2003 and 819/2003 preferred not to prosecute the Petitioner as one of its Directors for non compliance for a period ending 31.03.2002 presumably accepting the Petitioner's averments about his resignation.

16. Thus, in my opinion, the factum of the Petitioner's resignation had come to the notice of the ROC at least on 25.04.2000 when the intimation with regard to same was submitted by the Petitioner in his

reply to the show cause notice dated 17.02.2000. The Petitioner, therefore, could not have been prosecuted for violation of Sections 159/162 of the Act.

17. Since the Petitions are liable to be allowed on the short ground that ROC was informed about the Petitioner's resignation on 25.04.2000. Admittedly, the prosecution was launched after the expiry of period of six months from the last date of filing the return etc. I would stay my hands off the question whether the offence under Section 159 read with Section 162 of the Act were continuing offences or not and the divergence of opinion in **B.N. Kaushik** on the one hand and **Anita Chadha** and **Sugga Engineering Works (P) Ltd.** on the other.

18. The Petitions are accordingly allowed and the prosecution in the earlier said complaints are quashed.

19. Pending applications stand disposed of.

ILR (2013) II DELHI 1368
CO. PET.

CBZ CHEMICALS LTD. ....PETITIONER

VERSUS

KEE PHARMA LTD. ....RESPONDENT

(S. MURALIDHAR, J.)

CO. PET. NO. : 66/2003 DATE OF DECISION: 11.02.2013

Companies Act, 1956—Sec. 433, 434—Seeking winding up of the Respondent—Held, a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company—A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed—The principles on which the Court acts

are firstly, that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly, the company adduces *prima facie* proof of the facts on which the defence depends. Held, The response of the Respondent to the Illegal notice issued by the Petitioner raises disputed questions of fact, which will require examination of evidence in other appropriate proceedings. It is not possible to conclude that the defence of the Respondent is a mere "moonshine" and not *bonafide*.

[Di Vi]

APPEARANCES:

FOR THE PETITIONER : Mr. Ashwini Mata, Sr. Advocate with Mr. Sunil Agarwal, Advocate.

FOR THE RESPONDENT : None.

CASES REFERRED TO:

1. *Pradeshiya Industrial & Investment Corporation of U.P.* vs. *North India Petrochemicals Ltd.* (1994) 3 SCC 348.
2. *M/s. Madhusudan Gordhandas* vs. *Madhu Woollen Industries Pvt. Ltd.* (1971) 3 SCC 632.
3. *Amalgamated Commercial Traders (P) Ltd.* vs. *A.C.K. Krishnaswami* 1965 (35) Company Cases 456.

RESULT: Petition dismissed.

S. MURALIDHAR, J.

1. The Petitioner, CBZ Chemicals Ltd., has filed this petition under Sections 433 and 434 of the Companies Act, 1956 ("Act") read with Section 439 thereof seeking the winding up of the Respondent, Kee Pharma Ltd. on the ground of its inability to pay its debts owing to the Petitioner.

2. The background to the petition is that, on 18th May 2009, an agreement was entered into between the parties for the sale of design for the process of manufacturing a drug, "Atorvastatin" for a total consideration

of US$ 550,000 to be paid by the Respondent to the Petitioner. It is stated by the Petitioner that what was sold to the Respondent was only the "design of process" which would lead to the production of the drug "Atorvastatin" and not the sale of the process itself.

3. It is stated that under Clause 3 of the agreement, the Petitioner was to provide all relevant details and technical support to the Respondent "to facilitate the validation of the design of the process, the development of the process that leads to the manufacture of Atorvastatin and filing of the Patent for the same." Clause 4 of the agreement dealt with the mode of payment of US$ 550,000 by the Respondent to the Petitioner. A sum of US$ 40,000 was to be paid to the Petitioner by the Respondent and would be treated as an interest free refundable deposit. The amount would be refundable immediately in case the sale of the process design agreement was terminated in terms of Clause 2.c and 2.d or otherwise adjusted in terms of Clause 4.d. Under Clause 4.c (ii), a sum of US$ 60,000 was to be paid immediately after the successful validation of the design of the process. Thereupon the Petitioner was to have no further claims under the bank guarantee ("BG") issued by the Respondent. However, if the Respondent defaulted in making the payment within the stipulated time period, the Petitioner would have the liberty to invoke the BG issued by the Respondent. Upon the Respondent filing for patent of the process and grant of the patent by the Patent Office, the agreement was to come to its logical conclusion.

4. Under Clause 4.d, the payment of US$ 550,000 was for successful validation of the process developed and patented by the Petitioner leading to a patentable process to manufacture the drug "Atorvastatin" and accordingly certified by the Respondent, followed by an application for patent for the process being filed with the Patent Office, at which stage the remaining consideration of US$ 450,000 would become due and would be discharged in four parts as under:-

> "(i) The first part, constituting an amount of US $ 100,000 will be paid within one month of filing of the Patent for the process, i.e. after the end of the time period mentioned under Clause # 2.6.
>
> (ii) The second part, constituting an additional amount of US $ 100,000 will be paid by the end of the Quarter, following the quarter in which the first part of US $ 100,000, as detailed in

Clause # 4.d.i above, has been paid.

(iii) The third part, constituting a further amount of US $ 125,000 will be paid by the end of the next Quarter, following the quarter in which the second part of US $ 100,000, as detailed in Clause 4.d.ii above, has been paid.

(iv) The fourth and final part, constituting a further amount of US $ 125,000 will be paid by the end of the next Quarter, following the quarter in which the third part of US $ 125,000, as detailed in Clause # 4.d.iii above, has been paid."

5. According to the Petitioner, pursuant to Clause 2.c of the agreement, it made available initially to the Respondent directly and subsequently to its subsidiary Helvetica Industries (P) Ltd. a technology package, comprising of adequate documents and details and all support from time to time and thus fulfilled all its obligations under the agreement. However, the Respondent was unable to complete the validation process by the stipulated date of 28th February 2010. According to the Petitioner, by a communication dated 5th March 2010, the Respondent accepted the design of the process and stated that it was going ahead with the purchase of the design. It, however, requested the Petitioner to consider the deferment of further payments by a period of three months. This was repeated by another email dated 15th March 2010. In response thereto, the Petitioner agreed to defer the payment for a period of three months.

6. It is stated that by an email dated 8th October 2010, the Respondent admitted and confirmed its liability towards US$ 350,000, being the balance consideration after deducting tax at source. It is also stated that the Respondent, through its subsidiary, had already filed for two patents, based on the design for the process, as provided by the Petitioner - one patent having been filed simultaneously in USA, UK and India and the other having been filed under the Patent Cooperation Treaty. It is stated that since of the total consideration of US$ 550,000, the Respondent has paid only US$ 200,000 and the balance of US$ 350,000 constituted an admitted liability which, despite several reminders, remains unpaid. A legal notice was issued on 26th May 2012 by the Petitioner under Section 433 of the Act.

7. According to the Petitioner, in reply to the above legal notice, the Respondent admitted its liability but raised frivolous and irrelevant issues

with *malafide* intention, in a bid to deflect the attention from the main provisions and the essence of the agreement.

8. It is reiterated by Mr. Ashwini Mata, learned Senior counsel appearing for the Petitioner, that with there being a clear admission of liability by the Respondent in the reply to the legal notice, the further attempt by the Respondent to deny liability is nothing but a sham defence. It is pointed out that as per the balance sheet of the Respondent, its net current assets stood at Rs. 1,59,00,000 only. Even if the Respondent was to liquidate all its current assets and discharge its current liabilities it would be unable to generate sufficient amount to pay off the debt owing to the Petitioner.

Consequently, it is submitted that the Respondent is unable to pay its debts and should be deemed to be commercially insolvent.

9. This Court is, however, not persuaded to accept the above submission. In its reply dated 19th June 2012 to the notice dated 26th May 2012 the Respondent has denied any liability whatsoever. It is, inter alia, stated in the reply sent by the Respondent through its counsel that "In the facts and circumstances, please advise your client that my client is not liable to pay any sum of US$ 350,000 or any other amount under the Agreement dated 18.05.2008 as alleged. In fact the said sum of US$ 350,000 has not even become due or payable, for the reasons stated above. Even in spite of this, if your client initiates any winding up proceedings or any civil suit or any other proceedings, as threatened in your notice, my clients take all required steps to protect themselves against your client's illegal actions besides making your client shall be made responsible and liable for all consequences arising therefrom." The Petitioner has been asked to withdraw the notice and directed to extend the technical support to the Respondent pursuant to the agreement for the sale of design for the process.

10. In **Amalgamated Commercial Traders (P) Ltd. v. A.C.K. Krishnaswami** 1965 (35) Company Cases 456, the Supreme Court ruled that a winding up petition "is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatized as a scandalous abuse of the process of the Court."

11. In **M/s. Madhusudan Gordhandas v. Madhu Woollen Industries Pvt. Ltd.** (1971) 3 SCC 632 it was held that "the principles which the Court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly, the company adduces *prima facie* proof of the facts on which the defence depends."

12. In **Pradeshiya Industrial & Investment Corporation of U.P. v. North India Petrochemicals Ltd.** (1994) 3 SCC 348 the prayer for winding up was refused on a finding that "the defence raised is a substantial one and not mere moonshine" observing that "the admission of the winding up petition is fraught with serious consequence as far as the Appellant is concerned", the Supreme Court disapproved of reasoning of the High Court that the winding up petition had to be admitted as there were "arguable issues". It was reiterated that "the machinery for winding up will not be allowed to be utilized merely as a means for realising debts due from a company."

13. In the present case, the Court is not persuaded to hold that the requirements of Sections 433 and 434 read with Section 439 are satisfied. The response of the Respondent to the legal notice issued by the Petitioner raises disputed questions of fact, which will require examination of evidence in other appropriate proceedings. It is not possible to conclude that the defence of the Respondent is a mere "moonshine" and not *bonafide*.

14. Consequently, leaving it open to the Petitioner to avail of any other remedies that may be available to it in law, the petition is dismissed.

ILR (2013) II DELHI 1374

CEAC

WIPRO LIMITED ....PETITIONER

VERSUS

UNION OF INDIA ....RESPONDENT

(BADAR DURREZ AHMED & R.V. EASWAR, JJ.)

CEAC NO. : 16/2010 DATE OF DECISION: 13.02.2013

Service Tax—Chapter V of Finance Act, 1994—Export of Service Rules, 2005—Appellant being in the business of rendering IT enabled services, through a Business Process Outsourcing (BPO) unit was exporting the said services by way of providing telephonic assistance to customers of overseas companies and was thus liable to pay service tax—Notification No. 12/2005-ST issued on 19/4/2005 in pursuance of Rule 5 of Export of Service Rules, 2005 granted rebate of the whole of the duty paid on excisable inputs or the whole of the service tax and cess paid on all taxable input services used in providing taxable service exported out of India—The notification also required filing of a declaration providing description, quantity, value, rate of duty and amount of duty payable on inputs actually required to be used in providing taxable service to be exported—Appellant in terms of notification claimed rebate in respect of service tax paid on input services used by it. However claiming that the nature of its business is such that it is not possible to predict the inputs actually required, the appellant did not file declarations but provided complete details and documentation at the time of filing for refund—Both Dy. Commissioner, Service Tax and Commissioner of Central Excise (Appeals) rejected the claims for rebate holding that the requirement to

file a declaration prior to the date of export of service was essential to prevent evasion of duty and since appellant had not filed such a declaration, the rebate would not be admissible—Further appeals filed before the CESTAT led to the matters being remanded back to the original adjudicating authority for *de novo* decision with Tribunal agreeing that the requirement to filed declaration could not be waived. Held: Nature of service of appellant is such that they are rendered on a continuous basis making it a seamless service. Unlike manufacture and export of physical products like bicycles, the nature of BPO services is such that it is impossible to anticipate the date of export and with precision demarcate the point in the prior to export and also determine the point in time when the export may be said to have been completed. Requirement to file declaration in advance is impossible to comply with. Further, no irregularity or inaccuracy of falsity alleged in rebate claims. Appeal allowed with clarification that the decision rests on the peculiar facts of the case and the peculiar nature of the appellant's business.

All the lower authorities, including the CESTAT, are unanimous in their view that the requirement, though one of procedure, is nevertheless inflexible as it is conceived with a view to preventing the evasion of service tax and dispensing with the same would deprive the service tax authorities from carrying out the necessary preventive and audit-checks. The correctness of this view, as a broad proposition, need not be decided in this case. The question here is one of impossibility of compliance with the requirement. If, having regard to the nature of the business and its peculiar features - which are not in dispute - the description, value and the amount of service tax and cess payable on input-services actually required to be used in providing the taxable service to be exported are not determinable prior to the date of export but are determinable only after the export

and if, further, such particulars are furnished to the service tax authorities within a reasonable time along with the necessary documentary evidence so that their accuracy and genuineness may be examined, and if those particulars are not found to be incorrect or false or unauthenticated or unsupported by documentary evidence, we do not really see how it can be said that the object and purpose of the requirement stand frustrated. In the present case, no irregularity or inaccuracy or falsity in the figures furnished by the appellant both on 05.02.2007 and in the rebate claims has been alleged. Moreover, it appears to us somewhat strange that none of the authorities below has demonstrated as to how the appellant could have complied with the requirement prior to the date of the export of the IT-enabled services. **(Para 14)**

We clarify that our decision rests on the facts of the case and on the peculiar nature of the business of the appellant and that we have not decided the broader question whether the requirement of paragraph 3 of the Notification No.12/2005-ST dated 19.04.2005 is merely procedural and hence directory or is substantive and hence mandatory. **(Para 15)**

[An Gr]

Important Issue Involved: The nature of BPO services is such that it is impossible to anticipate and demarcate the point in time when the export of its services can be deemed to have been completed.

[Ah Cr]

APPEARANCES:

FOR THE PETITIONER : Mr. Devnath, Mr. Aditya Bhattacharya, Mr. Abhishek Anand and Mr. Bhuvnesh Satijha, Advocate.

FOR THE RESPONDENT : Mr. Satish Kr. Senior Standing Counsel for R-2.

CASE REFERRED TO:

1. *CST* vs. *Convergys India Pvt. Ltd.* reported in 2010 (20) STR 166 (P&H).

RESULT: Appeal Allowed.

R.V. EASWAR, J.

1. This is an appeal by Wipro Ltd., which was formerly known as Wipro BPO Solutions. It was at the material time engaged in the rendering of IT-enabled services such as technical support services, back-office services, customer-care services etc. to its various clients all of whom were situated outside India, i.e., in UK, USA and Australia.

2. The appeal arises out of the order passed by the Central Excise & Service Tax Appellate Tribunal ("CESTAT") in order No. ST/593/2011(PB) on 05.10.2011, in Appeal No. ST/66/2008. On 12.12.2012, the following substantial question of law was framed: -

> "Whether in facts & circumstances of present case impugned Final Order No'ST/593/11 dated 05.10.2011 passed by the Appellate Tribunal remanding the case back to the adjudicating authority for de novo adjudication with the direction that **Convergys India** case (supra) will not be applicable if the Appellant has not filed the declaration under Notification No.12/2005 dated 19.04.2005 or has filed after completion of export is correct in law in as much as the aforesaid direction is based on erroneous interpretation of the decision of **Convergys India** (supra)?"

3. In respect of the services provided by the appellant, it was liable to pay service tax under the relevant provisions of Chapter V of the Finance Act, 1994. The Export of Service Rules, 2005 were framed by notification No.9/2005-ST on 03.03.2005. Rule 5 of the said Rules provided for "Rebate of service tax". It provided as follows: -

> **"5. Rebate of service tax -** Where any taxable service is exported, the Central Government may, by notification, grant rebate of service tax paid on such taxable service or service tax or duty paid on input services or inputs, as the case may be, used in providing such taxable service and the rebate shall be subject to such conditions or limitations, if any, and fulfillment

> of such procedure, as may be specified in the notification."

Notification No.12/2005-ST was issued on 19.04.2005. The notification stated that there will be granted rebate of the whole of the duty paid on excisable inputs or the whole of the service tax and cess paid on all taxable input services used in providing taxable service exported out of India (to countries other than Nepal and Bhutan), "subject to the conditions, limitations and procedures specified" therein. While paragraph 2 of the notification laid down the conditions and limitations, paragraph 3 prescribed the procedure. These paragraphs are as below:

> "2. Conditions and limitations: -
>
> (a) that the taxable service has been exported in terms of rule 3 of the said rules and payment for export of such taxable service has been received in India in convertible foreign exchange;
>
> (b) that the duty, rebate of which has been claimed, has been paid on the inputs;
>
> (c) that the service tax and cess, rebate of which has been claimed have been paid on the input services;
>
> (d) the total amount of rebate of duty, service tax and cess admissible is not less than five hundred rupees;
>
> (e) no CENVAT credit has been availed of on inputs and input services on which rebate has been claimed; and
>
> (f) that in case, -
>
> (i) the duty or, as the case may be, service tax and cess, rebate of which has been claimed, have not been paid; or
>
> (ii) the taxable service, rebate for which has been claimed, has not been exported; or
>
> (iii) CENVAT credit has been availed on inputs and input services on which rebate has been claimed,
>
> the rebate paid, if any, shall be recoverable with interest as per the provisions of section 73 and section 75 of the Finance Act, 1994 (32 of 1994) as if no service tax and cess have been paid on such taxable service.
>
> 3. Procedure: -

3.1 Filing of declaration. - The provider of taxable service to be exported shall, prior to date of export of taxable service, file a declaration with the jurisdictional Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, describing the taxable service intended to be exported with,-

(a) description, quantity, value, rate of duty and the amount of duty payable on inputs actually required to be used in providing taxable service to be exported;

(b) description, value and the amount of service tax and cess payable on input services actually required to be used in providing taxable service to be exported.

3.2 Verification of declaration - The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, shall verify the correctness of the declaration filed prior to such export of taxable service, if necessary, by calling for any relevant information or samples of inputs and if after such verification, the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise is satisfied that there is no likelihood of evasion of duty, or as the case may be, service tax and cess, he may accept the declaration.

3.3 Procurement of input materials and receipt of input services. - The provider of taxable service shall, -

(i) obtain the inputs required for use in providing taxable service to be exported, directly from a registered factory or from a dealer registered for the purposes of the CENVAT Credit Rules, 2004 accompanied by invoices issued under the Central Excise Rules, 2002;

(ii) receive the input services required for use in providing taxable service to be exported and an invoice, a bill or, as the case may be, a challan issued under the provisions of Service Tax Rules, 1994.

3.4 Presentation of claim for rebate. -

(a) (i) claim of rebate of the duty paid on the inputs or the service tax and cess paid on input services shall be filed

with the jurisdictional Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, after the taxable service has been exported;

(ii) such application shall be accompanied by, -

a. invoices for inputs issued under Central Excise Rules, 2002 and invoice, a bill, or as the case may be, a challan for input services issued under Service Tax Rules, 1994 in respect of which rebate is claimed;

b. documentary evidence of receipt of payment against taxable service exported, payment of duty on inputs and service tax and cess on input services used for providing taxable service exported, rebate of which is claimed;

c. a declaration that such taxable service, has been exported in terms of rule 3 of the said rules, along with documents evidencing such export.

(b) The jurisdictional Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, as the case may be, having regard to the declaration, if satisfied that the claim is in order, shall sanction the rebate either in whole or in part. Explanation 1. - "service tax and cess" for the purposes of this notification means, - (a) service tax leviable under section 66 of the Finance Act, 1994; and (b) education cess on taxable service levied under section 91 read with section 95 of the Finance (No.2) Act, 2004 (23 of 2004).

Explanation 2. - "duty" for the purposes of this notification means, duties of excise leviable under the following enactments, namely: -

(a) the Central Excise Act, 1944 (1 of 1944);

(b) the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);

(c) the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978);

(d) National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001), as amended by section 169 of the Finance Act, 2003 (32 of 2003),

section 3 of the Finance Act, 2004 (13 of 2004) and further amended by clause 123 of the Finance Bill, 2005, which clause has the force of law by virtue of the declaration made under the Provisional Collection of Taxes Act, 1931 (16 of 1931);

(e) special excise duty collected under a Finance Act;

(f) additional duty of excise as levied under section 157 of the Finance Act, 2003 (32 of 2003);

(g) Education Cess on excisable goods as levied under section 91 read with section 93 of the Finance (No.2) Act, 2004 (23 of 2004); and

(h) the additional duty of excise leviable under clause 85 of the Finance Bill, 2005, which has the force of law by virtue of the declaration made in the said Finance Bill under the Provisional Collection of Taxes Act, 1931 (16 of 1931)."

It would appear that there is no prescribed form of declaration; however, Form ASTR-2 has been prescribed in the notification and the application for filing a claim for rebate of the duty paid on inputs or service tax paid on input services shall be in that form.

4. The appellant lodged two claims claiming rebate in respect of service tax paid on input services. In respect of the services rendered by the appellant between 16.03.2005 and 30.09.2005, the claim for rebate was filed on 15.12.2005 and in respect of the services rendered between 01.10.2005 and 31.12.2005, the claim was filed on 17.03.2006. The input services were mainly the night transportation services, recruitment services, bank charges etc. The declaration required to be filed in terms of paragraph 3 of the Notification No.12 (supra) was however filed by the appellant only on 05.02.2007.

5. Two separate show-cause notices were issued on 05.09.2006 in respect of the aforesaid two periods by the Deputy Commissioner, Service Tax, New Delhi-II calling upon the appellant to show cause why the rebate claims should not be rejected on the ground that the declaration as per paragraph 3 of the Notification No.12 (supra) was not filed "prior to the date of the export of taxable service". Replies to the notices were filed by the appellant on 09.10.2006 and 06.12.2006. It was pointed out

in these replies that since the appellant did not have the actual data with respect to the description, value and the amount of service tax paid on input services until it received and utilised the same for export of output services, the filing of the declaration in terms of paragraph 3.1 of the notification was "practically not possible". It was also submitted that these details can be found in the appellant's refund applications in the prescribed forms which were filed on 22.03.2006. It was further submitted that since the services are exported on a continuous basis it was difficult to have one-to-one correlation between the export of the services and the inputs and input-services utilised for the export and that "it was not possible to give information regarding input services actually required to be used in providing taxable services to be exported".

Reference was made to the details furnished in the refund/rebate claims filed in Form ASTR-2 which contained details regarding the description, value and the amount of service tax and cess paid on input services used in the export of services on actual basis which were more authentic than what would have only been an estimate in the declaration required to be filed prior to the date of the export. The appellant also pointed out in the replies that the requirement of filing the declaration prior to the date of the export of the services was a procedural requirement which could not be complied with due to practical difficulties and even if it was to be complied with as a ritual, the figures which the appellant could give therein would only be estimates which would not serve the purpose and object of the requirement which would be better achieved by verifying/scrutinising the actual figures given in the rebate claim forms with the documentary evidence that would then be available. It was submitted that since there was substantial compliance with the law and no fault or irregularity having been found in the details furnished in the rebate claims, the rejection of the rebate claims would not be justified.

6. The above submissions of the appellant did not find favour with the Deputy Commissioner, Service Tax, Delhi-II. He passed separate orders-in-original in respect of the two claims on 28.02.2007. He held that since the appellant had not followed the procedure prescribed for obtaining the rebate as laid down in Notification No.12 (supra), it was not entitled to the same. He accordingly rejected the rebate claims which amounted to ‘1,98,24,267 and ‘1,45,03,718 in respect of the two periods mentioned earlier.

7. Aggrieved by the above orders-in-original passed by the Dy. Commissioner, Service Tax, the appellant preferred appeals to the Commissioner of Central Excise (Appeals), New Delhi who dismissed the appeals by a common order dated 31.10.2007. In substance he agreed with the view taken by the Dy. Commissioner, Service Tax, Delhi-II; he also seems to have taken objection to the appellant's plea that it was not possible for it to furnish the description, value and the amount of the service tax paid on the input services until these details were received by it on actual utilisation of such input services. According to him, the non-filing of the declaration form prior to the date of export of the services deprived the service tax department of the opportunity of carrying out the necessary preventive and audit checks for ruling out any likelihood of evasion of service tax. In this view of the matter, the appeals were dismissed. 8. The appellant preferred further appeals before the CESTAT against the orders of the Commissioner of Central Excise (Appeals). The CESTAT passed a common order on 05.10.2011, the operative portion of which is as follows: -

> "9. In this case, according to the department, the appellant have not filed any declaration whatsoever as required under para 3.1. According to the appellant, however, since prior to the export of the services, it was not possible to file detailed declaration regarding input and input services required to be used, such declaration had been filed every month, though after some delay. However, this aspect can be verified only by the original adjudicating authority for which this matter has to be remanded. Accordingly, the impugned order is set aside and the matter is remanded back to the original adjudicating authority for de novo decision after verifying the appellant's claim that every month they had been filing the required declaration under para 3.1 of the notification. If the appellant every month were filing the required declaration, though after some delay, as in the case of **CST v. Convergys India Pvt. Ltd.** reported in 2010 (20) STR 166 (P&H), the ratio of this judgment would be applicable and in that case, the delay would be condonable. If however the declaration under para 3.1 had not been filed at all or had been filed after the completion of export of service for which rebate had been claimed, and thereby depriving the sanctioning authority of the opportunity to verify the correctness of the declaration and satisfy himself that

> there is no possibility of evasion of duty by misuse of this facility, the requirement of paras 3.1 & 3.2 cannot be said to have been satisfied and the rebate would not be admissible. The impugned order is, therefore, set aside and the matter is remanded to the original adjudicating authority for de novo adjudication of the matter in terms of our above directions. The appeal is disposed off by way of remand."

Towards the end of the earlier paragraph, though, the Tribunal had expressed a clear opinion that "The condition prescribed in para 3.1 is for the purpose of preventing the evasion of duty by misuse of this facility and, therefore, if this condition, though a procedural condition, is violated, the rebate would not be admissible".

9. The question for consideration is whether the filing of the declaration in terms of paragraph 3 of the notification No.12 (supra) on 05.02.2007, after the date of the export of the services, amounted to non-compliance with the condition disentitling the appellant from the rebate claims. The case of the appellant is that given the nature of services rendered by it, it is impossible to give the description, value and amount of the input services used in the services that are exported and that in any case, having regard to the object and purpose of the condition which is to prevent misuse of the rebate claim, there cannot be any objection if the relevant details are furnished in the rebate claim which are capable of verification with the help of documentary evidence which would by then be available. The revenue on the other hand canvasses for the acceptance of the reasoning adopted by the lower authorities including the CESTAT.

10. We are of the view that there is a good deal of force in what the appellant says. Any condition imposed by the notification must be capable of being complied with. If it is impossible of compliance, then there is no purpose behind it. The appellant is in the business of rendering IT-enabled services such as technical support services, customer-care services, back-office services etc. which are considered to be "business auxillary services" under the Finance Act, 1994 for the purpose of levy of service tax. The nature of the services is such that they are rendered on a continuous basis without any commencement or terminal points; it is a seamless service. It involves attending to cross-border telephone calls relating to a variety of queries from existing or prospective customers

in respect of the products or services of multinational corporations. The appellant's unit in Okhla is one of those places which are popularly known as "Call Centres" – business process outsourcing (BPO) centres. The wealth of skilled, English-speaking, computer-savvy youth in our country are a great source of manpower required by the multinational corporations for such services. The BPO centres become very active from evening because of the time-difference between India and the European and American continents. The mainstay of the call centres is a sophisticated computer system and a technically strong and sophisticated international telephone network. The service consists of providing information relating to the products and services of the MNCs, queries relating to maintenance and after-sales services, providing telephonic assistance in case of glitches during operating the consumer-products or while utilising the services and so on. For instance, the customer sitting in USA has a problem operating a washing machine sold to him by an American company. When he calls the company, the local telephone number would be linked to the call centre number in India and it will actually be an employee of the Indian call centre who would answer the queries and assist the customer in USA get over the problem. Another example could be of a person in USA wanting to book an international air-ticket from an airline; his queries over the phone will be answered by the employee of the Indian call centre, sitting in some place in India. The American manufacturer of the washing machine or the American airline company is the source of revenue for the Indian call centre or BPO centre.

11. Apart from the telephone and computer network, every call centre requires an employee-strength to attend to the calls. First they have to be recruited and then they have to be trained in following and speaking in different accents peculiar to different countries. This involves costs of recruitment and training. Once recruited, the staff has to be brought to the call centres. This involves costs on transportation and since most of the work, as stated earlier, is performed from late evening to the early hours in the next morning, the transportation of the staff is at night and that is the reason why the appellant calls it "night transportation services". When remittances are received from the client-corporations abroad through banks, there are bank charges. All these costs when charged to the appellant also involve service tax payment as additional costs. It is the service tax/cess paid by the appellant on such costs that

qualify for the rebate under Rule 5 of the Export of Services Rules, 2005.

12. The services rendered by the appellant in its call centre or BPO centre are considered exported, as the services are rendered to persons outside the country. Thus every phone call is an export of taxable service. But the bills and invoices in respect of the input-services described in the preceding paragraph would in the normal course be received by the appellant only at regular intervals, say once in a month or fifteen days etc., depending upon the arrangement which it has with those service-providers. Now we have to appreciate that in a call centre where there are hundreds of employees attending to calls from abroad at any given point of time, it is next to impossible to anticipate the date of export and with precision demarcate the point of time prior to the export and also determine the point of time when the export may be said to have been completed. What can be the determining factor? Is each call to be considered as an independent export of taxable services? Is the total number of calls attended to on any particular day to be considered as the export of taxable services? Or is the appellant to reckon the calls on a monthly basis? It needs also to be remembered that there is no way of anticipating any call or the number of calls the call centre would be required to attend on a single day, so that the appellant can comply with the requirement of filing a declaration "prior" to the date of export of taxable service. The very bedrock of the business is the attending of calls and given that they are received on a continuous basis, we find it difficult to conceive of any possibility as to how the appellant could not only determine the date of export but also anticipate the call so that the declaration could be filed "prior" to the date of export. In addition to this practically impossible situation, the appellant is also required by the procedure laid out in paragraph 3 of the notification to describe, value and specify the amount of service tax and cess payable on input services actually required to be used in providing taxable service to be exported. With the possible exception of the description, we are unable to appreciate how the service-exporter will be in a position to value and specify the amount of service tax/cess payable on the input services actually required to be used in providing the exported service. An estimate is ruled out by the use of the word "actually required"; and unless what was actually required is known, it is impossible to value and specify the amount of service tax or cess payable on the input services. That will be known only when the bill or invoice for the input-services is received by the

appellant. The bill or invoice is received after the calls are attended to. Thus, it seems to us that in the very nature of things, and considering the peculiar features of the appellant's business, it is difficult to comply with the requirement "prior" to the date of the export.

13. Let us take the case of a manufacturer-exporter of physical products, say, bicycles. The point of time when the export of bicycles is made is clearly demarcated and known. The export order is executed; the bicycles are manufactured and packed. They are ready for export. The process of export commences with the filing of the shipping bill. The exporter can now comply with the procedure laid down in paragraph 3 of the notification prior to that date. That is clear. The export is of physical goods; each export is under a separate shipping bill and it is easy to determine the point of time of commencement and termination of the export. Even in the case of a 100% export-oriented unit, every shipping bill is a separate export. It is also in such a case possible to describe, quantify and value the rate of duty and the amount of duty payable on inputs actually utilised in such exports under clause (a) of paragraph 3.1 of the notification. A one-to-one matching of such inputs with the exported products is possible without much of a problem. The inputs in the example given above would be steel, aluminium, rubber, plastic etc., and it is possible to even standardise, by adopting suitable costing methods, and determine the quantity, value, rate etc., of these inputs required to manufacture a single unit of bicycle. By a process of multiplication depending upon the number of bicycles exported, it is possible to determine the figures for the entire lot of bicycles kept ready for export. But a similar requirement in the case of an export of a taxable service of the type provided by the appellant, as opposed to the export of physical goods, appears to us to be almost impossible of compliance for the reasons stated in the preceding paragraphs.

14. All the lower authorities, including the CESTAT, are unanimous in their view that the requirement, though one of procedure, is nevertheless inflexible as it is conceived with a view to preventing the evasion of service tax and dispensing with the same would deprive the service tax authorities from carrying out the necessary preventive and audit-checks. The correctness of this view, as a broad proposition, need not be decided in this case. The question here is one of impossibility of compliance with the requirement. If, having regard to the nature of the business and its peculiar features – which are not in dispute – the description, value and

the amount of service tax and cess payable on input-services actually required to be used in providing the taxable service to be exported are not determinable prior to the date of export but are determinable only after the export and if, further, such particulars are furnished to the service tax authorities within a reasonable time along with the necessary documentary evidence so that their accuracy and genuineness may be examined, and if those particulars are not found to be incorrect or false or unauthenticated or unsupported by documentary evidence, we do not really see how it can be said that the object and purpose of the requirement stand frustrated. In the present case, no irregularity or inaccuracy or falsity in the figures furnished by the appellant both on 05.02.2007 and in the rebate claims has been alleged. Moreover, it appears to us somewhat strange that none of the authorities below has demonstrated as to how the appellant could have complied with the requirement prior to the date of the export of the IT-enabled services.

15. We clarify that our decision rests on the facts of the case and on the peculiar nature of the business of the appellant and that we have not decided the broader question whether the requirement of paragraph 3 of the Notification No.12/2005-ST dated 19.04.2005 is merely procedural and hence directory or is substantive and hence mandatory.

16. In the view we have taken, it is deemed not necessary to refer to the authorities cited on behalf of the appellant.

17. We accordingly allow the appeal and direct the respondents to allow the rebate claims. There shall however be no order as to costs.

ILR (2013) II DELHI 1389
CRL. M. (B)

GURMEET LAL **....APPELLANT**

VERSUS

NARCOTIC CONTROL BUREAU **....RESPONDENT**

(G.P. MITTAL, J.)

CRL. M. (B) NO. : 43/2013 **DATE OF DECISION: 18.02.2013**
CRL. A. 909/2009

Narcotics and Psychotropic Substances Act, 1988—Sec. 37—Applicant convicted for offence under section 21(c) of the Act and sentenced to undergo Rigorous Imprisonment for 10 years and to pay fine of Rs. 2,00,000/- already undergone the sentence of about 8 years and 2 months—Applicant during pendency of appeal sought to be released on bail only on the ground of long incarceration—Held, merely on the ground of long incarceration the applicant cannot be granted bail, as the twin test laid down under section 37 of the Act is not satisfied because the applicant has failed to satisfy the Court that there are reasonable grounds for believing that the applicant did not commit the offence under Sec. 21(c) and that he is not likely to commit any offence while on bail.

I have gone through the judgments of the Co-ordinate Benches of this Court whereby suspension of sentence was granted without satisfaction under Section 37 of the NDPS Act. The same would be of no avail in view of the judgments of the Supreme Court in **Dadu, Ratan Kumar Vishwas** and **Rattan Mallik**. **(Para 9)**

Nothing has been placed on record by the Applicant to satisfy this Court even prima facie that there are reasonable

grounds for believing that he is not guilty of the offence under Section 21(c) of the NDPS Act for which he stands convicted by the learned Special Judge, or that he is not likely to commit any offence while on bail. On the other hand, it is pointed out by the learned counsel for the Respondent that the instant case was registered against the Applicant while he was on bail in a case under the NDPS Act registered in Jammu. The learned counsel for the Applicant urges that the Applicant has since been acquitted in the said case. Be that as it may, the Applicant has failed to satisfy the twin test as laid down under Section 37(b)(ii) of the NDPS Act. **(Para 10)**

[Gi Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Vikas Jain, Advocate.

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

RESULT: Application Dismissed.

G.P. MITTAL, J.

Crl.M(B).43/2013 (Suspension of Sentence)

1. An interesting question of law falls for determination in the instant Application, viz., whether a person convicted under Sections 21/29 of the Narcotics and Psychotropic Substances Act, 1988(NDPS Act) and sentenced to a long period of imprisonment is entitled to suspension of sentence simply on the ground of long incarceration or the twin test as laid down under Section 37 of the NDPS Act is required to be satisfied?

2. The Applicant stands convicted for an offence under Section 21(c) of the NDPS Act. By an order on sentence dated 15.09.2009, the Applicant was sentenced to undergo RI for a period of 10 years and to pay a fine of Rs. 2,00,000/-. The Applicant avers that he has already undergone the sentence of about 08 years and 02 months from the date of his arrest which includes three years since the date of his conviction. It is stated that the Applicant during the period of interim suspension of sentence did not misuse the liberty granted to him by the Court. He is,

therefore, entitled to suspension of sentence.

3. The Application is opposed by the learned counsel for the Respondent on the ground that long incarceration is not a sufficient ground to suspend his sentence of imprisonment or the sentence of fine. The learned counsel for the Respondent relies on a three Judge Bench decision of the Supreme Court in **Dadu v. State of Maharashtra,** (2000) 8 SCC 437, another three Judge Bench decision of the Supreme Court in **Ratan Kumar Vishwas v. State of Uttar Pradesh,** (2009) 1 SCC 482, a Division Bench decision of Supreme Court in **Union of India v. Rattan Mallik @ Habul,** (2009) 2 SCC 624 and a judgment passed by a learned Single Judge of this Court in **Triloki v. NCB** (in Crl.A.794/2010) decided on 13.09.2012.

4. On the other hand, the learned counsel for the Applicant referring to the report of the Supreme Court rendered by a three Judge Bench in **Man Singh v. Union of India,** (2006) 1 SCC (Cri) 279 submits that long incarceration after conviction is sufficient to grant suspension of sentence. The learned counsel for the Applicant relies on **Vishal Sharma v. Directorate of Revenue Intelligence,** (Crl.M.(B).193/2011 in Crl.A.148/2010) decided on 06.02.2012, **Sachin Arora v. Directorate of Revenue Intelligence,** (Crl.M.(B).1659/2011 in Crl.A.881/2010) decided on 12.01.2012, **Ubesh Ansari @ Chandu v. State,** (Crl.M.(B).842/2011 in Crl.A.449/2009) decided on 15.07.2011, **Iqbal v. State,** (Crl.M.(B).1409/2011 in Crl.A.466/2009) decided on 12.08.2011 and **Sunil Kumar v. The State of NCT of Delhi,** (Crl.M.(B).1102/2010 in Crl.A.931/2010) decided on 13.09.2012 where the suspension of sentence was granted in a case of commercial quantity on the ground of long incarceration.

5. The Constitutional validity of Section 32A in the NDPS Act came up for consideration before a three Judge Bench of the Supreme Court in *Dadu*. The Supreme Court went into the objects and reasons for insertion of Section 32A in the NDPS Act, referred to the United Nations Conventions Against Illicit Traffic in Narcotics and Psychotropic Substances, 1988 and held that Section 32A of the NDPS Act so far as it ousted the jurisdiction of the Court to suspend the sentence awarded to a convict under the Act as unconstitutional, but at the same time laid down that grant of bail during trial or suspension of sentence during Appeal would only be on satisfying the condition as laid down under

Section 37 of the NDPS Act. In para 29 of the judgment, the Supreme Court concluded as under:

> "29. Under the circumstances the writ petitions are disposed of by holding that:
>
> (1) Section 32-A does not in any way affect the powers of the authorities to grant parole.
>
> (2) It is unconstitutional to the extent it takes away the right of the court to suspend the sentence of a convict under the Act.
>
> (3) Nevertheless, a sentence awarded under the Act can be suspended by the appellate court only and strictly subject to the conditions spelt out in Section 37 of the Act, as dealt with in this judgment."

6. In **Ratan Kumar Vishwas**, a three Judge Bench of the Supreme Court reiterated the principles for suspension of sentence as held in Dadu. Para 18 of the report lays down as under:

> "To deal with the menace of dangerous drugs flooding the market, Parliament has provided that a person accused of offence under the Act should not be released on bail during trial unless the mandatory conditions provided under Section 37 that there are reasonable grounds for holding that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail are satisfied. So far as the first condition is concerned, apparently the accused has been found guilty and has been convicted."

7. Similarly, in Rattan Mallik, this Court held that without recording the satisfaction as required under Section 37, the suspension of sentence cannot be granted and the matter was remitted back to the High Court for rehearing the Application for suspension of sentence only after the Respondent surrendered to custody. Paras 16 and 17 of the report are extracted as under:

> "16. Merely because, according to the learned Judge, nothing was found from the possession of the respondent, it could not be said at this stage that the respondent was not guilty of the offences for which he had been charged and convicted. We find

no substance in the argument of learned counsel for the respondent that the observation of the learned Judge to the effect that "nothing has been found from his possession" by itself shows application of mind by the learned Judge tantamounting to "satisfaction" within the meaning of the said provision. It seems that the provisions of the NDPS Act and more particularly Section 37 were not brought to the notice of the learned Judge.

17. Thus, in our opinion, the impugned order having been passed ignoring the mandatory requirements of Section 37 of the NDPS Act, it cannot be sustained. Accordingly, the appeal is allowed and the matter is remitted back to the High Court for fresh consideration of the application filed by the respondent for suspension of sentence and for granting of bail, keeping in view the parameters of Section 37 of the NDPS Act, enumerated above. We further direct that the bail application shall be taken up for consideration only after the respondent surrenders to custody. The respondent is directed to surrender to custody within two weeks of the date of this order, failing which the High Court will take appropriate steps for his arrest."

8. It is true that a three Judge Bench decision of the Supreme Court in **Man Singh** had granted suspension of sentence in a case under the NDPS Act where the convict had served more than seven years of imprisonment out of the total sentence of ten years. But, at the same time, it is to be noted that the provision of Section 37 of the NDPS Act did not come for consideration before the Supreme Court. The three Judge Bench in **Dadu** and in **Ratan Kumar Vishwas** specifically dealt with the interpretation and the satisfaction to be recorded while granting suspension of sentence during the pendency of the Appeal. Thus, the report in **Man Singh** shall not be of any help to the Applicant.

9. I have gone through the judgments of the Co-ordinate Benches of this Court whereby suspension of sentence was granted without satisfaction under Section 37 of the NDPS Act. The same would be of no avail in view of the judgments of the Supreme Court in **Dadu, Ratan Kumar Vishwas** and **Rattan Mallik**.

10. Nothing has been placed on record by the Applicant to satisfy this Court even prima facie that there are reasonable grounds for believing that he is not guilty of the offence under Section 21(c) of the NDPS Act

for which he stands convicted by the learned Special Judge, or that he is not likely to commit any offence while on bail. On the other hand, it is pointed out by the learned counsel for the Respondent that the instant case was registered against the Applicant while he was on bail in a case under the NDPS Act registered in Jammu. The learned counsel for the Applicant urges that the Applicant has since been acquitted in the said case. Be that as it may, the Applicant has failed to satisfy the twin test as laid down under Section 37(b)(ii) of the NDPS Act.

11. Thus, the Applicant is not entitled to the suspension of sentence.

12. Consequently, the Application is dismissed.

CRL.A.909/2009

13. Since the Applicant is in custody for a long time, the hearing of the Appeal is expedited.

14. Both the parties are directed to file brief synopsis along with relevant case laws running into not more than three pages within two weeks.

15. Renotify on 10.04.2013 in the category of 'After Notice Misc' Matters'.

ILR (2013) II DELHI 1395
CRL. A.

DELHI ADMINISTRATION THROUGH DESIGNATED OFFICER **....PETITIONER**

VERSUS

MANOHAR LAL **....RESPONDENT**

(G.P. MITTAL, J.)

CRL. A. NO. : 153/2013 **DATE OF DECISION: 31.01.2013**

Prevention of Food Adulteration Act, 1954 Sec. 7 r/w 16—Appellant convicted by learned Metropolitan Magistrate—In appeal, learned ASJ set aside conviction on the grounds that State had failed to prove that the presence of colour in the food article was to such an extent as to make the food article injurious to health and that the photo-chromatic test performed in this case was not a sure test to determine the presence of permitted metanil yellow coal tar dye and that delay of six days in signing of the analysis report by the Public Analyst made the report valueless—Appeal by State—Held, the reasoning given by the ASJ as regards the quantity of color being negligible goes beyond the standard laid down in Item A.18.06 read with A.18.06.09 of Appendix B and unless delay in signing report by the Public Analyst is shown to have caused any prejudice to the accused, the delay is inconsequential and in view of the Supreme Court's judgment in the case of *Dhian Singh* the method of analysis applied could not be challenged by the accused—As such, held the learned ASJ fell in error on all the three counts.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Ms. Rajdipa Behura, APP.

FOR THE RESPONDENT : Ms. Asha Tiwari, Advocate.

CASES REFERRED TO:

1. *State* vs. *Subhash Chand,* 2012 (2) JCC 1052.
2. *Delhi Administration* vs. *Amar Chand,* (Crl.L.P.266/2012) decided on 21.05.2012.
3. *Shayam Lal* vs. *State,* (in Crl.Rev.P.326/2010) decided on 13.12.2012.
4. *Food Inspector* vs. *Vinod Kumar* (in Crl.A.1209/2011).
5. *Balmukand Singh* vs. *State of Punjab,* 2008 Crl.L.J. 1084.
6. *State of Gujarat* vs. *Vishramdas Virumal,* (2000) 4 GLR 2884.
7. *Babubhai Ranchhodbhai Chauhan* vs. *State of Gujarat,* (Criminal Revision No.2936/1985) decided on 19.03.1996.
8. *Bansi Lal* vs. *State of Haryana,* 1993 (1) FAC 117.
9. *Eknath Shankarrao Mukkawar* vs. *State of Maharashtra,* (1977) 3 SCC 25.
10. *Prem Ballab and Anr.* vs. *State(Delhi Admn.),* (1977) 1 SCC 173.
11. *Municipal Corporation of Delhi* vs. *Thou Ram,* ILR, (1974) I Delhi 649.
12. *Dhian Singh* vs. *Municipal Board, Saharanpur,* 1970 AIR 318.
13. *Municipal Corporation of Delhi* vs. *Chhote Lal,* ILR, (1969) Delhi 885.

RESULT: Appeal allowed.

G.P. MITTAL, J.

1. The Appellant impugns a judgment dated 11.11.2011 whereby the order of the learned Metropolitan Magistrate("MM") dated 02.05.2011 holding the Respondent guilty under Section 7 read with Section 16 of the Prevention of Food Adulteration Act, 1954 (PFA Act) and the order

dated 13.05.2011 whereby the Respondent was sentenced to undergo RI for one year and to pay a fine of Rs. 15,000/- was set aside and the Respondent was acquitted.

2. On 31.03.2003, Food Inspector S.B. Sharma purchased a sample of "Dal Arhar" (a food article) for analysis. The sample purchased was properly mixed with the help of a jhaba; it was divided in three equal parts and was put in three separate clean and dry bottles. The bottles were separately packed, sealed and labelled as per the provisions of the PFA Act and the Rules made thereunder. One sealed bottle was sent to the Public Analyst for analysis who by his report dated 10.04.2003 opined the sample to be adulterated as it was found to contain a synthetic colouring matter, viz, *"Tartrazine"*. After obtaining consent under Section 20 of the PFA Act, the complaint was instituted against the Respondent.

3. On analysis of the evidence adduced, the learned MM opined that the Appellant had successfully proved the purchase of the sample which was found to be adulterated with the presence of *'Tartrazine'*. The Respondent was convicted and sentenced to imprisonment as stated earlier.

4. The Respondent challenged the judgment dated 02.05.2011 and order dated 13.05.2011 passed by the learned MM in the Court of learned Additional Sessions Judge("ASJ"). The learned ASJ acquitted the Respondent on the premise that the Appellant had failed to prove that the presence of colour was to such an extent so as to make the food article injurious to health. He opined that in the absence of any evidence about the quantity of *'Tartrazine'* present in the sampled food article, it could be presumed that the same was negligible. The learned ASJ further held that photo-chromatic test which was conducted in the instant case to determine the presence of the *'Tartrazine'* was not a sure test to determine presence of permitted metanil yellow coal tar dye in the sampled food article. The learned ASJ further found that as per the Public Analyst's report Ex.PW1/G, the analysis of the sample was started on 02.04.2003, it was completed on 04.04.2003 and the report was signed on 10.04.2003. The learned ASJ held that the delay of six days in signing the report would lose its value. Relying on the judgment of the Gujarat High Court in **Babubhai Ranchhodbhai Chauhan v. State of Gujarat,** (Criminal Revision No.2936/1985) decided on 19.03.1996, the Respondent was acquitted.

5. The following contentions are raised on behalf of the Appellant:

(i) The artificial colouring matter can be added only in the food articles specified in Rule 29 of the PFA Rules. Rule 23 prohibits addition of colouring matter to any article of food except specifically permitted by the PFA Rules. Since the standard of foodgrains is given in A.18.06 Appendix B of the Rules and that of *Arhar Dal* in Appendix A.18.06.09 of the Rules and Item A.18.06 specifically prohibits the use of any added colouring matter, thus, a conjoint reading of Rule 23, 28 and 29 read with Item A.18.06 and A.18.06.09 will clearly show that the sample of *Arhar Dal* was adulterated. Reliance is placed on the report of the Supreme Court in **Prem Ballab and Anr. v. State(Delhi Admn.),** (1977) 1 SCC 173.

(ii) It is true that the Public Analyst started analysis on 02.04.2003; the sample was completed on 04.04.2003 and the report Ex.PW1/G was signed by the Public Analyst on 10.04.2003; yet the delay of six days in signing the report by itself would not be fatal to the prosecution. The learned APP places reliance on a Full Bench judgment of this Court in **Municipal Corporation of Delhi v. Chhote Lal,** ILR, (1969) Delhi 885 and **Municipal Corporation of Delhi v. Thou Ram,** ILR, (1974) I Delhi 649.

(iii) The learned ASJ erred in holding that the photo-chromatic test was not a reliable test to determine the presence of an artificial colour. The learned APP relies on **Dhian Singh v. Municipal Board, Saharanpur,** 1970 AIR 318 in support of her contention that mode or particulars of analysis or test applied are not to be seen by the Court to come to a conclusion whether the article of food was or was not adulterated as defined in S. 2(i) of the PFA Act.

6. On the other hand, the learned counsel for the Respondent supports the impugned judgment. It is urged that the contentions raised by the learned APP cannot be attached any importance in view of the judgment of a learned Single Judge of this Court in **Delhi Administration v. Amar Chand,** (Crl.L.P.266/2012) decided on 21.05.2012.

7. I have given my thoughtful consideration to the contentions raised on behalf of both the parties.

8. In *Amar Chand,* a Co-ordinate Bench of this Court while dealing with a sample of *Dal Moth* held that making a harmonious construction of the provisions in Rule 28 and Article A.18.06, a synthetic food colour would not fall in the category of added colouring matters which are prohibited in foodgrains. Similarly, relying on the judgment of the Gujarat High Court in *Babubhai Ranchhodbhai Chauhan,* the learned Single Judge opined that the delay of twelve days in signing the report by the Public Analyst would be fatal and reliance could not be placed on the report.

9. With all humility at my command, I may say that the judgment in *Amar Chand* runs counter to the Supreme Court judgment in *Prem Ballab* and Full Bench judgment of this Court in *Chhote Lal*.

10. In the case of *Prem Ballab*, a sample of mustard oil was found to contain permitted coal tar dye. On behalf of the Appellant, a contention was raised before the Supreme Court that since no colouring matter was prescribed in respect of linseed oil (Item A.17.04), the presence of permitted artificial dye will make the sample of linseed oil to be adulterated.

11. The Supreme Court extracted Item A.17.04 of Appendix B which contains the standard of linseed oil and analysed Rules 23, 28 and 29 which deal with addition of artificial colour and held that since the added colouring matter was specifically prohibited, even permitted colouring matter was not permissible in linseed oil. Para 6 of the report is extracted hereunder:

> "6. That takes us to the question whether the present case falls within clause (j) of Section 2(i), for if it does, it would be immaterial whether it falls also within clause (l) of Section 2(i) and insofar as the linseed oil sold by the appellants is deemed to be adulterated under clause (j) of Section 2(i), the proviso to Section 16(1) would not be attracted. Now, the report of the Public Analyst showed that the linseed oil sold by the appellants contained artificial dye and this was clearly prohibited under the Rules. Rule 23 provided that the addition of a colouring matter to an article of food, except as specifically permitted by the Rules, shall be prohibited. The only artificial dyes, which were permitted to be used in food, were those set out in Rule 28, and

> Rule 29 prohibited the use of permitted coaltar dyes in or upon any food other than those enumerated in that rule. Linseed oil was admittedly not one of the articles of food enumerated in Rule 29 and hence even permitted coaltar dyes could not be added to linseed oil. It does not appear from the report of the Public Analyst as to what was the artificial dye found mixed in the sample of linseed oil sent to him but we will assume in favour of the defence that it was a permitted coaltar dye. Even so, by reason of Rules 23 and 29, it could not be added to linseed oil. In the circumstances, the linseed oil sold by the appellants contained artificial dye which was prohibited under the Rules. The argument of the appellants was that since colouring matter was prohibited in respect of linseed oil, it could not be said that any colouring matter was prescribed in respect of linseed oil by the Rules and hence the presence of artificial dye in linseed oil did not attract the applicability of clause (j) of Section 2(i). It was said that clause (j) of Section 2(i) would be attracted only if a colouring matter is prescribed in respect of an article of food and the article is found to contain a colouring matter different from that prescribed. But if no colouring matter is prescribed, which would be the position where colouring matter is totally prohibited, it cannot be said that the article of food contains a colouring matter other than that prescribed in respect of it. This argument has the merit of ingenuity but it has no force and cannot be sustained. When no colouring matter is permitted to be used in respect of an article of food, what is prescribed in respect of the article is "nil colouring matter" and if the article contains any colouring matter, it would be "other than that prescribed in respect" of the article. Clause (j) of Section 2(i) is not merely intended to cover a case where one type of colouring matter is permitted to be used in respect of an article of food and the article contains another type of colouring matter but it also takes in a case where no colouring matter is permitted to be used in respect of an article of food, or in other words, it is prohibited and yet the article contains a colouring matter. There is really no difference in principle between the two kinds of cases. Both are equally reprehensible; in fact the latter may in conceivable cases be more serious than the former. Where no colouring matter is permitted to be used in an article of food, what is prescribed in

respect of the article is that no colouring matter shall be used and if any colouring matter is present in the article in breach of that prescription, it would clearly involve violation of clause (j) of Section 2(i)."

12. Turning to the facts of the instant case, the standard of foodgrains is given in Item No.A.18.06, whereas Item No.A.18.06.09 lays down the standard of Dal Arhar which is included in the foodgrains. The relevant items for the purpose of dealing with the controversy raised are extracted hereunder:

"A.18.06-FOODGRAINS meant for human consumption shall be whole or broken kernels of cereals, millets and pulses. In addition to the undermentioned standards to which foodgrains shall conform, they shall be free from argemone maxicana and kesari in any form. They shall be free from added colouring matter. The foodgrains shall not contain any insecticide residues other than those specified in column (2) of the table of Rule 65 and the amount of insecticide residue in the foodgrains shall not exceed the limits specified in column (4) of the said Table. The foodgrains meant for grinding/processing shall be clean, free from all impurities including foreign matter (extraneous matter).

[Provided that the imported wheat for the purpose of Public Distribution System, or imported under the O.G.L. vide number G'S.R.386(E), dated the 28th June, 2006 from the date of commencement of the Prevention of Food Adulteration (VIth Amendment) Rules, 2006 till the 31st day of March, 2008, shall be practically free from argemone maxicana and kesari in any form.

Explanation.- For the purpose of this item, "Public Distribution System" shall have the same meaning assigned to it under the Public Distribution(Control) Order, 2001.]"

xxx xxx xxx xxx xxx

xxx xxx xxx xxx xxx

"A.18.06.09-SPLIT PULSE (DAL) ARHAR:

Dal Arhar shall consist of husk and split seeds of red gram

[Cajanus cajan (L) Millsp]. It shall be sound, clean, sweet, dry, wholesome and free from admixture of unwholesome substance. It shall also conform to the following standards, namely:-

(i) Moisture-Not more than 14 per cent by weight (obtained by heating the pulverised pulses at 130oC- 133oC for two hours).

(ii) Foreign matter (Extraneous matter)- Not more than 1 per cent by weight of which not more than 0.25 per cent by weight shall be mineral matter and not more than 0.10 per cent by weight shall be impurities of animal origin.

(iii) Other edible grains-Not more than 0.5 per cent by weight.

(iv) Damaged grains-Not more than 5 per cent by weight.

(v) Weevilled grains-Not more than 3 per cent by count.

(vi) Uric acid content-Not more than 100 mg per kilogram.

(vii) [Aflatoxin]-Not more than 30 micrograms per kilogram.

Provided that the total of foreign matter, other edible grains and damaged grains shall not exceed 6 per cent by weight."

13. The standard of Dal Arhar as given in Item A.18.06.09 has to be read with the general standard of foodgrains as given in Item A.18.06 of Appendix B. Item A.18.06 specifically prohibits the use of colouring matter as it says *they shall be free from added colouring matter*. The reasoning of the Supreme Court extracted above fully applies to the standard of foodgrains which similarly prohibits use of added colouring matter. Thus, the judgment of the learned Single Judge of this Court in **Delhi Administration v. Amar Chand** shall have to be held as per incuriam.

14. The reasoning given by the learned ASJ that the quantity of the colour could be negligible or that the added colour was not injurious to health is going beyond the standard laid down in Item A.18.06 read with A.18.06.09 of Appendix B. The same, therefore, cannot be accepted. On the basis of the report of Supreme Court in **Prem Ballab** there is no manner of doubt that presence of artificial dye even if it is one of the dyes as mentioned in Rule 28 cannot be allowed as it is not permitted by Rule 29 of the PFA Rules.

15. Now turning to the delay in signing the report Ex.PW1/G by the Public Analyst it is not in dispute that the analysis was completed on 04.04.2003 and the report was signed on 10.04.2003. The learned ASJ relied on the report of the Gujarat High Court in **Babubhai Ranchhodbhai Chauhan** to hold that delay in signing the report after completion of analysis would be fatal to the prosecution. In **State of Gujarat v. Vishramdas Virumal,** (2000) 4 GLR 2884, a Division Bench of the Gujarat High Court considered the judgment in **Babubhai Ranchhodbhai Chauhan** but declined to agree with the view on the ground that the report of the Public Analyst cannot be ignored without examining the Public Analyst. Paras 14 and 17 of the report are extracted hereunder:

> "14. In the case before us, it is very clear that neither the prosecution nor the accused nor the Court thought it fit to call the Public Analyst as a witness. In the absence of that, the report submitted by the Public Analyst has to be accepted by the Court.
>
> 17. Having discussed the issue in detail, our reply to the question raised is as under:
>
> A report of the Public Analyst delivered under Section 13(1) of the Prevention of Food Adulteration Act, 1954 declaring an analysis of a sample of food to be "adulterated" or "misbranded", cannot be ignored without examining the Public Analyst as a witness either by the Court or the accused raising a doubt about the correctness of the report only on the ground that the report is signed by the Public Analyst later on and not on the date on which sample was analysed."

16. In **Municipal Corporation of Delhi v. Chhote Lal,** ILR, (1969) Delhi 885, a Full Bench Bench of this Court held that unless prejudice is shown to have been caused to the accused by delay in signing the report, the same would not be of any significance. The delay of seven days in signing the report was, therefore, held to be inconsequential. The relevant para of the report in **Chhote Lal** is extracted hereunder:

> "Coming to the facts of the present case, we find that no prejudice is shown to have been caused to the accused respondent because of the lapse of seven days between the date of analysis and the

> signing of the report by the Public Analyst. We are not impressed by the argument advanced on behalf of the respondent that any every delay should be presumed to have caused prejudice to the accused. The question of prejudice is essentially one of fact and in the absence of any material on the record, we are unable to hold that prejudice has been caused to the accused merely because of the delay of seven days in signing the report by the Public Analyst."

17. Similarly, in **Municipal Corporation of Delhi v. Thou Ram,** ILR, (1974) I Delhi 649, a Division Bench of this Court held that in the absence of any indication to the contrary, the normal presumption would be that a few days delay in signing the report occurred in routine or due to the volume of work to be handled by him and not because of extraneous influences or consideration. It was held that delay of seven days in signing the report would not be of any significance.

18. Another ground for reversing the judgment of conviction taken by the learned A'S.J. was that photo-chromatic test was not a reliable test to conclude presence of colouring matter. The learned ASJ relied on a judgment of Punjab and Haryana High Court in **Bansi Lal v. State of Haryana,** 1993 (1) FAC 117. The observations about the authenticity of photo-chromatic test are only relevant where the Public Analyst is to determine the presence of a permitted or unpermitted coal tar dye. In **Balmukand Singh v. State of Punjab,** 2008 Crl.L.J. 1084, the learned Single Judge of Punjab and Haryana High Court held that paper chromatography test is not sufficient to conclude whether permitted or unpermitted colouring matter has been used in the sampled food article. To the same effect, are the observations of the learned Single Judge of this Court in **State v. Subhash Chand,** 2012 (2) JCC 1052. In the instant case, the artificial colour permitted by Rule 28 were also prohibited by virtue of the standard laid down in Item No.A.18.06 and 18.06.09. If the Respondent was not satisfied with the report of the Public Analyst, he had the option to get it analysed by Director CFL. The method of analysis or the days applied could not be challenged by the Respondent in view of the judgment of the Supreme Court in Dhian Singh, where it was held as under:

> "The correct view of the law on the subject is as stated in the decision of the Allahabad High Court in **Nagar Mahapalika of**

Kanpur v. Sri Ram wherein it is observed: "that the report of the public analyst under Section13 of the Prevention of Food Adulteration Act, 1954 need not contain the mode or particulars of analysis nor the test applied but should contain the result of analysis namely, data from which it can be inferred whether the article of food was or was not adulterated as defined in S.2(1) of the Act."

19. In this view of the matter, the learned ASJ fell into grave error in reversing the judgment of conviction passed by the learned M.M.

20. In result, the judgment dated 11.11.2011 passed by the learned ASJ is set aside.

21. It is urged by the learned counsel for the Respondent that the Respondent is now aged about 50 years. He is facing the rigours of prosecution for the last about ten years and, therefore, a lenient view may be taken in the matter of awarding sentence to the Respondent. It is contended that the offence was committed almost 10 years ago. No useful purpose would be served by sending the Respondent to jail.

22. On the other hand, Ms. Rajdipa Behura, learned APP for the Appellant argues that the offence under the PFA Act are very serious in nature as it affects the health of the public at large. It is urged that the Legislature in its wisdom amended Section 16 of the PFA Act and provided minimum sentence for various offences. It is urged that Section 20AA was added in the Act and the provisions of the Probation of Offenders Act, 1958 and Section 360 of the Code of Criminal Procedure were excluded in its applicability with regard to the persons convicted under the PFA Act unless he was under 18 years of age. It is submitted that for some of the offences under the PFA Act, punishment of imprisonment for life has been provided.

23. On the other hand, the learned counsel for the Respondent relies on two judgments of this Court in **Shayam Lal v. State,** (in Crl.Rev.P.326/2010) decided on 13.12.2012 and **Food Inspector v. Vinod Kumar** (in Crl.A.1209/2011) decided on 28.02.2012 where the sentence less than the minimum was awarded.

24. The question for consideration is whether the sentence less than the minimum provided under the PFA Act can be awarded to a person found guilty under the Act.

25. The Prevention of Food Adulteration Act was enacted by the Parliament and it came into force on 29.09.1954. The punishments for various violations as given in Clauses (a) to (g) of Section 16(1) were provided as under:

"16. Penalties.- (1) If any person-

(a) whether by himself or by any person on his behalf imports into India or manufactures for sale, or stores, sells or distributes any article of food in contravention of any of the provisions of this Act or of any rule made thereunder, or

(b) prevents a food inspector from a sample as authorised by this Act, or

(c) prevents a food inspector from exercising any other power conferred on him by or under this Act, or

(d) being a manufacturer of an article of food, has in his possession, or in any of the premises occupied by him, any material which may be employed for the purpose of adulteration, or

(e) being a person in whose safe custody any article of food has been kept under sub-section (4) of section 10, tampers or in any other manner interferes with such article, or

(f) uses any report or certificate of a test or analysis made by the Director of the Central Food Laboratory, or by a public analyst or any extract thereof for the purpose of advertising any article of food, or

(g) whether by himself or by any person on his behalf gives to the purchaser a false warranty in writing in respect of any article of food sold by him,

he shall, in addition to the penalty to which he may be liable under the provisions of section 6, be punishable-

(i) For the first offence, with imprisonment for a term which may extend to one year, or with fine which may extend to two thousand rupees, or with both;

(ii) For a second offence with imprisonment for a term

which may extend to two years and with fine;

Provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the court, such imprisonment shall not be less than one year and such fine shall not be less than two thousand rupees;

(iii) For a third and subsequent offences, with imprisonment for a term which may extend to four years and with fine;

Provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the court, such imprisonment shall not be less than two years and such fine shall not be less than three thousand rupees; (2)….."

26. The PFA Act came to be amended by the Prevention of Food Adulteration (Amendment) Act, 1964 and the minimum punishment of imprisonment came to be provided. At the same time, the Court was empowered to impose a sentence less than the minimum prescribed for adequate and special reasons. Section 9 of the Prevention of Food Adulteration (Amendment) Act 1964 which amended Section 16 is extracted hereunder:

"9. Amendment of Section 16.-For sub-section (1) of section 16 of the principal Act, the following sub-sections shall be substituted, namely:- "

(1) If any person-

(a) whether by himself or by any other person on his behalf imports into India or manufactures for sale, or stores, sells or distributes any article of food-

(i) which is adulterated or misbranded or the sale of which is prohibited by the Food (Health) authority in the interest of public health;

(ii) other than an article of food referred to in sub-clause (i), in contravention of any of the provisions of this Act or of any rule made thereunder; or

(b) prevents a food inspector from taking a sample as authorized by this Act; or

(c) prevents a food inspector from exercising any other power conferred on him by or under this Act; or

(d) being a manufacturer of an article of food, has in his possession, or in any of the premises occupied by him, any material which may be employed for the purposes of adulteration; or

(e) uses any report or certificate of a test or analysis made by the Director of the Central Food Laboratory or by a public analyst or any extract thereof for the purpose of advertising any article of food; or

(f) whether by himself or by any other person on his behalf gives to the vendor a false warranty in writing in respect of any article of food sold by him, he shall, in addition to the penalty to which he may be liable under the provisions of the section 6, be punishable with imprisonment for a term which shall not be less than six months but which may extend to six years, and with fine which shall not be less than one thousand rupees:

Provided that-

(i) if the offence is under sub-clause (i) of clause (a) and is with respect of an article of food which is adulterated under sub-clause (l) of clause (i) of section 2 or misbranded under sub-clause (k) of clause (ix) of that section; or

(ii) if the offence is under sub-clause (ii) of clause (a), the court may for any adequate any special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months or of fine of less than one thousand rupees or of both imprisonment for a term of less than six months and fine of less than one thousand rupees.

(1A)….

(1B)….

(1C)….

(1D)…."

27. The PFA Act was further amended by the Prevention of Food

Adulteration (Amendment) Act, 1976 whereby the penalties as provided in Section 16 of the PFA Act were made more stringent. The provision of Section 16(1)(f)(ii) of the Act whereby for adequate and special reasons, the sentence of imprisonment for less than six months or fine of less than one thousand rupees could be provided, were removed. As per the newly added Sections, the punishment of imprisonment of three months, six months, one year and six years were provided.

28. A three Judge Bench of the Supreme Court in **Eknath Shankarrao Mukkawar v. State of Maharashtra,** (1977) 3 SCC 25 which was in respect of a sample lifted on 13.04.1974, that is, before the Prevention of Food Adulteration (Amendment) Act, 1976 came into effect, held that the Magistrate on recording adequate and special reasons had jurisdiction to award a sentence less than the minimum. Thus, I am of the view that after amendment in Section 16 of the PFA Act w.e.f. 01.04.1976, the Court is not empowered to award any sentence less than the minimum prescribed under Section 16 of the PFA Act. The judgments relied upon by the learned counsel for the Respondent, therefore, will not help the Respondent.

29. Admittedly, the sample of *'Dal Arhar'* was found to contain a synthetic colouring matter, viz, *'Tartrazine'* which was prohibited as per the standard of *'Dal Arhar'* as prescribed in Item No.A.18.06 read with A.18.06.09. Thus, the sample of *'Dal Arhar'* was found adulterated within the meaning of Section 2(ia)(m) of the Act. The minimum punishment provided under Section 16(1)(a)(i) of the Act is punishment which shall not be less than six months but it may extend to three years or with fine which shall not be less than one thousand rupees. The learned M.M. in this case had awarded a sentence of rigorous imprisonment for one year and a fine of Rs. 15,000/-. I have already held above the Court is not empowered to impose any sentence less than the minimum provided under the Act. The Respondent otherwise also has failed to disclose any adequate or special reasons for imposing a sentence of less than the minimum prescribed. But, at the same time, in view of the fact that the Respondent faced the rigours of trial for almost ten years, the ends of justice would be met if the Respondent is awarded the minimum substantive sentence of imprisonment. Thus, the Respondent is sentenced to undergo RI for six months and to pay a fine of Rs. 15,000/-. In default of payment of fine, the Respondent shall undergo SI for 15 days as awarded by the learned M.M.

30. The Appeal is allowed in above terms.

31. The Respondent shall surrender before the Trial Court within six weeks from today.

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ITA

COMMISSIONER OF INCOME TAX ....APPELLANT

VERSUS

GITA DUGGAL ....RESPONDENT

(BADAR DURREZ AHMED & R.V. EASWAR, JJ.)

ITA NO. : 1237/2011 DATE OF DECISION: 21.02.2013

Income Tax Act, 1961—Section 54/54F—Respondent assessee, being the owner of a property in New Delhi entered into a collaboration agreement with the builder for developing the property and as per the agreement, in addition to the cost of construction incurred by the builder on the development of the property, further payment of Rs. Four crores was payable to the assessee and the builder was to get the third floor—Respondent assessee claimed the amount spent on the construction as deduction u/s 54F of the Act in computing the capital gains—Assessing Officer rejected the said claim on the footing that the building got constructed by the assessee contained two separate residential units having separate entrances and cannot qualify as a single residential unit and held assessee was eligible for the reduction u/s 54F only in respect of cost of construction incurred in one Unit, that was retained by her—On appeal, CIT and Tribunal allowed the deduction claimed by the

assessee. Held: Section 54/54F use the expression 'residential house' and not a 'residential unit'. Section 54/54F requires the assessee to acquire a "residential house" and so long as the assessee acquires a building, which may be constructed, for the sake of convenience, in such a manner as to consist of several units which can, if the need arises, be conveniently and independently used as an independent residence, the requirement of the Section should be taken to have been satisfied and the reduction claimed has to be allowed.

There could also be another angle. Section 54/54F uses the expression "a residential house". The expression used is not "a residential unit". This is a new concept introduced by the assessing officer into the section. Section 54/54F requires the assessee to acquire a "residential house" and so long as the assessee acquires a building, which may be constructed, for the sake of convenience, in such a manner as to consist of several units which can, if the need arises, be conveniently and independently used as an independent residence, the requirement of the Section should be taken to have been satisfied. There is nothing in these sections which require the residential house to be constructed in a particular manner. The only requirement is that it should be for the residential use and not for commercial use. If there is nothing in the section which requires that the residential house should be built in a particular manner, it seems to us that the income tax authorities cannot insist upon that requirement. A person may construct a house according to his plans and requirements. Most of the houses are constructed according to the needs and requirements and even compulsions. For instance, a person may construct a residential house in such a manner that he may use the ground floor for his own residence and let out the first floor having an independent entry so that his income is augmented. It is quite common to find such arrangements, particularly post-retirement. One may build a house consisting

of four bedrooms (all in the same or different floors) in such a manner that an independent residential unit consisting of two or three bedrooms may be carved out with an independent entrance so that it can be let out. He may even arrange for his children and family to stay there, so that they are nearby, an arrangement which can be mutually supportive. He may construct his residence in such a manner that in case of a future need he may be able to dispose of a part thereof as an independent house. There may be several such considerations for a person while constructing a residential house. We are therefore, unable to see how or why the physical structuring of the new residential house, whether it is lateral or vertical, should come in the way of considering the building as a residential house. We do not think that the fact that the residential house consists of several independent units can be permitted to act as an impediment to the allowance of the deduction under Section 54/54F. It is neither expressly nor by necessary implication prohibited. **(Para 8)**

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. Kamal Sawhney, Sr. Standing Counsel.

FOR THE RESPONDENT : Mr. P.C. Yadav, Advocate.

CASES REFERRED TO:

1. *CIT* vs. *B. Ananda Basappa* : (2009) 309 ITR 329.
2. *CIT* vs. *Smt. K G Rukminiamma* in ITA No.783/2008 dated 27.08.2010.

RESULT: Appeal dismissed.

R.V. EASWAR, J.

1. The revenue has filed the appeal under Section 260A of the Income Tax Act, 1961 against the order dated 07.06.2001 passed by the Income Tax Appellate Tribunal in ITA 3613/Del./2010 for the assessment year 2007-08.

2. The assessee which is the respondent in the appeal is an individual. In the computation of income filed along with the return of income, she declared long term capital gains of Rs. 2,68,25,750/- in the following manner :-

"Income from Capital Gain

Long Term		
A 22 WESTEND COLONY		
Consideration as per Collaboration Agreement	*40,000,000.00*	
Less Index cost for pur. of Rs. 1575000		
(Fair Value as on 1-04-81)	*8,174,250.00*	*31,825,750.00*
Less : Exemption under section 54EC (REC Bonds)		*5,000,000.00*
		26,825,750.00"

While completing the assessment the assessing officer took the view that on the terms of the agreement entered into with M/s Thapar Homes Ltd. on 08.05.2006, the cost of construction of the building incurred by the aforesaid company which was the developer of the property would also be included in the total sale consideration. The assessee responded by submitting that the entire cost of construction was incurred by the builder and even if it is considered as part of the sale consideration, since it has been fully invested in the residential house itself, the same would be exempt under Section 54 of the Act. The assessing officer did not accept the assessee's submission. He therefore, added an amount of Rs. 3,43,72,529/- which was the cost of construction incurred by the developer to the sale consideration of Rs. four crores received by the assessee and computed the total sale consideration at Rs. 7,43,72,529/-.

3. Dealing with the assessee's contention that in any case the sale consideration should be taken as having been invested in the new residential house and thus exempt under Section 54, which was supported by a judgment of the Karnataka High Court in **CIT Vs. B. Ananda Basappa** : (2009) 309 ITR 329, the assessing officer held that the two floors which were given to the assessee by the developer and on which the developer had incurred construction cost were independent of each other and self-contained and therefore they cannot be considered as one unit of residence. Accordingly, he held that the assessee was not eligible for the exemption under Section 54. Dealing with the claim for relief under Section 54F, the assessing officer held that the exemption would be available only in respect of one unit, since the two residential units were

independent of each other and the assessee cannot therefore claim exemption on the footing that both constituted a single residence. In this view of the matter he recomputed the capital gains by making an addition of Rs. 98,20,722/-.

4. On appeal, the CIT(Appeals) agreed with the assessee's contention and following the judgment of the Karnataka High Court cited above, held that the assessee was eligible for the deduction under Section 54 in respect of the basement, ground floor, first floor and the second floor. He accordingly, allowed the appeal.

5. The revenue carried the matter in appeal before the Tribunal and raised the following ground :-

> "On the facts and on the circumstances of the case Ld. Commissioner of Income Tax (Appeals) has erred in law and on the facts in deleting the addition of Rs. 98,20,722/- u/s. 54F of the IT Act, 1961 which the Assessing Officer had allowed in respect of only one unit by treating the units as two separate residential properties."

The Tribunal confirmed the decision of the CIT (Appeals) by observing as under: -

> "6. We have heard the rival contentions in light of the material produced and precedent relied upon. We find that ld. counsel of the assessee submitted that the issue is squarely covered in favour of the assessee by the decision of the Hon'ble Karnataka High Court in the case of **CIT & Anr. Vs. Smt. K.G.Rukminiamma** in ITA No.783 of 2008 vide order dated 27.8.2010 wherein it was held as under :-
>
> > "The context in which the expression "a residential house" is used in Section 54 makes it clear that, it was not the intention of the legislation to convey the meaning that: it refers to a single residential house, if, that was the intention, they would have used the word "one." As in the earlier part, the words used are buildings or lands which are plural in number and that: is referred to as "a residential house", the original asset. An asset newly acquired after the sale of the original asset also can be buildings or lands appurtenant thereto, which also should be "a residential

house." Therefore the letter "a" in the context it is used should not be construed as meaning "singular." But, being an indefinite article, the said expression should be read in consonance with the other words "buildings" and "lands" and, therefore, the singular 'a residential house, also permits use of plural by virtue of Section 13(2) of the General Clauses Act. - CIT V. D. Ananda Bassappa (2009) 223 (kar) 186 : (2009) 20 DTR (Kar) 266 followed."

7. Upon careful consideration, we find that the contentions of the assessee that the issue is covered in favour of the assessee are correct.

7.1 Ld. Departmental Representative could not controvert the above and no contrary decision was cited before us.

8. Accordingly, we do not find any infirmity or illegality in the order of the Ld. Commissioner of Income Tax (Appeals) and hence, uphold the same."

6. In the present appeal before us, the revenue has proposed the following questions as substantial questions of law which in its opinion arise out of the order of the Tribunal.

"A) Whether the Hon'ble ITAT has erred in deleting the addition of Rs. 98,20,772/- under section 54F of the Income Tax Act, 1961 as made by the Assessing Officer?

B) Whether the Hon'ble ITAT has erred in law and facts in holding that the assessee should be given deduction under section 54 of the Income Tax Act, 1961?"

7. We have considered the facts and taken note of the rival submissions. To complete the narration of facts, it needs to be noticed that the assessee was the owner of property at A/22, Westend Colony, New Delhi comprising of the basement, ground floor, first floor and second floor. She was deriving rental income from the property. On 08.05.2006 she entered into a collaboration agreement with M/s Thapar Homes Ltd. for developing the property. According to its terms, the assessee being desirous of getting the property redeveloped/reconstructed and not being possessed of sufficient finance and lacking in experience in construction, approached the builder to develop the property for and

on behalf of the owner at the cost of the builder. The builder was to demolish the existing structure on the plot of land and develop, construct, and/or put up a building consisting of basement, ground floor, first floor, second floor and third floor with terrace at its own costs and expenses. In addition to the cost of construction incurred by the builder on development of the property, a further payment of 'four crores was payable to the assessee as consideration against the rights of the assessee. The builder was to get the third floor. The assessee accordingly handed over vacant physical possession of the entire property along with 22.5% undivided interest over the land. The handing over of possession of the entire property was however only for the limited purpose of development; the undivided interest in the land stood transferred to the developer/ builder only to the extent of 22.5% for his exclusive enjoyment. It was on these facts that the assessing officer first took the view that the sale consideration for the transfer of the capital asset should be taken not merely at Rs. four crores which was the cash amount received by the assessee, but the cost of construction incurred by the developer on the development of the property amounting to Rs. 3,43,72,529/- should also be added to the sale consideration. The assessee thereupon claimed that if the cost of construction incurred by the builder is to be added to the sale price, then the same should also be correspondingly taken to have been invested in the residential house namely the two floors which the assessee was to get in addition to the cash amount under the agreement with the builder, and the amount so spent on the construction should be allowed as deduction under Section 54 of the Act. It was at this stage that the assessing officer rejected the claim for deduction under Section 54 on the footing that the two floors obtained by the assessee contained two separate residential units having separate entrances and cannot qualify as a single residential unit. He agreed that the assessee was eligible for the relief under Section 54F in respect of the cost of construction incurred on one unit. He noted that the assessee has retained the ground floor and the basement. He therefore, apportioned the construction cost of Rs. 3,43,72,529/- to have been incurred on the basement, ground floor, first floor and second floor in the ratio of 1:1:1:0.5 for second floor, first floor, ground floor, basement respectively. Since he was allowing the relief under Section 54F of the Act only in respect of one unit, he added Rs. 98,20,722/- which is the figure arrived at by dividing the total cost of construction of Rs. 3,43,72,529/- by 3.5. This is how the assessment was made. What in effect the assessing officer had done was to reject

the assessee's claim for deduction under Section 54/54F of the Act in respect of the house/units in the first and second floors holding that they were separate and independent residential units having separate entrances and cannot be considered as one unit to enable the assessee to claim the deduction. This was disapproved by the CIT(Appeals) on the basis of the judgment of the Karnataka High Court (supra) and his decision was approved by the Tribunal. The Tribunal expressed the view that the words "a residential house" appearing in Section 54/54F of the Act cannot be construed to mean a single residential house since under Section 13(2) of the General Clauses Act, a singular includes plural.

8. It is the correctness of the above view that is questioned by the revenue and it is contended that the interpretation placed by the Tribunal gives rise to a substantial question of law. The assessee strongly relies upon the judgment of the Karnataka High Court (supra) which, it is stated, has become final, the special leave petition filed by the revenue against the said decision having been dismissed by the Supreme Court as reported in the annual digest of Taxman publication. The judgment of the Karnataka High Court supports the contention of the assessee. An identical contention raised by the revenue before that Court was rejected in the following terms :

> "A plain reading of the provision of section 54(1) of the Income-tax Act discloses that when an individual-assessee or Hindu undivided family- assessee sells a residential building or lands appurtenant thereto, he can invest capital gains for purchase of residential building to seek exemption of the capital gains tax. Section 13 of the General Clauses Act declares that whenever the singular is used for a word, it is permissible to include the plural.
>
> The contention of the Revenue is that the phrase "a" residential house would mean one residential house and it does not appear to the correct understanding. The expression "a" residential house should be understood in a sense that building should be of residential in nature and "a" should not be understood to indicate a singular number. The combined reading of sections 54(1) and 54F of the Income-tax Act discloses that, a non residential building can be sold, the capital gain of which can be invested in a residential building to seek exemption of capital gain tax. However,

> the proviso to section 54 of the Income- tax Act, lays down that if the assessee has already one residential building, he is not entitled to exemption of capital gains tax, when he invests the capital gain in purchase of additional residential building."

This judgment was followed by the same High Court in the decision in **CIT Vs. Smt. K G Rukminiamma** in ITA No.783/2008 dated 27.08.2010.

9. There could also be another angle. Section 54/54F uses the expression *"a residential house"*. The expression used is not "a residential unit". This is a new concept introduced by the assessing officer into the section. Section 54/54F requires the assessee to acquire a "residential house" and so long as the assessee acquires a building, which may be constructed, for the sake of convenience, in such a manner as to consist of several units which can, if the need arises, be conveniently and independently used as an independent residence, the requirement of the Section should be taken to have been satisfied. There is nothing in these sections which require the residential house to be constructed in a particular manner. The only requirement is that it should be for the residential use and not for commercial use. If there is nothing in the section which requires that the residential house should be built in a particular manner, it seems to us that the income tax authorities cannot insist upon that requirement. A person may construct a house according to his plans and requirements. Most of the houses are constructed according to the needs and requirements and even compulsions. For instance, a person may construct a residential house in such a manner that he may use the ground floor for his own residence and let out the first floor having an independent entry so that his income is augmented. It is quite common to find such arrangements, particularly post-retirement. One may build a house consisting of four bedrooms (all in the same or different floors) in such a manner that an independent residential unit consisting of two or three bedrooms may be carved out with an independent entrance so that it can be let out. He may even arrange for his children and family to stay there, so that they are nearby, an arrangement which can be mutually supportive. He may construct his residence in such a manner that in case of a future need he may be able to dispose of a part thereof as an independent house. There may be several such considerations for a person while constructing a residential house. We are therefore, unable to see how or why the physical structuring of the new residential house,

whether it is lateral or vertical, should come in the way of considering the building as a residential house. We do not think that the fact that the residential house consists of several independent units can be permitted to act as an impediment to the allowance of the deduction under Section 54/54F. It is neither expressly nor by necessary implication prohibited.

For the above reasons we are of the view that the Tribunal took the correct view. No substantial question of law arises for our consideration. The appeal is accordingly dismissed with no order as to costs.

ILR (2013) II DELHI 1419
W.P. (C)

JOGESWAR SWAIN ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(S. RAVINDRA BHAT & SUDERSHAN KUMAR, JJ.)

W.P. (C) NO. : 17430/2006 DATE OF DECISION: 21.02.2013

Border Security Force Rules, 1969—Rule 49—Brief Facts—Petitioner, a Constable in the Border Security Force (BSF) was deployed for security aid duty to Dr. (Mrs.) Somy Dey Sarkar, who used to reside in the BSF Campus at Guwahati since 26.01.2004—It is stated that while on such duty, on 17.06.2005, Dr. (Mrs.) Somy Dey Sarkar instructed him at 07.45 PM to leave her quarters as she was about to bathe—He, therefore, left the quarters—Dr. Sarkar thereafter alleged that she found/ noticed two camera flashes within a span of few seconds from the window of the bathroom where she was bathing—She immediately shouted for help: her mother, Smt. Dipali Dey Sarkar went outside and found nobody—It was alleged that the matter was immediately

reported to the Chief Medical Officer, Dr. A.C. Karmakar over telephone; acting on his advice, she instructed the Gate Commander to stop the petitioner from leaving the BSF Campus—The BSF authorities thereafter investigated the matter and ultimately recorded the petitioner's admission; a written report was prepared and a proceeding was drawn-up against the petitioner under Rule 49 of the BSF Rules, 1969—In the course of the proceedings, it was alleged that the BSF authorities seized one Kodak Camera make EC-300 with a photo reel from the house of Constable Kunnu Thamaria, adjacent to the quarters of Dr. Sarkar—The seizure memo stated that the camera was used to take pictures of Dr. Sarkar—The petitioner was placed under open arrest on 20.06.2005 and taken into custody by the BSF the same day—By order dated 21.06.2005, the Commandant of 128 BN BSF issued an order for recording of evidence, directing that the proceedings in that regard should be completed by 29.06.2005—Petitioner nominated one Sh. Anil Kumar, Assistant Commandant as friend of the accused; this was also approved by the appropriate authority on 22.07.2005—It is stated that even though an Assistant was nominated to the petitioner to defend his case, the Security Court which held the proceedings on 23.07.2005, did not permit him to ask any questions during the trial, investigated under Section 157 of the BSF Act, 1968—It is alleged that the Court on 23.07.2005 recorded the guilt, allegedly admitted by the petitioner, without complying with the mandatory provisions of the Act and Rules and proceeded to pronounce him "guilty" and sentenced him to dismissal from service—This order was questioned by the petitioner in an appeal preferred to the concerned authority, i.e. the Deputy Inspector General (DIG), on 29.08.2005—This appeal was apparently rejected subsequently—Hence the present Petition—Petitioner contended inter alia that he was denied a fair trial on account of various

infirmities which obitiated the proceedings of the Security Force Court (Hereafter "the Court")—It was highlighted that the alleged confessional statement said to have been made by the accused whilst in custody could not be the basis of his guilt nor was it admissible in evidence against him—None of the witnesses had actually seen him using the camera or its flash, nor even witnesse him fleeing the spot—It was submitted that this deposition entirely undermined the prosecution case and furthermore, neither was the camera or its contents sent for examination nor was it proved in any manner known to the law that it belonged to the petitioner or was connected with him—Respondent contended inter alia that the procedure prescribed by law was duly followed before imposing the punishment of dismissal upon the petitioner. Held—Petitioner's arguments are two fold, i.e. procedural infirmities in regard to recording of evidence, and that the evidence on record did not implicate him—Records produced during the hearing reveal that in this case, the Court was both convened and presided over by, the petitioner/accused's Commanding Officer, i.e. Commandant Ghanshyam Puruswami—This serious infirmity would, in the opinion of this Court, invalidate the GSC proceeding—The absolute bar in regard to the participation of the Commandant of the accused, who also convened the Court, was prescribed apparently with a purpose, i.e. to eliminate all semblance of bias—Entire structure of Rules 60 and 61 is to ensure a degree of impartially, by requiring officials of different battalians to man the Courts—If the Commandant, who is in charge of the unit, and is expected to be in the know of such matters, is prohibited from participating in the Court, the rationale obviously is to ensure that bias—Real or perceived is eliminated altogether—The violation of this rule, in the opinion of the court, invalidates the proceedings. Entire finding of guilt was based on the

confessional statement extracted under duress, and not given with due knowledge of the petitioner's rights—On the evidence led, there was no occasion for the petitioner to have reasonably given a confessional statement—A close analysis of the evidence would highlight the following circumstances: (1) PW-1 noticed two camera flashes, whilst she was bathing, around 7-45 PM on 17th June, 2005, after she asked the petitioner to leave the premises. Despite her alert, no one was caught. PW-2 corroborated this. PW-3 who reached the spot, also could not see anyone (2)—The petitioner was asked to report back immediately; he did so. During the intervening period, he went to Const. Kunnu's house, and borrowed boots. This was verified from the latter's wife and sister in law (PW-9) the same day. PW-9 did not mention anything about any camera or the petitioner having asked her to hide it, when officials enquired from her (3) No incriminating object or article including the camera was seized from the petitioner's possession. It is unclear as to who owned the camera seized by the respondents (4) The petitioner was placed under open arrest the next day. He according to PW-7, PW-8 and another witness, confessed to having clicked with the camera and having hidden it with PW-9. The next day, PW-9 made another statement, leading to recovery of the camera. This internal contradiction between the version of PW-9 assumes importance because in her first statement, she never said anything about the camera. Her deposition in the Record of Evidence proceeding was over a week later, i.e. 25.06.2005 (5) No written record of the confession said to have been made on 18th June, 2005 exists; (6) Most importantly, the camera reel (though recovered on 18th June, 2005) was never developed. It was the best evidence of the petitioner's culpability.

The petitioner's arguments are two fold, i.e. procedural infirmities in regard to recording of evidence, and that the

evidence on record did not implicate him. This court proposes to take up first the question of procedural irregularity. On a plain reading of Rule 61, it is apparent that a certain diversity is expected (apparent from the mandate that *"as far as practicable, of officers of different battalions or units"* should compose the General Security Court). However, in this case, the personnel who manned the Court were entirely drawn from the petitioner's battalion, i.e. 128 Bn BSF. Such irregularity, however *ipso facto* would not invalidate the court. The next infraction, nevertheless, is more serious. Rule 60 lists out the officers who should not be part of the Court. These include *"(i) ..an officer who convened the Court.." and "(iv)...the Commandant of the accused."* The records . produced during the hearing reveal that in this case, the Court was both convened and presided over by, the petitioner/accused's Commanding Officer, i.e. Commandant Ghanshyam Puruswami. This serious infirmity would, in the opinion of this court, invalidate the GSC proceeding. The absolute bar in regard to the participation of the Commandant of the accused, who also convened the Court, was prescribed apparently with a purpose, i.e. to eliminate all semblance of bias. The entire structure of Rules 60 and 61 is to ensure a degree of impartiality, by requiring officials of different battalions to man the Courts. If the Commandant, who is in charge of the unit, and is expected to be in the know of such matters, is prohibited from participating in the court, the *rationale* obviously is to ensure that bias real or perceived- is eliminated altogether. The violation of this rule, in the opinion of the Court, invalidates the proceedings. **(Para 14)**

A close analysis of the evidence would highlight the following circumstances:

(1) PW-1 noticed two camera flashes, whilst she was bathing, around 7-45 PM on 17th June, 2005, after she asked the petitioner to leave the premises. Despite her alert, no one was caught. PW-2 corroborated this. PW-3 who reached the spot, also could not see anyone.

(2) The petitioner was asked to report back immediately; he did so. During the intervening period, he went to Const. Kunnu's house, and borrowed boots. This was verified from the latter's wife and sister in law (PW-9) the same day. PW-9 did not mention anything about any camera or the petitioner having asked her to hide it, when officials enquired from her.

(3) No incriminating object or article including the camera was seized from the petitioner's possession. It is unclear as to who owned the camera seized by the respondents.

(4) The petitioner was placed under open arrest the next day. He according to PW-7, PW-8 and another witness, confessed to having clicked with the camera and having hidden it with PW-9. The next day, PW-9 made another statement, leading to recovery of the camera. This internal contradiction between the version of PW-9 assumes importance because in her first statement, she never said anything about the camera. Her deposition in the Record of Evidence proceeding was over a week later, i.e. 25-6-2005.

(5) No written record of the confession said to have been made on 18th June, 2005 exists;

(6) Most importantly, the camera reel (though recovered on 18th June, 2005) was never developed. It was the best evidence of the petitioner's culpability. **(Para 23)**

Petitioner accused was not, given the necessary reasonable time to reflect about the overall effect of these statements, and directly asked to make his statement, the same day—This is starkly contrary to Rule 49 (3), which mandates that the accused is furnished with copies of the evidence and "shall be given an opportunity to make a statement if he so desires after he has been cautioned in the manner laid down in sub-rue (3) of Rule 48"—In the present

case, the original records reveal that the last witness, PW-10 deposed on 29th June, 2005; the Official recording the evidence administered the caution to the petitioner immediately thereafter and proceeded to straightaway record his statement, contrary to Proviso to Rule 49 (3)—This amounted to violation of the rule, and resulted in denial of fair-play—On an overall conspectus of circumstances, previously outlined in detail, it is apparent that the Record of Enquiry proceedings, and the proceedings before the Court were held in violation of mandatory conditions—Though this resulted in the punishment imposed upon the petitioner being fatal, this Court has analysed how the evidence relied on by the respondents could not have resulted a conclusion of guilt, on an application of the lowered threshold of preponderance of probabilities (as opposed to proof beyond reasonable doubt). Such being the case, the lack of his signatures in the Court proceedings, are such that the plea guilt before the Court cannot be accepted—In the result, the punishment of dismissal imposed upon the petitioner is hereby set aside. However, having regard to the overall circumstances, the petitioner shall not be entitled to the entire arrears of salary but would be entitled to 50% with full consequential benefits—Writ Petition is allowed in the above terms without any order as to costs.

The above circumstances have to be seen in the light of the further fact that the Record of Evidence in this case . i.e. the statement of prosecution witnesses, was completed on 29th June, 2005. The petitioner/ accused was not, however given the necessary reasonable time to reflect about the overall effect of these statements, and directly asked to make his statement, the same day. This is starkly contrary to Rule 49 (3), which mandates that the accused is furnished with copies of the evidence and *"shall be given an opportunity to make a statement if he so desires after he has been*

cautioned in the manner laid down in sub-rue (3) of Rule 48". Proviso to Rule 49 (3) prescribes that:

> "Provided that the accused shall be given such time as may be reasonable in the circumstances but in no case less than twenty four hours after receiving the abstract of evidence to make his statement."

> In the present case, the original records reveal that the last witness, PW-10 deposed on 29th June, 2005; the Official recording the evidence administered the caution to the petitioner immediately thereafter and proceeded to straightaway record his statement, contrary to Proviso to Rule 49 (3). This amounted to violation of the rule, and resulted in denial of fair-play.
>
> **(Para 24)**

On the question of whether a charged official's plea of guilt in the GSC proceeding can be accepted in the absence of his signatures, there is considerable authority. A Division Bench of the Jammu and Kashmir High Court in **Union of India and Ors. v. Ex Havaldar Prithpal Singh and Ors.,** 1991 KLJ 513 held that-

> "At the time of recording the 'plea of guilt' of the accused in a Summary Trail as well the accused should be necessarily informed of the nature of the charges levelled against him and the Court should ascertain that the accused has understood the nature of the charge to which he pleads guilty and shall inform him of the general effect of the plea and in particular of the meaning of the charge to which he pleads guilty. The Court should further require to advise the accused to withdraw that plea if it appears from summary of evidence or otherwise that the accused ought to plead not guilty- Non fulfillment of such a procedure violates and said rule and vitiates the trial as the rule is mandatory in nature.

Signature of the accused in token of the plea of guilt should be obtained which will show that the accused has willingly 'pleaded guilty'. The Court should also certify this compliance of the rule in the minutes of the proceedings of the trial."

This view was followed in **Chanchal Singh vs Union of India & Ors,** 2003 (3) JKJ 381 by the same court. In **Ex Const. Umesh Prasad vs Union Of India & Ors** (decided on 23-08-2012, in WP(C) 4099/2000 by a Division Bench of this Court), a divergence of judicial opinion was noticed, which was sought to be reconciled in the following terms:

"In a recent judgment pronounced by us on August 06, 2012: WP(C) 2681/2000 **Anil Kumar v. UOI & Ors.** we had opined that as per the BSF Rules 1969 which were in force when the trial took place there is no requirement of obtaining the signatures of the accused upon the accused pleading guilty. But, prudence demands that the signature of an accused, who pleads guilty to a charge, should be obtained when the guilt is admitted. However, we had hastened to add that a procedural default cannot be equated as a substantive default and merely because a plea of guilt does not bear the signatures of the accused is no ground to conclude in favour of the accused. The correct approach has to be, to apply the judicial mind and look at the surrounding circumstances enwombing the arraignment. Posing the question: What would the surrounding circumstances be? We had opined that the Record of Evidence would be a good measure of the surrounding circumstances. If at the Record of Evidence the accused has cross-examined the witnesses and has projected a defence and in harmony with the defence has made a statement, and with respect to the defence has brought out material evidence, it would not stand to logic or reason that such an accused would plead guilty at a

trial. But, where during Record of Evidence, if it is a case akin to a person being caught with his pants down i.e. it is an open and shut case, and the accused does not cross-examine the witnesses and does not make a statement in defence, but simply pleads for forgiveness, it would be an instance where the accused, having no defence, would be pleading guilty and simultaneously pleading for mercy at the trial. We had noted various decisions by Division Benches of this Court have been taking conflicting views with respect to absence of signatures of an accused beneath the plea of guilt at a Summary Security Force Court trial. In the decision reported as 2008 (152) DLT 611 **Subhas Chander v. UOI** the view taken was that a plea of guilt which is not signed by the accused would vitiate the punishment. The decision reported as 2004 (110) DLT 268 **Choka Ram v. UOI** holds to the converse. We had further noted that neither decision took note of the jural principle that a default in procedure, unless hits at the very root of the matter, would not vitiate a decision making process.

13. On the facts of the instant case, it assumes importance that all throughout it has been the case of the petitioner that he was being framed and that the Record of Evidence was prepared at his back. Under the circumstances, we see no reason why the petitioner would plead guilty at the trial.

14. The matter can be looked at from another angle.

15. Sub-Rule 2 of Rule 142 of the BSF Rules reads as under:-

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16. As held by us in **Anil Kumar's** decision (supra), an incisive reading of sub-rule 2 of Rule 142 would reveal that there are two distinct limbs thereof. As per

the first limb, if the accused pleads guilty, it is the duty of the Court to ascertain whether the accused understands the nature of the charge and the general effect of the plea of guilt. The second limb is for the Court to read the Record of Evidence or the Abstract of Evidence, as the case may be, and if it appears from the record that the accused ought to plead not guilty, to record a plea of not guilty (despite the accused having pleaded guilty) and proceed with the trial"..

21. Though of a very weak inferential nature, and not to be understood that we are resting our opinion and conclusions thereon, it does assume importance that the transcript contains an error of a kind which does occur when ante-timed documents are prepared.

22. On the facts of the instant case, signatures of the petitioner not being obtained beneath the plea of guilt and the petitioner taking a stand that he never pleaded guilty, in the backdrop facts of the case and in light of the law declared in **Anil Kumar's** case (supra) and for the additional reason the second limb of Rule 142(2) of the BSF Rules 1968 has not been complied with, compels us to allow the writ petition and quash the conviction and sentence imposed upon the petitioner and as a consequence we direct the petitioner to be reinstated in service with all consequential benefits. We are not directing a re-trial of the petitioner due to passage of time and would further highlight that appellate remedies are intended in the hope that the Appellate Authority would apply its mind and not act mechanically. We are left wondering as to why the Appellate Authority glossed over the fact that in the instant case the petitioner was alleging false entrapment; was alleging that the Record of Evidence was at his back and that he never pleaded guilty. Had the Appellate Authority applied its mind, the trial could have been set aside in the year

1999 itself when the appeal was rejected. A re-trial could have been ordered. Today, with 13 years having passed by, it would be too late in the day to hold a trial." **(Para 25)**

This Court concurs with the above observations. On an overall conspectus of circumstances, previously outlined in detail, it is apparent that the Record of Enquiry proceedings, and the proceedings before the Court were held in violation of mandatory conditions. Though this resulted in the punishment imposed upon the petitioner being fatal, this court has analysed how the evidence relied on by the respondents could not have resulted a conclusion of guilt, on an application of the lowered threshold of preponderance of probabilities (as opposed to proof beyond reasonable doubt). Such being the case, the lack of his signatures in the Court proceedings, are such that the plea guilt before the Court cannot be accepted. **(Para 26)**

Important Issue Involved: Border Security Force Rules, 1969—Entire structure of Rules 60 and 61 is to ensure a degree of impartiality, by requiring officials of different battalions to man the Courts—If the Commandant, who is in charge of the unit, and is expected to be in the know of such matters, is prohibited from participating in the Court, the rationale obviously is to ensure that bias—Real or perceived is eliminated altogether—The violation of this rule, in the opinion of the Court, invalidates the proceedings.

Petitioner accused was not, given the necessary reasonable time to reflect about the overall effect of the statements, and directly asked to make his defence statement, the same day—This is starkly contrary to Rule 49 (3), which mandates that the accused is furnished with copies of the evidence and "shall be given an opportunity to make a statement if he so desires after he has been cautioned in the manner laid down in sub-rue (3) of Rule 48.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Ms. Saahila Lamba, Advocate.

FOR THE RESPONDENT : Sh. Amrit Pal Singh, CGSC with Sh. Bhupinder Sharma, Law Officer, for Resp. Nos. 1 to 4.

CASES REFERRED TO:

1. *Ex Const. Umesh Prasad* vs. *Union Of India & Ors.* (decided on 23-08-2012, in WP(C) 4099/2000.
2. *Anil Kumar* vs. *UOI & Ors.* August 06, 2012: WP(C) 2681/2000.
3. *Union of India and Ors.* vs. *Ex Havaldar Prithpal Singh and Ors.,* 1991 KLJ 513.

RESULT: Petition Allowed.

S. RAVINDRA BHAT, J.

1. The petitioner joined the Border Security Force (BSF) as a Constable (92 BN BSF Kalyani Nadia) on 10.05.1995. Subsequently, he was posted as Constable in Kashmir and discharged his duties at different times, in Punjab, Manipur and Assam. He states that he was rewarded for his duties in tackling terrorists at Manipur and that he had never earned any adverse remarks or entry during his entire career. When he was working as Constable in 128 BN, BSF, Patgaon, Kamrup in Assam, he was deployed for security aid duty to Dr. (Mrs.) Somy Dey Sarkar, who used to reside in the BSF Campus at Guwahati since 26.01.2004. It is stated that while on such duty, on 17.06.2005, Dr. (Mrs.) Somy Dey Sarkar instructed him at 07.45 PM to leave her quarters as she was about to bathe. He, therefore, left the quarters. Dr. Sarkar thereafter alleged that she found/noticed two camera flashes within a span of few seconds from the window of the bathroom where she was bathing. She immediately shouted for help; her mother, Smt. Dipali Dey Sarkar went outside and found nobody. It was alleged that the matter was immediately reported to the Chief Medical Officer, Dr. A.C. Karmakar over telephone; acting on his advice, she instructed the Gate Commander to stop the petitioner from leaving the BSF Campus. The BSF authorities thereafter investigated the matter and ultimately

recorded the petitioner's admission; a written report was prepared and a proceeding was drawn-up against the petitioner under Rule 49 of the BSF Rules, 1969. In the course of the proceedings, it was alleged that the BSF authorities seized one Kodak Camera make EC-300 with a photo reel from the house of Constable Kunnu Thamaria, adjacent to the quarters of Dr. Sarkar. The seizure memo stated that the camera was used to take pictures of Dr. Sarkar. The petitioner was placed under open arrest on 20.06.2005 and taken into custody by the BSF the same day. By order dated 21.06.2005, the Commandant of 128 BN BSF issued an order for recording of evidence, directing that the proceeding in that regard should be completed by 29.06.2005. The petitioner claims that he apprehended that his wife might be sexually harassed by another Constable by taking advantage of his arrest, which he expressed to the concerned authorities, leading to allotment of a quarter inside the Campus, on 22.06.2005.

2. Pursuant to the directions of the Commanding Officer, the Deputy Commandant recorded the evidence of the prosecution witnesses whilst the petitioner was in custody. In all, 10 witnesses were examined and the statement of the accused was recorded at the end of the proceedings. The concerned official, i.e. the Deputy Commandant certified that the Record of Evidence (RoE) directed by the Commandant was completed on 29.06.2005. On the basis of the Record of Evidence, the Commandant of the petitioner's Batallion was of the opinion that the case be presented before the Security Force Court, and intimated accordingly, on 05.07.2005. The petitioner was also asked to intimate names of 3-4 officers of his choice, to defend him at the trial.

3. The charge framed on 19.07.2005 is as follows:

> "AN ACT PREJUDICIAL TO GOOD ORDER AND DISCIPLINE OF THE FORCE
>
> In that he,
>
> At BSF Campus, Patgaon, Guwahati, on 17.06.2005 at 2000 hours, improperly and without authority took photograph of Dr. (Mrs.) Somi Dey Sarkar, L.M.O., SHQ, BSF, Guwahati from the outside window of bath room of her quarter No.1, Type-III at BSF Campus, Patgaon, Guwahati, when she was taking bath there."

4. The petitioner nominated one Sh. Anil Kumar, Assistant Commandant as friend of the accused; this was also approved by the appropriate authority on 22.07.2005. It is stated that even though an Assistant was nominated to the petitioner to defend his case, the Security Court which held the proceedings on 23.07.2005, did not permit him to ask any questions during the trial, investigated under Section 157 of the BSF Act, 1968. It is alleged that the Court on 23.07.2005 recorded the guilt, allegedly admitted by the petitioner, without complying with the mandatory provisions of the Act and Rules and proceeded to pronounce him ¡°guilty¡± and sentenced him to dismissal from service. This order was questioned by the petitioner in an appeal preferred to the concerned authority, i.e. the Deputy Inspector General (DIG), on 29.08.2005. This appeal was apparently rejected subsequently.

5. Learned counsel argues that the petitioner was denied a fair trial on account of various infirmities which vitiated the proceedings of the Security Force Court (hereafter ¡°the Court¡±). It is stated that Rule 63(1) of the Rules was violated because the complainant, i.e. the Commandant was himself a member of the Court which enquired into the matter thus infringing one of the most cardinal principles of natural justice. It was highlighted that the alleged confessional statement said to have been made by the accused whilst in custody could not be the basis of his guilt nor was it admissible in evidence against him. It was contended that the petitioner had little or no knowledge of the English language and that the abstract of the evidence was not made available or known to him in the manner intended by Rule 46(3). The last witness, i.e. PW-10 was examined on 29.06.2005 and the petitioner was straightaway asked to give his statement although no copies of abstract of evidence were supplied to him, nor was he afforded the opportunity of taking stock of the situation. Learned counsel also highlighted that Rules 142(2) and 143(4)(a) were given a go-by, in that the Court did not follow the procedures prescribed and also did not satisfy itself that the petitioner fairly understood the entire purport of the evidence before it (the Court) to record his guilt. Having regard to all these circumstances, submitted counsel, the finding of guilt recorded against the petitioner was unsustainable in law.

6. Learned counsel submitted that on an overall reading of the entire evidence, what clearly emerged was that none of the witnesses had actually seen him using the camera or its flash, nor even witnessed him

fleeing the spot. The prosecution's allegations were completely undermined by the testimony of PW-9, Ms. Binita Sah who stated that when at around 08.30 two officers visited her house and enquired if the petitioner had visited immediately prior to that, she confirmed that he did visit but did not state anything about photo camera and that on the next day, she told them about the camera and handed it over to them. It was submitted that this deposition entirely undermined the prosecution case and furthermore, neither was the camera or its contents sent for examination nor was it proved in any manner known to the law that it belonged to the petitioner or was connected with him. In these circumstances, the material on the record clearly did not amount to evidence even pointing to, much less proving, his guilt on an application of the lower threshold of preponderance of probabilities. In these circumstances, neither could the Court have assumed his guilt nor could the appellate authority have blindly turned down his request for reinstatement. Learned counsel lastly argued that the decisions of this Court have now ruled that even though at the relevant time, the BSF rules did not mandate the signatures of accused in the GSC proceedings after the recording of statement, necessarily the evidence on record would have to be viewed in order to determine whether the findings entered by the Court on the basis of a confessional statement or a guilt recorded, in the probabilities of the case, could be sustained as valid. On a fair application of that principle, submitted counsel, the finding of guilt in the present case is unsustainable.

Respondent's contentions:

7. The respondent argues that when the petitioner was working as a security aide to Dr. (Mrs) Sarkar, (LMO of 18 Bn BSF) and attached with Sector Hospital BSF, Guwahati, he indulged in misconduct amounting to betraying the trust reposed in him, by indulging in the unethical act of stealthily photographing of the medical officer when she was bathing. It was urged that soon after this was reported, the petitioner was put up on offence report before the Commandant, who after hearing the petitioner, ordered preparation of Record of Evidence (ROE) against him for committing an offence Under Section 40 of BSF Act for an act prejudicial to good order and discipline of the Force. In view of the above charge, the Record of Evidence was prepared under Rule 48 of BSF Rule 1969; on completion of Record of Evidence, the Commandant decided to try the petitioner by Summary Security Force Court as under Rule 51 of BSF Rules 1969. The petitioner was given notice along with the copy of

charge sheet and Record of Evidence proceedings as mandated under Rule 63 of the BSF Rule 1969. The Summary Security Force Court trial of the petitioner was held at Bn HQr. on 23.07.2005. On being arraigned by the Court, the petitioner pleaded .Guilty. to the charge. The Court duly complied with the provisions of BSF Rule 142(2) before recording its findings of 'guilty' on the charge. Thereafter, the Record of Evidence proceedings was read over, explained to the accused and attached to the proceedings. On being given an opportunity to make statement in mitigation of punishment, the accused while admitting his guilt stated that he had committed an offence and requested for pardon and stated that he would not repeat the mistake in future. In view of above, the Court sentenced him ¡°to be dismissed from service.' The petitioner's statutory petition against the dismissal order was duly considered and dismissed by the respondent by order dated 24.01.2006.

8. It is contended that the procedure prescribed by law was duly followed before imposing the punishment of dismissal upon the petitioner. The respondents argue that the Record of Evidence (ROE) was prepared under BSF Rules. All the evidence was recorded in presence of the petitioner. After recording of each and every statement of PWs, the petitioner was given opportunity to cross-examine the witnesses under the provision of Rule 48(2) of BSF Rules, 1969, thereafter same was read over to the witnesses and the petitioner in the language they understand well, i.e. in Hindi and then only the witnesses, as well as the petitioner signed the same. It is further submitted that Rule 49(3) of BSF Rules, 1969 is not applicable in this case.

9. It was argued that during the trial, Sh. Ghanshyam Purswani, Commandant, i.e. the Court was affirmed as interpreter as per Rule 136 of BSF Rules, 1969. On being arraigned by the Court, the accused pleaded .Guilty¡± to the charge. The Court complied with the provisions of BSF Rule 142(2) before recording its findings of "guilty" on the charge. Thereafter, the Record of Evidence proceedings was read over, translated and explained to the accused in the language he understands well, i.e. in Hindi and attached to the proceedings. It is, therefore, clear that the punishment was imposed after following due procedure of law.

10. It was further argued that the proper procedure mandated by law was strictly followed. On commencement of disciplinary proceedings, the petitioner was placed under open arrest as provided under BSF Rule

38 and simultaneously he was afforded opportunity to defend his case without any pressure and harassment. The petitioner was placed under open arrest subject to the condition of his keeping within the limit of BSF Campus, Patgaon. He was also intimated by order that in case his move outside the Campus is required, prior written permission of the Commandant had to be taken. After hearing the petitioner as per Rule 45 of BSF Rules, Commandant directed the preparation of Record of Evidence by Sh. A.K. Jha, Dy. Commandant as provided under Rule 45(2)(iii) of BSF Rules, 1969. Sh. A.K. Jha, Dy. Commandant completed the ROE on 29.06.2005. After recording each statement of witnesses, the petitioner was given opportunity to cross-examine under Rule 48(2). The depositions were read over to the witnesses and the petitioner in the language they understand well, i.e. in Hindi and then the witnesses, as well as the petitioner signed the statements.

11. The respondents submit that the Record of Evidence in respect of witnesses was recorded in accordance with the Act and Rules and in presence of the accused/petitioner. During this process, he admitted his guilt voluntarily without any threat, inducement or promise and his said admission was recorded in accordance with rules. The Recording officer took down the statement of the petitioner (accused) as provided under BSF Rule 48(3) in English, thereafter same was read over to the petitioner in the language he understood well, i.e. Hindi and then only did he appended his signature in the presence of independent witness, namely ASI (RM) R.P. Tripathi.

12. The respondents deny that the petitioner was not permitted to engage a next friend, or defence assistant. It was submitted that having regard to the fact that the petitioner admitted to his guilt on more than one occasion and having regard to the fact that the misconduct really amounted to sexual harassment, this court should not interfere with the disciplinary order.

Relevant provisions under the BSF Rules

13. Before a discussion on the merits, it would be necessary to extract the relevant Rules, i.e. the Border Security Force Rules, 1969. The same are as follows:

> "48. **Record of evidence.-** (1) 1[The officer ordering the record of evidence may either prepare the record of evidence himself or

detail another officer to do so.

(2) The witnesses shall give their evidence in the presence of the accused and the accused shall have right to cross-examine all witnesses who give evidence against him.

2[Provided that where statement of any witness at a court of inquiry is available, examination of such a witness may be dispensed with and the original copy of the said statement may be taken on record. A copy thereof shall be given to the accused and he shall have the right to cross-examine if he was not afforded an opportunity to cross-examine the witness at the Court of Inquiry.]

(3) After all the witnesses against the accused have been examined, he shall be cautioned in the following terms; "You may make a statement if you wish to do so, you are not bound to make one and whatever you state shall be taken down in writing and may be used in evidence." After having been cautioned in the aforesaid manner what ever the accused states shall be taken down in writing.

(4) The accused may call witnesses in defence and the officer recording the evidence may ask any question that may be necessary to clarify the evidence given by such witnesses....."

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49 **Abstract of evidence.-** (1) An abstract of evidence shall be prepared either by 1[the officer ordering it] or an officer detailed by him.

(2)(a) The abstract of evidence, shall include-

(i) signed statements of witnesses wherever available or a precis thereof,

(ii) copies of all documents intended to be produced at the trial.

(b) Where signed statements of any witnesses are not available a precis of their evidence shall be included.

(3) A copy of the abstract of evidence shall be given by the officer making the same to the accused and the accused shall be

given an opportunity to make a statement if he so desires after he has been cautioned in the manner laid down in sub-rue (3) of Rule 48:

Provided that the accused shall be given such time as may be reasonable in the circumstances but in no case less than twenty four hours after receiving the abstract of evidence to make his statement.

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60. **Disqualification of officers for serving on General and Petty Security Courts.]-** An officer shall be disqualified from serving on a Court if he:-

(i) is an officer who convened the Court; or

(ii) is the prosecutor or a witness for the prosecution; or

(iii) has taken any part in the investigation of the case, which would have necessitated his applying his mind to any part of the evidence, or to the facts of the case; or

(iv) is the Commandant of the accused; or

(v) has a personal interest in the case.

61. **Composition of General and Petty Security Force Courts.-** (1) A court shall consist, as far as practicable, of officers of different battalions 3[or units].

(2) The members of a court for the trial of an officer shall be of a rank not lower than the rank of that officer, unless in the opinion of the convening officer, officers of such rank are not, having due regard to the exigencies of public service, available. Such opinion shall be recorded in the convening order.

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142. **General plea of "Guilty" or "Not Guilty".-** (1) The accused person's plea of 'Guilty' or 'Not Guilty' or if he refuses to plead or does not plead intelligibly either one or the other, a plea of "Not Guilty" shall be recorded on each charge.

(2) If an accused person pleads "Guilty" that plea shall be recorded as the finding of the Court but before it is recorded, the Court shall ascertain that the accused understands the nature of the charge to which he has pleaded guilty and shall inform him of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty, and of the difference in procedure which will be made by the plea of guilty and shall advise him to withdraw that plea if it appears from the record or abstract of evidence (if any) or otherwise that the accused ought to plead not guilty.

(3) Where an accused person pleads guilty to the first two or more charges laid in the alternative, the Court may after sub-rule (2) has been complied with and before the accused is arraigned on the alternative charge or charges, withdraw such alternative charge or charges as follow the charge to which the accused has pleaded guilty without requiring the accused to plead thereto, and a record to that effect shall be made in the proceedings of the Court."

Analysis and Findings

14. The petitioner's arguments are two fold, i.e. procedural infirmities in regard to recording of evidence, and that the evidence on record did not implicate him. This court proposes to take up first the question of procedural irregularity. On a plain reading of Rule 61, it is apparent that a certain diversity is expected (apparent from the mandate that *"as far as practicable, of officers of different battalions or units"* should compose the General Security Court). However, in this case, the personnel who manned the Court were entirely drawn from the petitioner's battalion, i.e. 128 Bn BSF. Such irregularity, however *ipso facto* would not invalidate the court. The next infraction, nevertheless, is more serious. Rule 60 lists out the officers who should not be part of the Court. These include *"(i) ..an officer who convened the Court.." and "(iv)...the Commandant of the accused."* The records . produced during the hearing reveal that in this case, the Court was both convened and presided over by, the petitioner/ accused's Commanding Officer, i.e. Commandant Ghanshyam Puruswami. This serious infirmity would, in the opinion of this court, invalidate the GSC proceeding. The absolute bar in regard to the participation of the Commandant of the accused, who also convened the Court, was prescribed

apparently with a purpose, i.e. to eliminate all semblance of bias. The entire structure of Rules 60 and 61 is to ensure a degree of impartiality, by requiring officials of different battalions to man the Courts. If the Commandant, who is in charge of the unit, and is expected to be in the know of such matters, is prohibited from participating in the court, the *rationale* obviously is to ensure that bias 'real or perceived- is eliminated altogether. The violation of this rule, in the opinion of the Court, invalidates the proceedings.

15. This Court does not rest its decision on the above reasoning. There appears to be a more fundamental flaw in the proceeding. Counsel had argued that the petitioner did not make the confession attributed to him during the Record of Evidence and that the matter has to be considered from the overall conspectus of evidence and deposition of witnesses. She had argued that none of the witnesses had seen the petitioner actually clicking the photograph or noticed the flash of the camera; even the camera roll was not admittedly developed. The entire finding of guilt was based on the confessional statement extracted under duress, and not given with due knowledge of the petitioner's rights. On the evidence led, there was no occasion for the petitioner to have reasonably given a confessional statement. She relied on the decision in **Ex Const. Umesh Prasad vs Union Of India & Ors.** (decided on 23-08-2012, in WP(C) 4099/2000 to say that confessions recorded by the Security Force Court or during the Record of Evidence cannot be taken at face value. It would therefore, be essential to briefly analyse the Record of Evidence, taken down between 22-6-2005 and 29-6-2005.

Evidence before the Security Court

16. PW-1, Dr Somi Dey Sarkar (the complainant) deposed that the petitioner, was her security aide from approximately one year before the date of the incident till the date of the incident; on 17.6.2005, at about 7:45 PM, she had told him that he could leave as she was going for her bath. He left her quarter. While bathing, she twice observed camera flashes of light through the bathroom window focusing inside the bathroom; she even heard the auto rotation of a camera reel. She then screamed, calling for help, telling her mother to go out and stop the person who was doing this. Her mother checked the back of the quarter, but did not find anybody/anything except that the flower-tub. She informed Dr. A.C. Karmakar CME (SG) on telephone; he advised her to tell the

gate cadre at Gate no-1 to not allow the petitioner leave the campus. She made further enquiries about the petitioner from the other GDs that if they sighted the petitioner, he should be told to report to her quarters. At about 8:20 PM, Dr Karmakar visited the scene of incident; one Keshav Kumar (DC Adjutant 128 Bn) also visited the spot, and they both examined it; soon thereafter the petitioner arrived. He was asked what he had in his protruding pocket, to which he answered that he had a water bottle. This deposition was corroborated by her mother, PW-2, Deepali Dey Sarkar in material particulars.

17. PW-3 Keshav Kumar, was in his office when he was called and asked to go PW-1's residence. When he reached there, Dr Karmakar was present. The witness was told by PW-1 that the petitioner, who was well-versed with layout of the quarter and the in-house routine, might have clicked the pictures. He further deposed that they (he and Dr Karmakar) questioned the petitioner about his involvement in the incident, which he (the petitioner) denied stating that after leaving the quarters, he went to Const. Kunu Thamaria's house to collect ankle shoes which he needed for Zero Parade for leave purpose. He further stated that he along with Dr Karmakar went to Kunu Thamaria's house. Const. Kunu repeated the petitioner's version, as was narrated to them. They were further told by Const. Kunu that the petitioner visited his house in his absence, when only his sister-in-law and his wife were present. He also testified that Const. Kunu's wife and sister-in-law too narrated the same story. He also stated that next day (18th June), when further enquiries were made as to who had a photo camera, the petitioner's name came up; that when the petitioner was asked about this, at first he denied, but when he was further questioned by Const. Sushant Behra in the presence of Sub. S.K. Sharma, Hukum Singh Narula and Ram Lakhan Sharma he accepted that he had clicked the photos of PW-1 the previous evening. The petitioner even agreed to hand over the camera with the reel, which he said he had kept at Const. Kunu's house. Thereafter, they visited Const. Kunu's house again, where at the instance of the petitioner, the camera and reel were recovered. PW-3 further stated that both the items had been hidden by Kunu's sister-in-law on the petitioner's request the previous night. The items were seized and seizure memo was prepared.

18. PW-4 Dr. A.C. Karmarkar corroborated the version of PW-1 about her narrating the incident, his reaching the spot, finding nothing etc. He further stated that when the petitioner came back, his slippers

were wet and his pocket was bulging outwards; that upon being asked, the petitioner showed the items he was carrying viz. liquor bottle and bundle of keys; that the petitioner told them (Dr. Karmakar and PW-3 Keshav Kumar) that he had taken the liquor from his box kept at Const. Kunu's house; then they went to Const. Kunu's house and asked him (Const. Kunu) to show the petitioner's box, which he did. The witness further stated that they enquired about that too, but none including Kunu's sister-in-law and wife stated anything.

19. PW-5 Const. Kunu Kamaria, stated that on the evening of the incident, he was informed by his wife, when he reached home, that the petitioner visited and had taken his (Kunu's) ankle boots; that at about 9:15 PM, PW-3 and PW-4 came along-with the petitioner and enquired whether the latter had visited his house, more particularly about whether the petitioner left any camera at his house. The witness enquired the same from his wife and sister-in-law, who denied; these were conveyed to the officers present. He further stated that the next day (18th June), the petitioner along with Sub. S.K. Sharma, SI (Adjt) Hukum Singh Naruka and HC Ram Lakhan again visited his house and asked his (Kunu's) sister-in-law to bring the camera which he had kept in her box; she did so. The camera was seized. PW-5 further deposed that he then asked his sister-in-law as to why she did not reveal her knowledge about the hidden camera the previous night, to which she stated that she had been asked by the petitioner not to do so. PW-6 SI Hukum Singh Naruka corroborated Kunnu's version about the circumstances under which the camera was seized from his sister-in-law. He also stated that he was present when the petitioner was questioned about the incident, on 18-6-2005.

20. PW-7 Sub. S.K. Sharma testified about his presence at *sammelan kakshya* at the time when the petitioner was questioned about the incident; PW-3 Keshav Kumar was also present then. He further revealed that the petitioner also took him aside and confessed that he had clicked the photos in question and that he did so because he had been requesting leave which the LMO (Lady Medical Officer . PW-1 Somi Dey Sarkar) kept on denying. The petitioner also stated that the camera had been kept at Const. Kunu's house. The witness also stated that after the confession, he along with SI (Adjt.) Hukum Singh HC, Ram Lakhan and the petitioner visited Kunu's house, from where the camera was recovered, after Kunu's sister-in-law handed it over to him (Kunu). Lastly, he stated that the

camera was taken in possession and seized. A similar version was given by PW-8 in his deposition.

21. PW-9 Ms Binita, sister in law of Const. Kunu stated that at about 8 PM on 17th June, the petitioner came and handed over to her a camera with the instruction of remaining silent about the same, which she carried out; that at that time, Const. Kunu was not present. She recognized the petitioner during her testimony. She stated that the petitioner used to come to their house as he also hailed from Orissa. She further stated that at about 8:30 PM, two officers visited the house, and enquired about the petitioner, and his having kept any camera at the house. The witness deposed that upon such enquiry she admitted that the petitioner had been to the house that evening, but did not say anything about the camera. She further deposed that the next morning, at about 9 AM, the petitioner again visited the house with other persons, asking her to bring the camera. She stated that she had kept the camera in the box which she handed over to the petitioner, in the presence of Kunu and other persons.

22. PW-10 Deepak Chaturvedi (Second in Command 128 Bn BSF) deposed in the same light as PW-7 and PW-8 about the Petitioner's confession at the *sammelan kakshya,* where the petitioner touched his feet saying *"mujhse galti ho gayi, mujhe bacha lo"*. He further stated that the petitioner admitted to having clicked two photos of Dr Somi Dey Sarkar the previous night. The reason for this misbehaviour was rejection of his leave request by Dr. Sarkar. He also stated that the petitioner confessed that he had been asked by his wife to whom he confided about the matter; she suggested him to apologize. The witness further stated that the petitioner had then demonstrated how he had climbed and got access for clicking the photo. The witness stated that the petitioner confessed that he climbed a small portion of a wall which was jutting out, then climbed on to the window using the iron pipe. He reached the window, whereupon he clicked the photos with his left, free hand. The witness stated that after this he went back to his office. The witness identified the petitioner.

23. A close analysis of the evidence would highlight the following circumstances:

(1) PW-1 noticed two camera flashes, whilst she was bathing, around 7-45 PM on 17th June, 2005, after she asked the petitioner

to leave the premises. Despite her alert, no one was caught. PW-2 corroborated this. PW-3 who reached the spot, also could not see anyone.

(2) The petitioner was asked to report back immediately; he did so. During the intervening period, he went to Const. Kunnu's house, and borrowed boots. This was verified from the latter's wife and sister in law (PW-9) the same day. PW-9 did not mention anything about any camera or the petitioner having asked her to hide it, when officials enquired from her.

(3) No incriminating object or article including the camera was seized from the petitioner's possession. It is unclear as to who owned the camera seized by the respondents.

(4) The petitioner was placed under open arrest the next day. He 'according to PW-7, PW-8 and another witness, confessed to having clicked with the camera and having hidden it with PW-9. The next day, PW-9 made another statement, leading to recovery of the camera. This internal contradiction between the version of PW-9 assumes importance because in her first statement, she never said anything about the camera. Her deposition in the Record of Evidence proceeding was over a week later, i.e. 25-6-2005.

(5) No written record of the confession said to have been made on 18th June, 2005 exists;

(6) Most importantly, the camera reel (though recovered on 18th June, 2005) was never developed. It was the best evidence of the petitioner's culpability.

24. The above circumstances have to be seen in the light of the further fact that the Record of Evidence in this case . i.e. the statement of prosecution witnesses, was completed on 29th June, 2005. The petitioner/ accused was not, however given the necessary reasonable time to reflect about the overall effect of these statements, and directly asked to make his statement, the same day. This is starkly contrary to Rule 49 (3), which mandates that the accused is furnished with copies of the evidence and *"shall be given an opportunity to make a statement if he so desires after he has been cautioned in the manner laid down in sub-rue (3) of Rule 48"*. Proviso to Rule 49 (3) prescribes that:

"Provided that the accused shall be given such time as may be reasonable in the circumstances but in no case less than twenty four hours after receiving the abstract of evidence to make his statement."

In the present case, the original records reveal that the last witness, PW-10 deposed on 29th June, 2005; the Official recording the evidence administered the caution to the petitioner immediately thereafter and proceeded to straightaway record his statement, contrary to Proviso to Rule 49 (3). This amounted to violation of the rule, and resulted in denial of fair-play.

25. On the question of whether a charged official's plea of guilt in the GSC proceeding can be accepted in the absence of his signatures, there is considerable authority. A Division Bench of the Jammu and Kashmir High Court in **Union of India and Ors. v. Ex Havaldar Prithpal Singh and Ors.,** 1991 KLJ 513 held that-

"At the time of recording the 'plea of guilt' of the accused in a Summary Trail as well the accused should be necessarily informed of the nature of the charges levelled against him and the Court should ascertain that the accused has understood the nature of the charge to which he pleads guilty and shall inform him of the general effect of the plea and in particular of the meaning of the charge to which he pleads guilty. The Court should further require to advise the accused to withdraw that plea if it appears from summary of evidence or otherwise that the accused ought to plead not guilty- Non fulfillment of such a procedure violates and said rule and vitiates the trial as the rule is mandatory in nature.

Signature of the accused in token of the plea of guilt should be obtained which will show that the accused has willingly 'pleaded guilty'. The Court should also certify this compliance of the rule in the minutes of the proceedings of the trial."

This view was followed in Chanchal Singh vs Union of India & Ors 2003 (3) JKJ 381 by the same court. In **Ex Const. Umesh Prasad vs Union Of India & Ors** (decided on 23-08-2012, in WP(C) 4099/2000 by a Division Bench of this Court), a divergence of judicial opinion was noticed, which was sought to be reconciled in the following terms:

"In a recent judgment pronounced by us on August 06, 2012: WP(C) 2681/2000 **Anil Kumar v. UOI & Ors.** we had opined that as per the BSF Rules 1969 which were in force when the trial took place there is no requirement of obtaining the signatures of the accused upon the accused pleading guilty. But, prudence demands that the signature of an accused, who pleads guilty to a charge, should be obtained when the guilt is admitted. However, we had hastened to add that a procedural default cannot be equated as a substantive default and merely because a plea of guilt does not bear the signatures of the accused is no ground to conclude in favour of the accused. The correct approach has to be, to apply the judicial mind and look at the surrounding circumstances enwombing the arraignment. Posing the question: What would the surrounding circumstances be? We had opined that the Record of Evidence would be a good measure of the surrounding circumstances. If at the Record of Evidence the accused has cross-examined the witnesses and has projected a defence and in harmony with the defence has made a statement, and with respect to the defence has brought out material evidence, it would not stand to logic or reason that such an accused would plead guilty at a trial. But, where during Record of Evidence, if it is a case akin to a person being caught with his pants down i.e. it is an open and shut case, and the accused does not cross-examine the witnesses and does not make a statement in defence, but simply pleads for forgiveness, it would be an instance where the accused, having no defence, would be pleading guilty and simultaneously pleading for mercy at the trial. We had noted various decisions by Division Benches of this Court have been taking conflicting views with respect to absence of signatures of an accused beneath the plea of guilt at a Summary Security Force Court trial. In the decision reported as 2008 (152) DLT 611 **Subhas Chander v. UOI** the view taken was that a plea of guilt which is not signed by the accused would vitiate the punishment. The decision reported as 2004 (110) DLT 268 **Choka Ram v. UOI** holds to the converse. We had further noted that neither decision took note of the jural principle that a default in procedure, unless hits at the very root of the matter, would not vitiate a decision making process.

13. On the facts of the instant case, it assumes importance that all throughout it has been the case of the petitioner that he was being framed and that the Record of Evidence was prepared at his back. Under the circumstances, we see no reason why the petitioner would plead guilty at the trial.

14. The matter can be looked at from another angle.

15. Sub-Rule 2 of Rule 142 of the BSF Rules reads as under:-

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16. As held by us in **Anil Kumar's** decision (supra), an incisive reading of sub-rule 2 of Rule 142 would reveal that there are two distinct limbs thereof. As per the first limb, if the accused pleads guilty, it is the duty of the Court to ascertain whether the accused understands the nature of the charge and the general effect of the plea of guilt. The second limb is for the Court to read the Record of Evidence or the Abstract of Evidence, as the case may be, and if it appears from the record that the accused ought to plead not guilty, to record a plea of not guilty (despite the accused having pleaded guilty) and proceed with the trial"..

21. Though of a very weak inferential nature, and not to be understood that we are resting our opinion and conclusions thereon, it does assume importance that the transcript contains an error of a kind which does occur when ante-timed documents are prepared.

22. On the facts of the instant case, signatures of the petitioner not being obtained beneath the plea of guilt and the petitioner taking a stand that he never pleaded guilty, in the backdrop facts of the case and in light of the law declared in **Anil Kumar's** case (supra) and for the additional reason the second limb of Rule 142(2) of the BSF Rules 1968 has not been complied with, compels us to allow the writ petition and quash the conviction and sentence imposed upon the petitioner and as a consequence we direct the petitioner to be reinstated in service with all consequential benefits. We are not directing a re-trial of the petitioner due to passage of time and would further highlight that appellate remedies are intended in the hope that the Appellate Authority would apply its mind and not act mechanically. We are

left wondering as to why the Appellate Authority glossed over the fact that in the instant case the petitioner was alleging false entrapment; was alleging that the Record of Evidence was at his back and that he never pleaded guilty. Had the Appellate Authority applied its mind, the trial could have been set aside in the year 1999 itself when the appeal was rejected. A re-trial could have been ordered. Today, with 13 years having passed by, it would be too late in the day to hold a trial."

26. This Court concurs with the above observations. On an overall conspectus of circumstances, previously outlined in detail, it is apparent that the Record of Enquiry proceedings, and the proceedings before the Court were held in violation of mandatory conditions. Though this resulted in the punishment imposed upon the petitioner being fatal, this court has analysed how the evidence relied on by the respondents could not have resulted a conclusion of guilt, on an application of the lowered threshold of preponderance of probabilities (as opposed to proof beyond reasonable doubt). Such being the case, the lack of his signatures in the Court proceedings, are such that the plea guilt before the Court cannot be accepted.

27. In the result, the punishment of dismissal imposed upon the petitioner is hereby set aside. However, having regard to the overall circumstances, the petitioner shall not be entitled to the entire arrears of salary but would be entitled to 50%, with full consequential benefits. The writ petition is allowed in the above terms without any order as to costs.

ILR (2013) II DELHI 1449
W.P. (C)

NARVIR SINGH ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(GITA MITTAL & J.R. MIDHA, JJ.)

W.P. (C) NO. : 3439/2010 IN C.M. NO. : 18869/2012 DATE OF DECISION: 25.02.2013

Pension Regulations for the Navy—Regulation 23—Brief Facts—On 26th December, 1966, the Petitioner was granted regular commission in the Indian Navy and he sought voluntary retirement as he claimed that he had been wrongly superseded for the next higher rank of Commander in the navy—He was permitted to so retire on 31st March, 1983—Petitioner claims that he was permanently absorbed in the Shipping Corporation of India Ltd. on 30th November, 1982, when he had served for 16 years, 65 days in the Indian Navy—By way of this writ petition, the petitioner assails the order dated 22nd March, 2010 passed by the Armed Forces Tribunal in O.A. no.211/2009 rejecting the prayer of the petitioner for grant of pro-rata pension to him from the date of his discharge from the Indian Havy and a direction to the respondents to release service pension under Regulation 23 of the Pension Regulations for the Navy—Respondents contend that the petitioner had not joined the Shipping Corporation of India, the public sector undertaking, on deputation or otherwise with the consent of Naval authorities. Held—Petitioner places reliance on a circular dated 20th January, 1979 which shows that this circular only provided criteria for pre-mature retirement/resignation of Defence Services Officers and does not contain

the mention of grant of pro-rata pension—Letter dated 20th January, 1979 or the policy letter dated 12th July, 1982 were not placed before the Armed Forces Tribunal by the petitioner—Policy letter dated 12th July, 1982 which refers to orders issued by the Ministry of Finance read with memos of the Ministry of Defence to the effect that: "Officers who have been permitted to be absorbed in the Public Sector Undertakings on or after 8th November 1968, are deemed to have retired from service from the date of such absorption and are eligible to draw the pay of the post in the Public Sector Enterprise in addition to pro-rata pension from the date of absorption, subject to fulfillment of the eligibility conditions for this purpose laid down in the orders issued by the BPE regarding the period of option etc. Instant case does not relate to an officer who has been permitted by the respondents to be absorbed in the public sector undertaking—Respondents have placed reliance on a circular of the Government of India dated 19th February, 1987 which clarified the above noticed position—These communications and circulars were never placed before the Armed Forces Tribunal—Armed Forces Tribunal has found that the applicant was not entitled to pro-rata pension for the simple reason that the conditions mentioned in the circular dated 19th February, 1987 are not satisfied—Given the clear policy enunciation in the prior policy letter dated 12th July, 1982 noticed hereto before, which is relied upon by the petitioner, the position does not change whether reference is made to policy letter dated 12th July, 1982—Subsisting position has only been clarified by the letter dated 19th February, 1987—No fault in the order passed by the Armed Forces Tribunal—The present writ petition has no merit and is dismissed.

As noticed above, the instant case does not relate to an officer who has been permitted by the respondents to be absorbed in the public sector undertaking. **(Para 6)**

The respondents have placed reliance on a circular of the Government of India dated 19th February, 1987 which clarified the above noticed position in the following terms:

> "(i) while on deputation to Central Public Enterprises exercise an option for permanent absorption and are discharged/permitted to retire prematurely from Defence Services for this purpose.
>
> (ii) are appointed in Central Public Enterprises on the basis of their own applications sent through proper channel in response to advertisements and are permitted to retire prematurely from service in the Defence Services for the purpose of taking up the appointment in the Enterprise." **(Para 7)**

We find that the Armed Forces Tribunal has found that the applicant was not entitled to pro-rata pension for the simple reason that the conditions mentioned in the circular dated 19th February, 1987 are not satisfied. Learned counsel for the petitioner has challenged the applicability of the letter dated 19th February, 1987 31st for the reason that the petitioner had voluntary retired on March, 1983. We find that given the clear policy enunciation in the prior policy letter dated 12th July, 1982 noticed hereto before, which is relied upon by the petitioner, the position does not change whether reference is made to policy letter dated 12th July, 1982. We find that the subsisting position has only been clarified by the letter dated 19th February, 1987.

(Para 8)

We may note that petitioner has expired during the pendency of the writ petition on 16th September, 2012 and the present petition is being pursued by his legal heirs.

(Para 9)

Important Issue Involved: Pension Regulations for the Navy—Regulation 23—Policy letter dated 12th July, 1982 issued by the Ministry of Finance states that Officers who have been permitted to be absorbed in the Public Sector Undertakings on or after 8th November, 1968, are deemed to have retired from service from the date of such absorption and are eligible to draw the pay of the post in the Public Sector Enterprise in addition to pro-rata pension from the date of absorption, but the Petitioner's case does not relate to an officer who has been permitted by the respondents to be absorbed in the public sector undertaking.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Col (Retd.) S.R. Kalkal, Advocate.

FOR THE RESPONDENTS : Ms. Barkha Babbar, Advocate.

RESULT: Petition dismissed.

GITA MITTAL, J. (Oral)

CM No.18869/2012

By way of this application, the legal representatives of Cdr. Narvir Singh (Retd.) seek to be impleaded as petitioners as he has unfortunately expired on 16th September, 2012.

For the reasons stated in the application, the application is allowed.

WP(C) No.3439/2010

1. By way of this writ petition, the petitioner assails the order dated 22nd March, 2010 passed by the Armed Forces Tribunal in O.A. no.211/2009 rejecting the prayer of the petitioner for grant of pro-rata pension to him from the date of his discharge from the Indian Army and a direction to the respondents to release service pension under Regulation 23 of the Pension Regulations for the Navy.

2. The case of the petitioner is that on 26th December, 1966 he was granted regular commission in the Indian Navy and he sought voluntary retirement as he claimed that he had been wrongly superseded for the

next higher rank of Commander in the Navy. He was permitted to so retire on 31st March, 1983. The petitioner claims that he was permanently absorbed in the Shipping Corporation of India Ltd. on 30th November, 1982, when he had served for 16 years, 65 days in the Indian Navy. The respondents contend that the petitioner had not joined the Shipping Corporation of India, the public sector undertaking, on deputation or otherwise with the consent of Naval authorities.

3. We find that this position was not disputed before the Armed Forces Tribunal. The petitioner does not challenge this position even in the writ petition or in the rejoinder which has been filed.

4. We may note that these communications and circulars were never placed before the Armed Forces Tribunal. Learned counsel for the petitioner also places reliance on a circular dated 20th January, 1979. Perusal of this document shows that this circular only provided criteria for pre-mature retirement/resignation of Defence Services Officers and does not contain the mention of grant of pro-rata pension. We may also note that the letter dated 20th January, 1979 or the policy letter dated 12th July, 1982 were not placed before the Armed Forces Tribunal by the petitioner.

5. So far as claim of the petitioner is concerned, Col. S.R. Kalkal, learned counsel for the petitioner has drawn our attention to the policy letter dated 12th July, 1982 which refers to orders issued by the Ministry of Finance read with memos of the Ministry of Defence to the effect that:

> "Officers who have been permitted to be absorbed in the Public Sector Undertakings on or after 8th November, 1968, are deemed to have retired from service from the date of such absorption and are eligible to draw the pay of the post in the Public Sector Enterprise in addition to pro-rata pension from the date of absorption, subject to fulfillment of the eligibility conditions for this purpose laid down in the orders issued by the BPE regarding the period of option etc. They are required under the relevant orders applicable to them to exercise option within 6 months of their absorption for either of the alternatives indicated below:
>
> (a) Receiving the monthly pension and death-cum retirement gratuity under the usual Government arrangement, or

> (b) Receiving the DCR Gratuity and a lump-sum amount in lieu of pension worked out with reference to the commutation tables obtaining on the date from which the commuted value becomes payable.
>
> Where no option is exercised within the prescribed period the officer is automatically governed by alternative (b) above. A person opting for alternative (a) is entitled to commutation of a portion of pension as admissible in accordance with the existing orders."

(Emphasis supplied)

6. As noticed above, the instant case does not relate to an officer who has been permitted by the respondents to be absorbed in the public sector undertaking.

7. The respondents have placed reliance on a circular of the Government of India dated 19th February, 1987 which clarified the above noticed position in the following terms:

> "(i) while on deputation to Central Public Enterprises exercise an option for permanent absorption and are discharged/permitted to retire prematurely from Defence Services for this purpose.
>
> (ii) are appointed in Central Public Enterprises on the basis of their own applications sent through proper channel in response to advertisements and are permitted to retire prematurely from service in the Defence Services for the purpose of taking up the appointment in the Enterprise."

8. We find that the Armed Forces Tribunal has found that the applicant was not entitled to pro-rata pension for the simple reason that the conditions mentioned in the circular dated 19th February, 1987 are not satisfied. Learned counsel for the petitioner has challenged the applicability of the letter dated 19th February, 1987 31st for the reason that the petitioner had voluntary retired on March, 1983. We find that given the clear policy enunciation in the prior policy letter dated 12th July, 1982 noticed hereto before, which is relied upon by the petitioner, the position does not change whether reference is made to policy letter dated 12th July, 1982. We find that the subsisting position has only been clarified by the letter dated 19th February, 1987.

9. We may note that petitioner has expired during the pendency of the writ petition on 16th September, 2012 and the present petition is being pursued by his legal heirs.

10. In this background, we find no fault in the order passed by the Armed Forces Tribunal. The present writ petition has no merit and is dismissed.

ILR (2013) II DELHI 1455
W.P. (C)

A.P. VERMA **....PETITIONER**

VERSUS

NATIONAL COUNCIL OF EDUCATIONAL RESEARCH & TRAINING **....RESPONDENT**

(BADAR DURREZ AHMED & SIDDHARTH MRIDUL, JJ.)

W.P. (C) NO. : 8489/2011 & 8491/2011 **DATE OF DECISION: 25.02.2013**

Service Law—Contributory Provident Fund (CPF) & Pension/General Provident Fund (GPF) Scheme—Office Memorandum No. F.4/1/87-PIC-I dated 01.05.1987—Brief Facts from WP (C) No. 8489/2011—Petitioner came to be appointed in the respondent National Council of Educational Research and Training (NCERT) on 08.02.1966—By an Office Memorandum No.F.4/1/87-PIC-I dated 01.05.1987 the Central Government on the recommendations of the Fourth Central Pay Commission notified that the Government employees subscribing to the existing Contributory Provident Fund (CPF) were being given an opportunity to switch over to the Pension/General Provident Fund (GPF) Scheme—Cut-off date for exercising such an option was 30.09.1987—The terms also specified that in case an employee did not given any option he/she would be deemed to have opted for pension scheme—If an employee wanted to continue under the CPF scheme, he/she had to exercise the option for the CPF scheme—Petitioner exercised his option for continuing with the post retirement benefit under the CPF scheme—In the year 1993, in pursuance of the respondents' advertisement for recruitment to the post of Professor (Vocational Education) in Pandit Sunderlal Sharma Central Institute of Vocational Education (PSSCIVE) at Bhopal, petitioner along with other internal and external candidates applied for the said posts and were offered appointment for the said posts in Bhopal—By an order dated 26.04.1994, the NCERT issued a formal order of appointment w.e.f. 21.04.1994—In accordance with the terms and conditions of service, the petitioner along with other appointees, were to be on probation for a period of two years—On 10.04.2001 and 24.08.2001, petitioner made representations to the respondent for change over from CPF scheme to the pension scheme—However, the said representations were not responded to by the respondent—Petitioner retired in the year 2004 on attaining the age of superannuation—However, since the respondent considered the petitioner as having been bound by the option exercised by him before his appointment as a Professor in PSSCIVE, Bhopal, the petitioner challenged the action of the respondent—In the original application filed before the Tribunal the petitioner stated that it had come to his knowledge that one Ms M. Chandra had joined NCERT, respondent, as a Professor of Chemistry in the year 1989 through direct recruitment and had opted for CPF while working in her erstwhile organization—Since, after 01.05.1987 all employees who were appointed afresh were deemed to be covered by the notification dated 01.05.1987, she could not be

placed in the CPF scheme. Therefore, Ms Chandra made a representation to the respondent for being granted GPF/Pension scheme. Pursuant to that, after seeking advice from the Ministry of Human Resource Development, the respondent allowed Ms. Chandra to switch over from CPF scheme to GPF/Pension scheme—Similarly, the petitioner had urged in his application that one Ms. Pushplata Verma who was governed by CPF scheme while in her erstwhile department and similarly opted for being governed by the CPF scheme, was informed, that she would be entitled to get the benefit of pension-cum-gratuity as per the rules of the respondents—Plea of the petitioner for giving him benefit of the GPF/Pension scheme was rejected—Aggrieved by the said order of the competent authority dated 12.03.2010, the petitioner was constrained to file OA No.1160/2010—By the impugned order the Tribunal disposed of the said original application and held that the petitioner's service cannot be treated to have been begun afresh and there being only a technical break in his service, he will not be entitled to exercise the option of which over at this stage—Aggrieved by the said common judgment and order dated 10.11.2010 the petitioners have preferred the present petitions. Held—In view of the fact the the respondent NCERT has permitted similarly placed appointees to switch over to the GPF scheme after being selected through the same recruitment process, a legitimate expectation is raised in favour of the petitioners to be treated in a similar manner—The expectation is further accentuated when the said appointees were permitted to derive the benefit of GPF scheme despite having exercised the option of CPF scheme even after they were absorbed in the service of the respondent NCERT—Therefore, when similarly placed employees of the respondent have been extended the benefit, of the GPF/Pension scheme merely because they were earlier engaged in

the service of the respondent NCERT—Petitioners had been put on probation for a period of two years subsequent upon their appointment to the relevant post in PSSCIVE, Bhopal—The Tribunal failed to appreciate that it is settled law that once a person is appointed to a substantive post through direct recruitment in an open selection after competing with internal and external candidates the appointment on the said post is a fresh appointment—Petitioners have been subjected to hostile discrimination, although they were appointed by the same recruitment procedure as others, only because they were working with one of the establishments of the respondents earlier—Same constitutes unequal treatment amongst equals and is violative of Article 14 of the Constitution of India—Writ petitions are allowed and the order of the Tribunal is set aside—Consequently, the respondents are directed to extend all the benefits of the GPF/Pension Scheme after making necessary deductions to both the petitioners.

In view of the fact that the respondent NCERT has permitted similarly placed appointees to switch over to the GPF scheme after being selected through the same recruitment process, a legitimate expectation is raised in favour of the petitioners to be treated in a similar manner. The expectation is further accentuated when the said appointees were permitted to derive the benefit of GPF scheme despite having exercised the option of CPF scheme even after they were absorbed in the service of the respondent NCERT.

(Para 12)

Therefore, when similarly placed employees of the respondent have been extended the benefit, it would be unreasonable and improper to deny to the petitioners the benefit of the GPF/Pension scheme merely because they were earlier engaged in the service of the respondent NCERT. In this behalf we must observe that the petitioners had been put on probation for a period of two years

subsequent upon their appointment to the relevant post in PSSCIVE, Bhopal. The Tribunal failed to appreciate that it is settled law that once a person is appointed to a substantive post through direct recruitment in an open selection after competing with internal and external candidates the appointment on the said post is a fresh appointment. Therefore, in our opinion, the petitioners have been subjected to hostile discrimination, although they were appointed by the same recruitment procedure as others, only because they were working with one of the establishments of the respondent earlier. In our view the same constitutes unequal treatment amongst equals and is violative of Article 14 of the Constitution of India.

(Para 13)

We, accordingly, allow the writ petitions and set aside the order of the Tribunal. Consequently, the respondents are directed to extend all the benefits of the GPF/Pension Scheme after making necessary deductions to both the petitioners. No costs. **(Para 14)**

Important Issue Involved: Contributory Provident Fund (CPF) & Pension/General Provident Fund (GPF) Scheme—Office Memorandum No.F.4/1/87-PIC-I dated 01.05.1987—Petitioners had been put on probation for a period of two years subsequent upon their appointment to the relevant post in PSSCIVE, Bhopal—Tribunal failed to appreciate that it is settled law that once a person is appointed to a substantive post through direct recruitment in an open selection after competing with internal and external candidates the appointment on the said post is a fresh appointment—It would be unreasonable and improper to deny to the petitioners the benefit of the GPF/Pension scheme merely because they were earlier engaged in the service of the respondent NCERT.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Manu Mridul with Mr. Anant K. Vatsya and Ms. Priyanka Singh.

FOR THE RESPONDENT : Mr. R.K. Singh with Ms. Deepa Rai and Ms. Reena Chongtham.

CASE REFERRED TO:

1. *Krishna Kumar* vs. *UOI,* (1990) 4 SCC 207.

RESULT: Petition Allowed.

SIDDHARTH MRIDUL, J.

1. These two petitions assail the common judgment and order dated 10.11.2010 passed by Central Administrative Tribunal (hereinafter referred to as 'Tribunal') in OA No.1160/2010 and OA No.1168/2010 whereby the Tribunal dismissed the original applications of the petitioners.

2. Since the above petitions raise common issues, this common Judgment shall dispose of the aforesaid petitions filed by the petitioners.

3. For the sake of convenience the facts relevant to the instant adjudication are being extracted from WP(C) No.8489/2011 and are as under:

(i) The petitioner came to be appointed in the respondent National Council of Educational Research and Training (NCERT) on 08.02.1966.

(ii) By an Office Memorandum No.F.4/1/87-PIC-I dated 01.05.1987 the Central Government on the recommendations of the Fourth Central Pay Commission notified that the Government employees subscribing to the existing Contributory Provident Fund (CPF) were being given an opportunity to switch over to the Pension/General Provident Fund (GPF) Scheme.

(iii) The cut-off date for exercising such an option was 30.09.1987. The terms also specified that in case an employee did not give any option he/she would be deemed to have opted for pension scheme. If an employee wanted to continue under the CPF scheme, he/she had to exercise the option for the CPF scheme.

(iv) The petitioner exercised his option for continuing with the post retirement benefit under the CPF scheme. (v) In the year 1993, the respondent invited applications inter alia for recruitment to the post of Professor (Vocational Education) in Pandit Sunderlal Sharma Central Institute of Vocational Education (PSSCIVE) at Bhopal.

(vi) Pursuant to the said advertisement, petitioner along with other internal and external candidates applied for the said posts. The petitioner along with a number of persons from various organizations and institutions participated in the direct recruitment process and were offered appointment for the said posts in Bhopal.

(vii) On acceptance of the offer of appointment the petitioner was appointed as Professor (Vocational Education) in the newly accredited institute PSSCIVE at Bhopal on a temporary capacity w.e.f. 21.04.1994.

(viii) By an order dated 26.04.1994, the NCERT issued a formal order of appointment w.e.f. 21.04.1994.

(ix) In accordance with the terms and conditions of service, the petitioner along with other appointees, were to be on probation for a period of two years. On 10.04.2001 and 24.08.2001 the petitioner made representations to the respondent for change over from CPF scheme to the pension scheme. However, the said representations were not responded to by the respondent.

(x) The petitioner retired in the year 2004 on attaining the age of superannuation.

(xi) However, since the respondent considered the petitioner as having been bound by the option exercised by him before his appointment as a Professor in PSSCIVE, Bhopal, the petitioner challenged the action of the respondent.

(xii) In the original application filed before the Tribunal the petitioner stated that it had come to his knowledge that one Ms M.Chandra had joined NCERT, respondent herein, as a Professor of Chemistry in the year 1989 through direct recruitment and had opted for CPF while working in her erstwhile organization. Since, after 01.05.1987 all

employees who were appointed afresh were deemed to be covered by the notification dated 01.05.1987, she could not be placed in the CPF scheme. Therefore, Ms Chandra made a representation to the respondent for being granted GPF/Pension scheme. Pursuant to that, after seeking advice from the Ministry of Human Resource Development, the respondent allowed Ms Chandra to switch over from CPF scheme to GPF/Pension scheme.

(xiii) Similarly, the petitioner had urged in his application that one Ms Pushplata Verma who was governed by CPF scheme while in her erstwhile department and similarly opted for being governed by the CPF scheme, was informed that she would be entitled to get the benefit of pension-cum-gratuity as per the rules of the respondents.

(xiv) The petitioner's OA No.3530/2010 was disposed of by the Tribunal vide its order dated 25.01.2010 directing the respondent to hear him in the matter and pass appropriate orders.

(xv) The petitioner duly appeared before the Secretary, NCERT. However, on consideration of the submissions made by the petitioner, the competent authority of the respondent passed an order dated 12.03.2010 by which the plea of the petitioner for giving him benefit of the GPF/Pension scheme was rejected.

(xvi) Aggrieved by the said order of the competent authority dated 12.03.2010, the petitioner was constrained to file OA No.1160/2010.

(xvii) By the impugned order the Tribunal disposed of the said original application and held that the petitioner's service cannot be treated to have been begun afresh and there being only a technical break in his service, he will not be entitled to exercise the option of switch over at this stage.

(xviii) Aggrieved by the said common judgment and order dated 10.11.2010 the petitioners have preferred the present petitions.

4. The issue involved in the present petitions is within a narrow compass and requires a determination as to whether the petitioners can

be given the benefit of being governed by the GPF/Pension scheme in the facts and circumstances of the case.

5. Learned counsel for the petitioners submits that the petitioners were appointed to the posts in PSSCIVE at Bhopal through direct recruitment. It is urged that the said post is a substantive post to be filled through an open selection process inviting internal as well as external candidates and that in accordance with the terms and conditions of the service the petitioners were put on probation for a period of two years. In other words, their appointment should be governed by the rules as prevalent on the date of the appointment.

6. It is next urged by learned counsel for the petitioners that the said Ms Chandra and Ms Pushplata Verma who were also appointed through direct recruitment along with petitioners have been given the benefit of being governed by the GPF/Pension scheme even though they were governed by the CPF scheme prior to their appointments and thus on the basis of parity the petitioners are entitled to the same benefit.

7. Per contra, it is argued on behalf of the respondent that the petitioners had specifically opted to continue under the CPF scheme in accordance with the OM No.F.4/1/87-PIC-I dated 01.05.1987 and that since, thereafter, there has been no enabling office memorandum permitting the petitioners to switch over from the earlier exercised option, the petitioner cannot be permitted to do so.

8. The respondent relies on the decision in **Krishna Kumar v. UOI,** (1990) 4 SCC 207, to demonstrate that an option once exercised under the above OM, and the dead line for exercising such option having expired, the employee has no right to change from one scheme to other.

9. It is also relevant, at this stage, to consider the findings of the Tribunal which rejected the petitioners' arguments of fresh appointment and observed that though the petitioners were selected on the basis of direct recruitment yet all the contributions made under the CPF scheme in their past service in the NCERT and future accretions would accrue to the same account. The Tribunal, therefore, found that there was only a technical break in service and as such the petitioners cannot be treated as a new entrant to service. Further, the Tribunal also rejected the argument on parity observing that in the case of Professor M.Chandra, she has joined the service of NCERT on the first time and as such was a fresh appointee.

10. In the present case, it is observed that the said Ms M.Chandra had opted for the CPF scheme in her erstwhile organization as well as in 1991 when she was absorbed in the services of the respondent NCERT. This is evident from the document appended at page 188 of the present petition. In this regard the respondent after obtaining the approval of the Ministry of Human Resource Development vide letter No.F.1-47/2006-Sch.4 dated 09.04.2007 on the representation of the said Ms. Chandra permitted her to exercise the option to switch over from CPF to GPF/Pension scheme on two earlier occasions. It is also observed that in the case of the said Ms Pushplata Verma, the incumbent was also governed by the CPF scheme while in her erstwhile department and had been permitted by the appointment letter issued to her to get the benefit of pension-cum-gratuity as per the rules of the Council.

11. In the present case, it is observed that in the backdrop of the aforesaid facts, deeming the petitioners be governed by CPF scheme even when it was not in vogue and presuming service conditions of their last service to be applicable upon them, has resulted in a wholly anomalous situation.

12. In view of the fact that the respondent NCERT has permitted similarly placed appointees to switch over to the GPF scheme after being selected through the same recruitment process, a legitimate expectation is raised in favour of the petitioners to be treated in a similar manner. The expectation is further accentuated when the said appointees were permitted to derive the benefit of GPF scheme despite having exercised the option of CPF scheme even after they were absorbed in the service of the respondent NCERT.

13. Therefore, when similarly placed employees of the respondent have been extended the benefit, it would be unreasonable and improper to deny to the petitioners the benefit of the GPF/Pension scheme merely because they were earlier engaged in the service of the respondent NCERT. In this behalf we must observe that the petitioners had been put on probation for a period of two years subsequent upon their appointment to the relevant post in PSSCIVE, Bhopal. The Tribunal failed to appreciate that it is settled law that once a person is appointed to a substantive post through direct recruitment in an open selection after competing with internal and external candidates the appointment on the said post is a fresh appointment. Therefore, in our opinion, the petitioners have been subjected

to hostile discrimination, although they were appointed by the same recruitment procedure as others, only because they were working with one of the establishments of the respondent earlier. In our view the same constitutes unequal treatment amongst equals and is violative of Article 14 of the Constitution of India.

14. We, accordingly, allow the writ petitions and set aside the order of the Tribunal. Consequently, the respondents are directed to extend all the benefits of the GPF/Pension Scheme after making necessary deductions to both the petitioners. No costs.

ILR (2013) II DELHI 1465
CRL. M.C.

MADAN SINGH & ANR. ....PETITIONERS

VERSUS

VEE PEE INTERNATIONAL PVT. LTD. & ORS. ....RESPONDENTS

(G.P. MITTAL, J.)

CRL. M.C. NO. : 2071/2012 DATE OF DECISION: 06.03.2013

Code of Criminal Procedure, 1973—Section 482—Quashing of complaint—Negotiable Instruments Act, 1881—Sections 138 and 141—Complaint—Code of Criminal Procedure Section 251—Notice—Complaint under section 138 NIA—Sought to prosecute as partners—The firm prosecuted through its proprietor/ partner and respondent no.2 prosecuted as proprietor/ partner/authorised signatory—Averred that the firm is a partnership firm and accused no.2 to 5 were its partners were incharge of and responsible for conduct of day to day business—Notice under section 251 Cr. P.C. served on respondent no.3—Stated that his father

and younger brother had nothing to do with the firm and accused Bharat was merely an employee—Petition filed for quashing of the complaint—Pleaded—Documents placed showing that the firm is a proprietorship firm—Not taken into consideration—respondents pleaded that averments contained in the complaint have to be accepted—Documents relied upon by the accused not to be considered while framing charge—Held—Complainant was not sure whether the firm is a proprietorship or a partnership firm—Genuineness of the documents issued by the Government Departments not disputed by respondents—The firm was a proprietorship firm-filing of complaint u/s. 138 with aid of Section 141 not permissible—Proceedings against the petitioner quashed.

Important Issue Involved: The provisions of summary trial enable the Respondent to lead defence evidence by way of an Affidavit and other documents, thus an accused who considers that he has a tenable defence and the case against him was not maintainable, he can enter his plea on the very first day of his appearance and file an Affidavit in his defence.

A Magistrate is not required to record detailed reasons while issuing process.

Defence of an accused is not to be taken into consideration at the time of framing of the charge but at the same time when there are documents of sterling character from an authentic source like a Govt. department whose genuineness is not in dispute the same can be considered by the Court particularly in a summons trial and the proceedings can be stayed as provide under Section 258 of the Code.

In its inherent jurisdiction under Section 482 of the Code the High Court can be persuaded to quash such criminal proceedings where the material produced by the accused is such that would lead to the conclusion that his defence is based on sound, reasonable and indubitable facts; material produced is such, as would rule out and displace the assertion contained in the charges leveled against the accused.

Form 32 deposited with the Registrar of Companies showing that the Director who was prosecuted for being incharge of and responsible for the conduct of the business of the company would be entitled to be discharged, if Form 32 shows that he ceased to be the Director of the company on the date the cheque issued by the drawer was payable.

[Vi Ku]

APPEARANCES:

FOR THE PETITIONER : Mr. Rajesh Gupta, Advocate with Mr. Harpreet Singh, Advocate.

FOR THE RESPONDENTS : Mr. Ritesh Kumar Bahri, Advocate with Mr. Vinay Kumar Gupta, Advocate for R-1. Mr. K.K. Sharma, Advocate for R-2 to R-4. Ms. Jasbir Kaur, APP for the State.

CASES REFERRED TO:

1. *Krishna Murari Lal* vs. *IFCI Factors Ltd.* 2013 (1) JCC (NI) 1.
2. *Rajiv Thapar & Ors.* vs. *Madan Lal kapoor,* Criminal Appeal No.174/2013 decided on 23.01.2013.
3. *Bhushan Kumar & Anr.* vs. *State (NCT of Delhi) & Anr.,* Criminal Appeal No.612/2012 decide on 04.04.2012.
4. *Rajesh Agarwal & Ors.* vs. *State & Ors.* 2010 (3) JCC (NI) 273.
5. *Shri Raj Chawla* vs. *Securities & Exchange Board of India (SEBI) & Anr.* Crl.M.C.3937/2009.
6. *V.Y. Jose & Anr.* vs. *State of Gujarat & Anr.* 2009 I AD (Cr.) (S.C.) 567.
7. *All Carogo Movers (I) Pvt. Ltd.* vs. *Dhanesh Badarmal Jain & Anr.* (2007) 12 SCALE 39.
8. *State of Orissa* vs. *Debendra Nath Padhi* (2005) 1 SCC 568.
9. *State of Orissa* vs. *Debendra Nath Pandhi,* Criminal Appeal No.497/2001 decided on 29.11.2004.
10. *Minakshi Bala* vs. *Sudhir Kumar* (1994) 4 SCC 142.

RESULT: Petition allowed.

G.P. MITTAL, J. (ORAL)

1. The Petitioners invoke the inherent powers of this Court under Section 482 of the Code of Criminal Procedure for quashing of the Complaint under Section 138 of the Negotiable Instruments Act, 1881 (the Act) on the premise that the Petitioners were sought to be prosecuted as Partners of M/s. Dhanlaxmi Fashion whereas infact M/s. Dhanlaxmi Fashion was a Proprietorship Firm. In fact, in the Complaint itself, the firm was prosecuted through its Proprietor/Partner and Respondent No.2 was prosecuted as Proprietor/Partner/Authorized signatory of M/s. Dhanlaxmi Fashion. Thus, although in the title of the Complaint, the Respondent was not sure whether the firm was a Partnership or Proprietorship firm. In Para 3 of the complaint it was averred that M/s. Dhanlaxmi Fashion was a Partnership firm and accused Nos. 2 to 5 were its partners and were in charge of and responsible for the conduct of the day to day business of the firm. It was further stated that accused No.2 (not a Petitioner before this Court) was the signatory of the cheque in question and was also, therefore, liable to be prosecuted. Learned counsel for the Petitioners referring to the reply to the notice under Section 251 Cr.P.C. served upon Respondent No.3, stated that M/s. Dhanlaxmi Fashion was a Proprietorship firm and his father Madan Singh and his younger brother Rajender Rajpurohit had nothing to do with the same and further that accused Bharat who was also prosecuted as partner of M/s. Dhanlaxmi Fashion was merely an employee who had left the job.

2. The learned counsel for the Respondents urges that a host of documents were placed before the Trial Court to prove that M/s. Dhanlaxmi Fashion was a proprietorship firm but the same were not taken into consideration. The learned counsel refers to a letter dated 26.10.2010 written by Respondent Mahender Singh Rajpurohit as Proprietor of M/s. Dhanlaxmi Fashion to his Banker, HDFC Bank, Johri Bazar, Jaipur whereby the payment of the cheque in question was stopped. He has placed on record a copy of the notice given by M/s. Dhanlaxmi Fashion to the Inspector of Shops and Commercial Establishments, whereby the Govt. department was notified that the shop will close on Sunday; the registration certificate of the shop M/s. Dhanlaxmi Fashion with the Inspector Shops and Commercial Establishments and the registration certificate issued to M/s. Dhanlaxmi Fashion by Commercial Taxes Officer, Division Kar Bhawan, Jahalana, Jaipur. In all these documents M/s. Dhanlaxmi Fashion has been described as a proprietorship firm.

3. Learned counsel for the Respondents opposes the Petition for quashing the complaint. Relying on **Rajesh Agarwal & Ors. v. State & Ors.** 2010 (3) JCC (NI) 273; and **Krishna Murari Lal v IFCI Factors Ltd.** 2013 (1) JCC (NI) 1 he urges that at this stage the averments made in the Complaint have to be accepted on its face value and the Petitioners' defence, if any, cannot be considered at this stage.

4. Relying on **Bhushan Kumar & Anr. v. State (NCT of Delhi) & Anr.,** Criminal Appeal No.612/2012 decide on 04.04.2012, the learned counsel for the Respondents submits that while taking cognizance, a Magistrate is not expected to give any explicit reason. Referring to **State of Orissa v. Debendra Nath Pandhi,** Criminal Appeal No.497/2001 decided on 29.11.2004, the learned counsel argues that the documents relied upon by the accused cannot be taken into consideration at the time of framing of the charge.

5. In the case of **Rajesh Agarwal,** a Coordinate Bench of this Court held that the provisions of summary trial enable the Respondent to lead defence evidence by way of an Affidavit and other documents, thus an accused who considers that he has a tenable defence and the case against him was not maintainable, he can enter his plea on the very first day of his appearance and file an Affidavit in his defence. It is also true that a Magistrate is not required to record detailed reasons while issuing process. It is also true as held in **Debendra Nath Pandhi** that defence

of an accused is not to be taken into consideration at the time of framing of the charge but at the same time when there are documents of sterling character from an authentic source like a Govt. department whose genuineness is not in dispute the same can be considered by the Court particularly in a summons trial and the proceedings can be stayed as provide under Section 258 of the Code.

6. In a latest judgment of the Supreme Court in **Rajiv Thapar & Ors. v. Madan Lal kapoor,** Criminal Appeal No.174/2013 decided on 23.01.2013 the Supreme Court after referring to the judgment in **Debendra Nath Pandhi** (relied upon by the learned counsel for Respondent No.1) observed that in its inherent jurisdiction under Section 482 of the Code the High Court can be persuaded to quash such criminal proceedings where the material produced by the accused is such that would lead to the conclusion that his defence is based on sound, reasonable and indubitable facts; material produced is such, as would rule out and displace the assertions contained in the charges leveled against the accused. Para 22 of the report is extracted hereunder:-

> "22. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 of the Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 of the Cr.P.C., at the stages referred to hereinabove, would have far reaching consequences, inasmuch as, it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 of the Cr.P.C. the High Court has to be fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled

by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/ complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice."

7. Turning to the facts of the instance case, I may mention that the complaint under Section 138 of the Act was preferred on 31.01.2011. Respondent No.1 was either not sure whether M/s. Dhanlaxmi Fashion was a proprietorship firm or was a partnership firm or he intentionally tried to create confusion by mentioning M/s. Dhanlaxmi Fashion as a proprietorship/partnership firm. Thus, as stated earlier in the title of the complaint he mentioned M/s. Dhanlaxmi Fashion through its Proprietor/ Partner. The genuineness of the documents filed by the Petitioners, particularly, the documents issued by Shops and Commercial Establishments Department and Commercial Tax Officers, Jaipur were not disputed by the Respondents.

8. In **Shri Raj Chawla v. Securities & Exchange Board of India (SEBI) & Anr.** Crl.M.C.3937/2009 decided on 12.01.2010, a Coordinate Bench of this Court relying on Form 32 deposited with the Registrar of Companies (ROC) showing that the Director who was prosecuted for being incharge of and responsible for the conduct of the business of the company would be entitled to be discharged, if Form 32 shows that he ceased to be the Director of the company on the date the cheque issued by the drawer was payable. Relying on the judgment of the Supreme Court in **All Cargo Movers (I) Pvt. Ltd. v. Dhanesh Badarmal Jain & Anr.** (2007) 12 SCALE 39; **V.Y. Jose & Anr. v. State of Gujarat & Anr.** 2009 1 AD (Cr.) (SC) 567; and **Minakshi Bala v. Sudhir Kumar** (1994) 4 SCC 142, the learned Single Judge observed as under:-

11. In **All Carogo Movers (I) Pvt. Ltd. Vs. Dhanesh Badarmal**

Jain & Anr. (2007) 12 SCALE 39, the Hon'ble Supreme Court observed as under:-

"It is one thing to say that the Court at this juncture would not consider the defence of the accused but it is another thing to say that for exercising the inherent jurisdiction of this Court, it is impermissible also to look to the admitted documents."

In **V.Y. Jose & Anr. Vs. State of Gujarat & Anr.** 2009 I AD (Cr.) (S.C.) 567, the Hon'ble Supreme Court has observed as under:-

"It is one thing to say that a case has been made out for trial and as such the criminal proceedings should not be quashed but it is another thing to say that a person should undergo a criminal trial despite the fact that no case has been made out at all."

In **Minakshi Bala v. Sudhir Kumar** (1994) 4 SCC 142, the Hon'ble Supreme Court, inter alia, observed as under in para 7 of the judgment:

"7. If charges are framed in accordance with Section 240 Cr.P.C. on a finding that a prima facie case has been made out - as has been done in the instant case - the person arraigned may, if he feels aggrieved, invoke the revisional jurisdiction of the High Court or the Sessions Judge to contend that the charge-sheet submitted under Section 173 Cr.P.C. and documents sent with it did not disclose any ground to presume that he had committed any offence for which he is charged and the revisional court if so satisfied can quash the charges framed against him. To put it differently, once charges are famed under Section 240 Cr.P.C. the High Court in its revisional jurisdiction would not be justified in relying upon documents other than those referred to in Section 239 and 240 Cr.P.C.; nor would it be justified in invoking its inherent jurisdiction under Section 482 Cr.P.C. to quash the same except in those rare cases where forensic exigencies and formidable compulsions justify such a course. We hasten to add even in such exceptional cases

the High Court can look into only those documents which are unimpeachable and can be legally translated into relevant evidence."

The above-referred observations in the Hon'ble Supreme Court in the case of **Minakshi Bala** (supra) were considered by the Hon'ble Court in **State of Orissa vs. Debendra Nath Padhi** (2005) 1 SCC 568 and the Hon'ble Court, inter alia, observed as under:

"It is evident from the above that this Court was considering the rare and exceptional cases where the High Court may consider unimpeachable evidence while exercising jurisdiction for quashing under Section 482 of the Code. In the present case, however, the question involved is not about the exercise of jurisdiction under Section 482 of the Code where alongwith the petition the accused may file unimpeachable evidence of sterling quality and on that basis seek quashing, but is about the right claimed by the accused to produce material at the stage of framing of charge."

Thus, there can be no valid legal objection to considering the certified copy of Form-32 issued by Registrar of Companies correctness of which is unimpeachable and which can be otherwise be read in evidence without any formal proof.

12. A criminal trial is a serious matter, having grave implications for an accused, who not only has to engage a lawyer and incur substantial expenditure on defending him, but, has also to undergo the ordeal of appearing in the Court on every date of hearing, sacrificing all his engagements fixed for that day. If he is in business or profession, he has to do it at the cost of affecting his business or profession, as the case may be. If he is in service, he has to take leave on every date of hearing. Besides inconvenience and expenditure involved, a person facing criminal trial undergoes constant anxiety and mental agony, as the sword of possible conviction keeps hanging on his head throughout the trial. Therefore, when there is a reasonably certainty that the trial is not going to result in conviction, it would be neither fair nor reasonable to allow it to proceed against a person such as the

petitioner in this case."

9. Keeping in view the fact that Respondent No.1 himself is wavering whether M/s. Dhanlaxmi Fashion was a Proprietorship or a partnership firm and in view of the documents issued by Govt. Deptt. as stated earlier, it is evident that M/s. Dhanlaxmi Fashion was a proprietorship firm whereof Mahender Singh Rajpurohit was the proprietor. Thus, the filing of the Complaint under Section 138 with the aid of Section 141 of the Act on the premise that the Petitioners were the partners of M/s. Dhanlaxmi Fashion was not permissible.

10. Thus, the orders dated 06.03.2012 and 26.03.2012 passed in Complaint Case Nos.126/2011 and 127/2011 and the proceedings arising therefrom as against the Petitioners are quashed.

11. Pending Applications also stand disposed of.

ILR (2013) II DELHI 1474
CRL. M.C.

SAKET AGGARWAL ....PETITIONER

VERSUS

DIRECTORATE OF REVENUE ....RESPONDENT

(G.P. MITTAL, J.)

CRL. M.C. NO. : 1752/2012 DATE OF DECISION: 06.03.2013

Code of Criminal Procedure, 1973—Section 482—Quashing of complaint—Indian Penal Code, 1860 (IPC)—Sections 174 and 175—Customs Act, 1968—Section 108—M/s. Kartik Traders imported 22400 kg and 400 kg medical herb—Reached Inland Container Depot Tuglakabad on 07.01.2008—Examined by the officials of DRI on 08.01.2008—Petitioner summoned to appear on 11.01.2008—Petitioner out of town—Expressed his

inability to appear on that day—Expressed his willingness to appear after 5-7 days—Another summons issued for appearance on 22.01.2008—Petitioner sought 10 days time—Complaint filed under section 174 and 175 IPC—Alleged intentionally omitted to appear and failed to produce documents though legally bound to appear and produce the documents—Summoned to appear vide order dated 16.07.2011—Petitioner u/s. 482 Cr. P.C. filed to quash the complaint—Plea taken u/s. 108 Customs Act only a Gazetted Officer of customs duly empowered by the Central Government in this behalf is competent to issue summons—Notification dated 20.08.2008 whereby the words 'duly empowered by the Central Government in this behalf omitted came into force on 10.05.2008—The custom officer who issued the summons on 11.01.2008 and 22.01.2008 was not duly empowered by the Central Government—Not competent to issue the summons—Held an action punishable retrospectively by an amendment in the Statute hit by Art. 20 of the Constitution of India—Complaint and summoning order dated 16.07.2011 quashed.

Important Issue Involved: Although by retrospective legislation the legislature can confer a procedural competency on an officer, however, an act or omission cannot be made punishable as an offence unless the competency exists on the day when the offence is committed.

[Vi Gu]

APPEARANCES:

FOR THE PETITIONER : Mr. Mohit Mathur with Mr. Vikram Bajaj, Advocates.

FOR THE RESPONDENT : Mr. Satish Aggarwala, Advocate.

CASES REFERRED TO:

1. *Rakesh Kumar Goyal* vs. *NCT of Delhi & Anr.,* 2012 V AD (Delhi) 505.
2. *State of Haryana & Ors.* vs. *Bhajan Lal & Ors.* 1992 Supp(1) SCC 335.
3. *Calder* vs. *Bull* (1798) 3 Dallas 386; 1 Law Ed 648 at p. 649 (F).
4. *Rao Shiv Bahadur Singh and Anr.* vs. *State of Vindhya Pradesh* AIR 1953 SC 394.
5. *Khota Ram and Ors.* vs. *Emperor,* 6 (1907) Crl.L.J. 107.
6. *Phillips* vs. *Eyre,* (1870) 6 Q.B. 1, at pp 23 and 25 (D).

RESULT: Petition allowed.

G.P. MITTAL, J. (ORAL)

1. Aggrieved by an order dated 16.07.2011 passed by the learned Additional Chief Metropolitan Magistrate (ACMM), New Delhi, the Petitioner seeks to invoke the inherent powers of this Court under Section 482 of the Code of Criminal Procedure (Code) to set aside the summoning order and quashing of the complaint for an offence punishable under Section 174 and 175 of Indian Penal Code(IPC).

2. As per the averments made in the Petition, one M/s. Kartik Traders having its office at S-27, Brindavan Garden, Sahibabad imported 22400 kgs of 'dry medicinal herb material Inula Racemosa' and 400 kgs of 'dry medicinal herb material Chinese Ginseng' which arrived at Inland Container Depot(ICD) Tuglakabad on 07.01.2008. The officials of DRI after receipt of certain information that the importer was importing some restricted items examined the said consignment on 08.01.2008 in presence of the proprietor of Kartik Traders, his custom house agent, two independent witnesses and officers of Wildlife Crime Control Bureau. The Petitioner was summoned by the Customs Officer to appear before him on 11.01.2008 along with all import and sale documents for the last five years in respect of earlier said M/s. Kartik Traders. The summons were handed over to the father of the Petitioner on 11.01.2008 at about 2:00 am. Since the Petitioner was out of town, he wrote a letter to the Respondent and expressed his inability to appear on 11.01.2008. However, the Petitioner showed his willingness to appear after 5-7 days. Another summons were issued for the Petitioner's appearance on 22.01.2008 at 2:00 pm. The Petitioner again sought 10 days time as his wife was not

keeping good health and was under medication. The instant complaint under Sections 174 and 175 of the Indian Penal Code(IPC) was filed by the Respondent against the Petitioner on the ground that the Petitioner had committed an offence punishable under Sections 174 and 175 IPC as he intentionally omitted to appear before a public servant although he was to appear before the Respondent in pursuance of the summons. Similarly, violation of the provision of Section 175 IPC was alleged on the ground that the Petitioner being legally bound to produce or deliver all documents failed to produce the same.

3. A short submission raised by Mr. Mohit Mathur, the learned counsel for the Petitioner is that it is admitted case of the parties that as per the provision of Section 108 of the Customs Act, 1962, as it was in force at the time of issuance of the earlier said summons, only a Gazetted Officer of Customs duly empowered by the Central Government in this behalf was entitled to summon any person or to produce documents or other things which were necessary for any inquiry by the said officer under the Customs Act. However, as per the M.F.(D.R.) Notification No.8/2008-Cus.(N.T.) dated 20th February, 2008 issued by the Government of India which came into force on 10.05.2008, the words 'duly empowered by the Central Government in this behalf' were omitted w.e.f. 13.07.2006. Thus, as per the provision of Section 108 of the Act which was in force at the time of issuance of the summons for appearance of the Petitioner and production of documents for 11.01.2008 and 22.01.2008, the customs officer who issued the summons was not duly empowered by the Central Government in this behalf. Thus, he was not entitled to issue the summons under Section 108 of the Act. However, by virtue of the amendment in Section 108 of the Act which came into force retrospectively w.e.f. 13.07.2006, he got an authority to issue the summons as required under Section 108 of the Act. The only question for determination is whether on account of the retrospective amendment in Section 108 of the Act, the Petitioner could be prosecuted under Sections 174 and 175 IPC?

4. This question is answered by a judgment of a Co-ordinate Bench of this Court in **Rakesh Kumar Goyal v. NCT of Delhi & Anr.,** 2012 V AD (Delhi) 505 where this Court held that although by retrospective legislation the legislature can confer a procedural competency on an officer, however, an act or omission cannot be made punishable as an offence unless the competency exists on the day when the offence is

committed. Paras 6 to 13 of Rakesh Kumar Goyal are extracted hereunder:

> "6. It may be noted that prior to the amendment on 13th July, 2006 Section 108 of the Customs Act enabled any Gazetted officer of Customs to summon any person to give evidence. By Section 25 of the Taxation Laws Amendment Act, 2006 Section 108 of the Customs Act was amended with effect from 13th July, 2006 and it entitled a Gazetted officer of Customs specifically empowered by the Central Government in this behalf to summon a person, to give evidence or produce documents. By M.F.(D.R.) Notification No. 8/2008-Cus.(N.T.) dated 20th February, 2008 Central Government empowered all Gazetted officers of the Customs for the purpose of Section 108 of the Customs Act. By Section 69 of the Finance Act, 2008 Section 108 (1) of the Act was amended so as to remove the words "duly empowered by the Central Government in this behalf". This Finance Act came into force on 10th May, 2008 however the amendment was made retrospectively with effect from 13th July, 2006. It would be thus evident that when the summons were issued, Respondent No.2 was not empowered by the Central Government to summon a person, to give evidence or produce documents under Section 108 of the Customs Act. This empowerment was conferred on 20th February, 2008, and thereafter the words "duly empowered by the Central Government in this behalf" were deleted on 10th May, 2008 with retrospective effect from 13th July, 2006.
>
> 7. The issue before this Court is whether this retrospective amendment brought by Section 69 of the Finance Act though procedurally can empower an officer to summon retrospectively, however can retrospectively create an offence for non-compliance of the summons issued under Section 108 of the Customs Act. All the summons issued to the Petitioner i.e. on 12th June, 2006, 3rd July, 2006, 3rd November, 2006, 10th January, 2007, 2nd April, 2007, 21st May, 2007 and finally on 10th July, 2007 were issued when Respondent No.2 was not duly authorized to issue summons. Even on the date when the cognizance of the offences under Sections 174/175 IPC was taken by the Learned ACMM on the complaint of Respondent No.2, the Respondent No.2 was not authorized to issue summons to a person to give evidence or to produce documents. The retrospective amendment by Section

69 of the Finance Act, 2008 can ex-post facto ratify the acts of officers in issuing summons under Section 108 of the Customs Act, however cannot make them liable for the offence for the non-compliance thereof because when the non-compliance of the summons was done the same was not an offence. It is well settled that by a retrospective amendment no offence can be created as the same is contrary to Article 20 of the Constitution of India.

8. A plain reading of Section 108 of the Customs Act shows that the offence is attracted only if a summon being issued by the officer duly authorized in this behalf is intentionally disobeyed. Thus, violation or avoidance of summons issued by an officer who is not authorized or competent to issue the same cannot sustain a conviction under Section 174/175 IPC. Dealing with this issue in Shiam Lal Vs. Emperor. 15 (1914) Crl.L.J. 595 it was held that:

> "Shiam Lal has been convicted under Section 174 of the Indian Penal Code and sentenced to a fine of Rs. 30. The case has been submitted to this Court by the Additional Sessions Judge with the recommendation that the conviction and sentence be set aside. It appears that a decree was transferred to the Collector by the Civil Court for execution inasmuch as the property to be sold was ancestral property. In the course of the proceedings held in this execution case a Tahsildar, who is an Assistant Collector of the second Class, issued a summons to Shiam Lal to attend his Court in order to enable the Tahsildar to ascertain whether there was any incumbrance on the property ordered to be sold. Shiam Lal did not attend and thereupon he was prosecuted and sentenced as stated above. In order to sustain a conviction under Section 174 it must be shown that the summons issued was issued by a public servant legally competent as such public servant to issue the same and the accused intentionally omitted to attend in pursuance of the summons. In this case under the rules framed by the Local Government in regard to the sale of ancestral land, the Collector is empowered to summon any person whom he thinks it necessary to summon for

> the purpose of ascertaining the matters to be specified in the proclamation of sale and under rule 44 he can delegate his powers only to an Assistant Collector of the first Class. He could not delegate his authority to an Assistant Collector of the second class and, therefore, the Tahsildar, was not legally competent to issue the summons which Shiam Lal did not obey. Furthermore, in this case there is nothing to show that the non-compliance with the summons was intentional. Under these circumstances the conviction of Shiam Lal was illegal. I accordingly set it aside and direct that the fine imposed on him, if paid, be refunded."

9. In **Khota Ram and Ors. Vs. Emperor,** 6 (1907) Crl.L.J. 107 it was held:

> "There is nothing in the Revenue Act authorizing the issue of such summons. Section 149 of that Act only provides for the attendance of persons within the limits of the estate within which they reside.
>
> **Queen-Empress v. Subanna** (1) shows that in the Madras Presidency there is an act III of 1869, giving power to issue summons for attendance of persons for purposes connected with the Revenue administration, but there is no such Act in the Punjab.
>
> **Crown v. Kashi Ram** (2) and **Crown v. Kuria** (3), show that arbitrators cannot be such be required to attend Court, and **Ghulam Khan v. Empress** (4) decided that it had not been shown that the attendance of a lambardar for the purpose of appointing a village chaukidar could be legally enforced.
>
> We are of opinion that the Tahsildar was not legally competent to issue summons for the attendance in Court of those munsifs, and we set aside the convictions and sentences. The fines, if paid, will be refunded."

10. It is well settled that though by a retrospective legislation, the Legislature can confer a procedural competency on an officer, however an act or omission is not punishable as an offence unless it existed on the day when it was committed. In **Rao Shiv**

Bahadur Singh and Anr. Vs. State of Vindhya Pradesh AIR 1953 SC 394, the Constitution Bench of the Hon'ble Supreme Court held:

> "7. The next and the only serious question that arises in this case is with reference to the objections raised in reliance on Art. 20 of the Constitution. This question arises from the fact that the charges as against the two appellants, in terms, refer to the offences committed as having been under the various sections of the Indian Penal Code as adapted in the United States of Vindhya Pradesh by Ordinance No. 48 of 1949. This Ordinance was passed on 11-9-1949, while the offences themselves are said to have been committed in the months of February, March and April, 1949, i.e., months prior to the Ordinance. It is urged therefore that the convictions in this case which were after the Constitution came into force are in respect of an ex post facto law creating offences after the commission of the acts charged as such offences and hence unconstitutional. This contention raises two important questions, viz., (1) the proper construction of Article 20 of the Constitution and (2) whether the various acts in respect of which the appellants were convicted constituted offences in this area only from the date when Ordinance No. 48 of 1949 was passed or were already so prior thereto.
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> 8. Article 20(1) of the Constitution is as follows :
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> "No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."
>
> This Article, in its broad import has been enacted to prohibit convictions and sentences under ex post facto laws. The principle underlying such prohibition has been very elaborately discussed and pointed out in the very learned judgment of Justice Willes in the well known case of **'Phillips v. Eyre',** (1870) 6 Q.B. 1, at pp 23 and 25 (D),

> and also by the Supreme Court of U'S.A. in **'Calder v. Bull'** (1798) 3 Dallas 386; 1 Law Ed 648 at p. 649 (F).]. In the English case it is explained that ex post facto laws are laws which voided and punished what had been lawful when done. There can be no doubt as to the paramount importance of the principle that such ex post facto laws, which retrospectively create offences and punish them are bad as being highly inequitable and unjust. In the English system of jurisprudence repugnance of such laws to universal notions of fairness and justice is treated as a ground not for invalidating the law itself but as compelling a beneficent construction thereof where the language of the statute by any means permits it. In the American system, however, such ex post facto laws are themselves rendered invalid by virtue of Art. 1, Ss. 9 and 10 of its Constitution. It is contended by the learned Attorney-General that Art. 20 of the Constitution was meant to bring about nothing more than the invalidity of such ex post facto laws in the post-Constitution period but that the validity of the pre-Constitution laws in this behalf was not intended to be affected in any way."

11. Thus, by revival of the procedure the officer can be made competent to issue summons however it cannot make the act an offence which was not an offence when it was allegedly committed in view of the want of competency of the officer issuing summons. No offence having been committed at the time when it is alleged, the Petitioner cannot be prosecuted for an offence by giving retrospective competence to the officer issuing summons.

12. The contention of the Learned Additional Solicitor General that this Court will not decide the issue regarding the competency of the officer to issue summons at the relevant time and thus the violation thereof being an offence as the same would be an issue to be decided during trial and in exercise of its power under 482 Cr.P.C. this Court by considering the same will not quash the criminal proceedings pending before the Learned Trial Court deserves to be rejected. In **State of Haryana & Ors. Vs. Bhajan Lal & Ors.** 1992 Supp(1) SCC 335 the Court considered in

detail and summarized the legal position by laying down the following guidelines to be followed by the High Court in exercise of its inherent powers to quash criminal complaint.

> "102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extra-ordinary power under Article 226 or the inherent powers Under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised. 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.
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>
> 7.. ...

> 104. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the F.I.R. or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice."

13. It may be noted that the competence of issuing summons by the officer is sine-qua-non for a valid summon. In the absence of a valid summon the violation thereof cannot be an offence and even taking the allegations in the complaint as they are, no offence is made out. In such a situation this Court is duty bound to exercise its jurisdiction under Section 482 Cr.P.C. and not relegate the Petitioner to the trial."

5. I do agree that making an action punishable retrospectively by an amendment in the Statute would be hit by Article 20 of the Constitution of India. In view of this, the complaint under Sections 174 and 175 IPC and the summoning order dated 16.07.2011 are hereby quashed.

6. Pending Applications stand disposed of.

ILR (2013) II DELHI 1485
CRL. M.C.

ASHOK KUMAR ....PETITIONER

VERSUS

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

(G.P. MITTAL, J.)

CRL. M.C. NO. : 987/2013 DATE OF DECISION: 08.03.2013

Code of Criminal Procedure, 1973—Section 482 inherent powers—Section 311—Recalling of witness—Application for recalling PW4 Dr. P.C. Prabhakar for further cross examination—Alleged discrepancies in the testimonies of PW4 and PW13 (I.O.)—Held—PW4 cross examined at length—Contradiction in the testimony of two witness—No ground for recalling PW4—Application dismissed aggrieved petitioner/applicant filed the petition for quashing the order—Held—Petitioner was at liberty to challenge the testimony of PW4 by putting appropriate questions in cross examination—Power u/s. 311 has to be exercised when a specified justification is shown for recalling for witness application rightly—Petition dismissed.

Important Issue Involved: The inherent powers under section 482 of the Code conferred on the High Court to use such powers as may be necessary to

—give effect to an order under the code;

—prevent abuse of the process of the Court, and

—to secure the ends of justice.

—The inherent powers under section 482 of the Code have to be exercised sparingly, carefully and with caution and not as a matter of routine.

—Section 311 of the Code confers vide powers on every Court to examine, recall, re-examine any person already examined for just decision of the case.

—Section 311 is divisible in two parts. In the first part discretion is given to the Court and enables it at any stage of an inquiry, trial or other proceedings under the code.

—to summon anyone as a witness, or

—to examine any person in the court, or

—to recall and re-examined any person whose evidence has already been recorded.

—The second part appears to be mandatory and requires the Court to take any of these steps it the new evidence appears essential to it for the just decision of the case.

—Section 311 is couched in the widest possible terms but the powers have to be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts and for just decision of the case. The Court is under obligation to take the due care and caution while exercising these powers.

—The main purpose behind conferring this power (u/s. 311 of the Code) is to do justice between the parties irrespective of the fact whether any party produces any evidence within its power and position. The power to recall, re-examine the witness already examined has also been conferred with that very object in view.

—Although the Court has very wide powers under section 311 of the Code yet, the powers have to be exercised to recall any witness only when a specified justification is shown for recalling the witness.

[Vi Ku]

APPEARANCES:

FOR THE PETITIONER : Mr. Sunil Ahuja, Advocate.

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

CASE REFERRED TO:

1. *Mohanlal Shamji Soni* vs. *Union of India & Anr.,* 1991 Supp (1) SCC 271.

RESULT: Petition dismissed.

G.P. MITTAL, J.

(ORAL) CRL MA 3059/2013 (Exemption)

Exemption allowed, subject to all just exceptions. The Application is allowed.

CRL. M.C. 987/2013

1. The Petitioner invokes the inherent powers of this Court under Section 482 of the Code of Criminal Procedure (the Code) and seeks opportunity to recall PW-4 Dr. P.C. Prabhakar for further cross-examination.

2. The ground taken up by the Petitioner for recalling PW-4 is that there are discrepancies in the testimonies of PW-4 and PW-13 viz. PW-4 examined the prosecutrix and observed bruises and scratches around the neck and front of chest, small abrasions over lower lip whereas PW-13 (IO) in his cross-examination stated that he did not observe any external injury on the person of the prosecutrix.

3. The learned Additional Sessions Judge ('ASJ') dismissed the application under Section 311 of the Code on the premise that PW-4 Dr. P.C. Prabhakar was cross examined at length on 17.10.2012. Simply because there were contradictions in the testimony of two witnesses, it was not permissible to recall PW-4 for the purpose of cross-examination.

4. The inherent powers under Section 482 of the Code have been conferred on the High Court to use such powers as may be necessary (i) to give effect to an order under the Code; (ii) to prevent abuse of the process of the Court; and (iii) otherwise to secure the ends of justice. It is well settled that the inherent powers under Section 482 of the Code have to be exercised sparingly, carefully and with caution and not as a matter of routine.

5. Section 311 of the Code confers wide powers on every Court to examine, recall, re-examine any person already examined for just decision of the case. This Section is devisible in two parts. In the first part discretion is given to the Court and enables it at any stage of an inquiry, trial or other proceedings under the Code, (a) to summon anyone as a witness, or (b) to examine any person in the Court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part appears to be mandatory and requires the Court to take any of the steps mentioned above if the new evidence appears essential to it for the just decision of the case.

6. Section 311 is couched in the widest possible terms but the powers have to be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts and for just decision of the case. The unbridled exercise of the power may lead to undesirable results. Therefore, the Court is under obligation to take due care and caution while exercising these powers. In **Mohanlal Shamji Soni v. Union of India & Anr.,** 1991 Supp (1) SCC 271, the Supreme Court dealt with the scope and the purpose of conferring powers under Section 311 of the Code. In Paras 9 and 10 it observed as under:-

> "9. The very usage of the words such as 'any court', 'at any stage', or 'of any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that this section is expressed in the widest possible terms and do not limit the discretion of the court in any way. However, the very width requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised

judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow for any discretion but it binds and compels the court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the just decision of the case.

10. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. Nonetheless if either of the parties withholds any evidence which could be produced and which, if produced, be unfavourable to the party withholding such evidence, the court can draw a presumption under Illustration (g) to Section 114 of the Evidence Act. In such a situation a question that arises for consideration is whether the presiding officer of a court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? .... ."

7. Thus, the main purpose behind conferring this power is to do justice between the parties irrespective of the fact whether any party produces any evidence within its power and position. Similarly, the power to recall, re-examine the witnesses already examined has also been conferred with that very object in view.

8. In the instance case, PW-4 Dr. P.C. Prabhakar was examined on 17.10.2012. He was cross-examined on that very day, without any demur by the defence. From the examination-in-chief as well as the MLC Ex.PW-4/A it can be seen that the doctor did notice some injuries on the person of the prosecutrix. The Petitioner was at liberty to challenge the doctor's

testimony by putting appropriate questions in cross-examination. The effect of the contradictions, if any is to be analyzed by the Court at the final stage. The learned ASJ, in the circumstances, declined to recall PW-4 for the purpose of further cross-examination.

9. Although, the Court has very wide powers under Section 311 of the Code yet, as stated above, the powers have to be exercised to recall any witness only when a specified justification is shown for recalling the witness. The learned ASJ rightly exercised his discretion in dismissing the application under Section 311 of the Code. It does not call for any interference in exercise of the inherent powers of this Court under Section 482 of the Code.

10. The Petition is accordingly dismissed.

ILR (2013) II DELHI 1490
W.P. (C)

DINESH UNIYAL **....PETITIONER**

VERSUS

UNION OF INDIA & ANR. **....RESPONDENTS**

(GITA MITTAL & J.R. MIDHA, JJ.)

W.P. (C) NO. : 8439/2011 **DATE OF DECISION: 13.03.2013**

Constitution of India, 1950—Article 226—Recruitment Guidelines—Disciplinary Proceedings—Brief Facts—An advertisement issued in September 2000 for recruitment of Constables/General Duty (CT/GD) in the Central Reserve Police Force (CRPF)—Petitioner posted at Lucknow and was initially inducted as a member of the Lucknow Recruitment Board—Petitioner

assigned specific duties to the various members of the Lucknow Recruitment Board vide a communication dated 19th December, 2003—A merit list compiled by the Recruitment Board was sent on 29th February, 2004 to the ADIGP, CRPF for his scrutiny as per instructions—One day after the submission of the merit list, the ADIGP gave directions on 1st March, 2004 for dispersal of the Recruitment Board and returned the members to their respective units—Instant case raises a controversy with regard to the interpretation of Clause XV(C) of the Recruitment Guidelines issued by the Directorate General, CRPF on 9th September, 2000 and the implementation thereof—Clause (C) stipulated that the result of all the shortlisted candidates who were medically examined and interviewed shall be compiled on the last day of the recruitment programme by each center and category wise merit lists for each centre would be prepared by the recruitment board authority of the centre in a state designated by ADG Zone/IGP sector—Petitioner with Sh. C.M. Thomas had compiled such result of the Lucknow Recruitment Board which was sent to the ADIGP on 29th February, 2004—No objections were received with regard to the compilation submitted by the Lucknow Recruitment Board which was presided over by the petitioner—A charge sheet dated 18th May, 2007 was issued to the Petitioner whereby it was alleged that while posted and functioning as Presiding Officer of the rectt. Board of Ct/GD Male/Female at GC, CRPF, Lucknow centre held during December 2003 to February 2004, Petitioner committed an act of remissness in discharging his duties in that the while preparing and submitting the merit list of selected personnel for enlistment as Ct/GD, ignored the instructions issued in connection with preparation of merit list of short listed candidates, by the Directorate General, CRPF vide letter No. R.II-15/2000-Pers-II dated 09.09.2000, which resulted into

inclusion of 23 unqualified candidates of SC/ST categories in the merit list and issue of offer of appointment to them—Respondents appointed an enquiry officer who after conducting detailed enquiry exonerated the Petitioner of the charges—However Disciplinary Authority disagreed with the findings of enquiry officer and inflicted the penalty of withholding of one increment for a period of one year without cumulative effect—Petitioner assails the disciplinary proceedings and the punishment awarded to him—It is the contention of the Petitioner that the Petitioner's responsibility was only the compilation of the said list, that too jointly and recommending the same to the ADIGP while the checking of the list as per the instructions was the responsibility of the ADIGP alone. Held—Confusion on correct interpretation of Para XIV and XV of the Dte. Genl., CRPF letter No. R.II.15/2000-Pers-II dated 9/9/2000, which persisted not only in the mind of Lucknow Board members, but also in the Rampur and Allahabad Board members, led to inclusion of 23 candidates having less than cut-off marks in the merit list submitted by the Lucknow Rectt. Board presided by Petitioner and due to non scrutiny of the merit lists submitted by the Lucknow Board at ADIG GC CRPF Lucknow level which was otherwise mandatory before issuing offer of appointment—This led to issuance of offer of appointment to 23 ineligible candidates—Above mistakes cannot be construed as an act of remissness on the part of Petitioner in discharging his duties as Presiding Officer of Rectt. Board—This mistake had occurred only due to different interpretation of ambiguous instructions issued by the Dte.—Further had the scrutiny work at ADIG GC CRPF office level been done, the above mistake could have easily been detected and rectified before issue of offer of appointment to 23 ineligible SC/ST candidates by GC Lucknow—On a consideration of the entire matter and the evidence placed before it, the

enquiry officer held that the charge contained in the Article-1 that charged officer has committed an act of remissions in discharging his duties and has failed to maintain absolute devotion to duty stands not proved.

Mr. Ravi Prakash, learned counsel for the petitioner has drawn our attention to a brief submitted by the presenting officer on 10th March, 2008 to the enquiry officer. The relevant extract of the same is reproduced as under:

> "Inclusion of names of candidates having less than the cut-off marks in the final list were also found in the list of other two Boards in UP who were detailed simultaneously for Rampur and Allahabad centre but those were timely detected and rectified before issue of the offer of appointment which could not be done in the case of Lucknow Board.
>
> 8) CONCLUSION
>
> After going through the above facts at length it may easily be concluded that firstly confusion on correct interpretation of Para XIV and XV of the Dte. Genl, CRPF letter No. R.II.15/2000-Pers-II dated 9/9/2000, which persisted not only in the mind of Lucknow Board members, but also in the Rampur and Allahabad Board members led to inclusion of 23 candidates having less than cut-off marks in the merit list submitted by the Lucknow Rectt. Board presided by Shri Dinesh Uniyal then 21/C 127BN. CRPF (now Commandant 79 BN. CRPF) and secondly due to non scrutiny of the merit lists submitted by the Lucknow Board at ADIG GC CRPF Lucknow level which was otherwise mandatory before issuing offer of appointment. This led to issuance of offer of appointment to 23 ineligible candidates.
>
> Above mistakes cannot be construed as an act of remissness on the part of Shri Dinesh Uniyal the then 21/C 127 BN in discharging his duties as Presiding Officer of the Rectt. Board of CT/GD Male/Female at GC CRPF Lucknow centre held during Dec '2003 to Feb 2004. This mistake had occurred only due to different interpretation of ambiguous instructions issued by the Dte. quoted in above paras. Further had the scrutiny work at ADIG GC CRPF office level been done, the above mistake could have easily been detected and rectified before issue of offer of appointment to 23 ineligible SC/ST candidates by GC Lucknow."
>
> (Emphasis by us) **(Para 10)**

In para 3.2.1 of the advice tendered by the UPSC dated 31st March, 2010 in the case of Sh. Jaidev Kesri, the UPSC has specifically observed that Members of the Board, including the CO, cannot be held responsible for any such discrepancy and that the mistake, occurred not only at level of the Recruitment Board but also subsequently, UPSC makes a reference to the mistake occurring at the first stage thereafter by the order passed by the ADIG on 1st March, 2004 dispersing the Board without ensuring that the proceedings have been drawn up properly and thereafter repeating mistake by issuing offers of appointment to those SC/ST candidates who had secured less than cut off marks of 33% prescribed for appointment—These recommendations were accepted without any reservation by the respondents—The charge against the petitioner was identical to the charge levied against Sh. Jaidev Kesri. The respondents held that Sh. Keshri was not guilty of the charge—In this background, the finding that the petitioner was guilty of misconduct is certainly devoid of any legal merit—The respondents are unable to explain if the Recruitment Board was guilty of misconduct why no proceedings were drawn against Sh. C.M. Thomas and also as to how all other members

of the Board against whom disciplinary proceedings were conducted, have been exonerated of charges—The disciplinary proceedings initiated against him pursuant to a charge sheet dated 18th May, 2007; the disagreement note dated 2nd March, 2009 issued by the disciplinary authority; a final order dated 21st May, 2010 and order dated 9th June, 2011 are hereby set aside—As a result, the petitioner shall be entitled to all consequential reliefs as if the aforesaid orders had never been passed—This writ petition is allowed in the above terms.

We also find that in para 3.2.1 of the advice tendered by the UPSC dated 31st March, 2010 in the case of Sh. Jaidev Kesri, the UPSC has specifically observed that Members of the Board, including the CO, cannot be held responsible for any such discrepancy and that the mistake occurred not only at level of the Recruitment Board but also subsequently, UPSC makes a reference to the mistake occurring at the first stage thereafter by the order 1st passed by the ADIG on March, 2004 dispersing the Board without ensuring that the proceedings have been drawn up properly and thereafter repeating mistake by issuing offers of appointment to those SC/ST candidates who had secured less than cut off marks of 33% prescribed for appointment. These recommendations were accepted without any reservation by the respondents. The charge against the petitioner was identical to the charge levied against Sh. Jaidev Kesri. The respondents held that Sh. Kesri was not guilty of the charge. In this background, the finding that the petitioner was guilty of misconduct is certainly devoid of any legal merit.**(Para 22)**

The respondents are unable to explain if the Recruitment Board was guilty of misconduct why no proceedings were drawn against Sh. C.M. Thomas and also as to how all other members of the Board against whom disciplinary proceedings were conducted, have been exonerated of charges.

(Para 23)

Important Issue Involved: Mere error of judgment or a wrong interpretation of the rules, regulations and guidelines does not tantamount to misconduct within the meaning of the expression in service jurisprudence inviting disciplinary action.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONERS : Mr. Ravi Prakash & Ms. Avni Singh, Advocates.

FOR THE RESPONDENTS : Sh. Saqib Advocate.

CASES REFERRED TO:

1. *R.T. Paramhans* vs. *Union of India & Anr.* WP (C) No.5564/2012.
2. *Bongaigaon Refinery & Petrochemicals Ltd.* vs. *Girish Chandar Sarma,* (2007) 7 SCC 206.
3. *Hardwari Lal Vishal Yadav. State of U.P. & Ors.* (1999) 8 SCC 582.
4. *Zunjarrao Bhikaji Nagarkar* vs. *Union of India and Others,* (1999) 7 SCC 409.
5. *State of Punjab and Others* vs. *Ram Singh Ex-Constable,* (1992) 4 SCC 54.

RESULT: Petition allowed.

GITA MITTAL, J. (Oral)

1. The petitioner in the instant case assails the disciplinary proceedings initiated against him pursuant to a chargesheet dated 18th May, 2007; the disagreement note dated 2nd March, 2009 issued by the disciplinary authority; the advice of the UPSC dated 31st March, 2010 and a final order dated 21st May, 2010 issued by the disciplinary authority holding against the petitioner and imposing the penalty of withholding of one increment for a period of one year without cumulative effect as well as the order dated 9th June, 2011 rejecting the petitioner's statutory memorandum.

2. The facts giving rise to the present petition are within a narrow compass. The instant case is concerned with an advertisement issued in September 2000 for recruitment of Constables/General Duty (CT/GD) in the Central Reserve Police Force (CRPF). The petitioner was posted at Lucknow and was initially inducted as a member of the Lucknow Recruitment Board which was headed by one Sh. Joginder Singh, Commandant. The petitioner's name was included in the Recruitment Board pursuant to an amending order dated 17th December, 2003 whereby he was appointed as the Presiding Officer.

3. The petitioner assigned specific duties to the various members of the Lucknow Recruitment Board vide a communication dated 19th December, 2003. So far as the task of compilation of the result and roll of the merit list of SC/ST/OBC (male/female) was concerned, the petitioner had assigned the same to Sh. C.M. Thomas and himself.

4. A merit list compiled by the Recruitment Board was sent on 29th February, 2004 to the ADIGP, CRPF for his scrutiny as per instructions. It is the contention of the petitioner that the petitioner's responsibility was only the compilation of the said list, that too jointly and recommending the same to the ADIGP while the checking of the list as per the instructions was the responsibility of the ADIGP alone. 5. In the instant case, merely one day after the submission of the merit list, the ADIGP gave directions on 1st March, 2004 for dispersal of the Recruitment Board and returned the members to their respective units.

6. Inasmuch as the instant case raises a controversy with regard to the interpretation of Clause XV(C) of the Recruitment Guidelines issued by the Directorate General, CRPF on 9th September, 2000 and the implementation thereof, for convenience, the same is reproduce extenso and reads as follows:

> "XV FINAL SELECTION
>
> A) The final selection of the candidates will be made in order of merit in each category from each centre separately as per allotment of vacancy.
>
> B) The cut off percentage of marks for appointment will be as under:
>
> General and Ex-servicemen : 35%
>
> SC/ST/OBC : 33%
>
> C) The result of all the shortlist candidates who were medically examined and interviewed shall be compiled on the last day of the recruitment programme by each centre and category wise merit lists for each centre will be prepared by the recruitment board authority of the centre in a state designated by the ADG Zone/IGP sector. These merit list shall be handed over to the Addl. DIG/Principal/Commandant of the designated application receiving centre. Offer of appointment will be issued as per the availability of vacancies in each category in the order of merit from each merit list by the respective Addl. DIG/designated authority. One format each for pre-verification certificate will also be enclosed alongwith the offer of appointment for obtaining the certificate from the designated civil authorities and submission when the candidate report for appointment to the application receiving centre by a stipulated date."

7. It appears that there was no dispute or difficulty at all with regard to the working of the Clauses (A) and (B). Inasmuch as Clause (C) stipulated that the result of all the shortlisted candidates who were medically examined and interviewed shall be compiled on the last day of the recruitment programme by each centre and category wise merit lists for each centre would be prepared by the recruitment board authority of the centre in a state designated by the ADG Zone/IGP sector, the petitioner with Sh. C.M. Thomas had compiled such result of the Lucknow Recruitment Board which was sent to the ADIGP on 29th February, 2004. No objections were received with regard to the compilation submitted by the Lucknow Recruitment Board which was presided over by the petitioner.

8. A chargesheet dated 18th May, 2007 was issued to the petitioner whereby it was proposed to commence disciplinary proceedings against him on the following charge:

> "That the said Shri Dinesh Uniyal, 2 I/C (now Commandant) while posted and functioning as 2 I/C in 127 Bn, CRPF was detailed as Presiding Officer of the rectt. Board of Ct/GD Male/ Female at GC, CRPF, Lucknow centre held during December 2003 to February 2004, committed an act of remissness in discharging his duties in that he while preparing and submitting

the merit list of selected personnel for enlistment as Ct/GD, ignored the instructions issued in connection with preparation of merit list of short listed candidates, by the Directorate General, CRPF vide letter No. R.II-15/2000-Pers-II dated 09.09.2000, which resulted into inclusion of 23 unqualified candidates of SC/ ST categories in the merit list and issue of offer of appointment to them. Thus Shri Dinesh Uniyal, 2 I/C (now Commandant) failed to maintain absolute devotion to duty, thereby violated the Provisions contained in Rule 3(1) (ii) of CCS Conduct Rules, 1964."

9. The petitioner's representation against the same pointing out the above guidelines as well as the fact that he had been singled out for the issuance of the chargesheet and the proposed disciplinary action did not receive a favourable consideration. The respondents appointed an enquiry officer.

10. Mr. Ravi Prakash, learned counsel for the petitioner has drawn our attention to a brief submitted by the presenting officer on 10th March, 2008 to the enquiry officer. The relevant extract of the same is reproduced as under:

"Inclusion of names of candidates having less than the cut-off marks in the final list were also found in the list of other two Boards in UP who were detailed simultaneously for Rampur and Allahabad centre but those were timely detected and rectified before issue of the offer of appointment which could not be done in the case of Lucknow Board.

8) CONCLUSION

After going through the above facts at length it may easily be concluded that firstly confusion on correct interpretation of Para XIV and XV of the Dte. Genl, CRPF letter No. R.II.15/2000-Pers-II dated 9/9/2000, which persisted not only in the mind of Lucknow Board members, but also in the Rampur and Allahabad Board members led to inclusion of 23 candidates having less than cut-off marks in the merit list submitted by the Lucknow Rectt. Board presided by Shri Dinesh Uniyal then 21/C 127BN. CRPF (now Commandant 79 BN. CRPF) and secondly due to non scrutiny of the merit lists submitted by the Lucknow Board at

ADIG GC CRPF Lucknow level which was otherwise mandatory before issuing offer of appointment. This led to issuance of offer of appointment to 23 ineligible candidates.

Above mistakes cannot be construed as an act of remissness on the part of Shri Dinesh Uniyal the then 21/C 127 BN in discharging his duties as Presiding Officer of the Rectt. Board of CT/GD Male/Female at GC CRPF Lucknow centre held during Dec '2003 to Feb '2004. This mistake had occurred only due to different interpretation of ambiguous instructions issued by the Dte. quoted in above paras. Further had the scrutiny work at ADIG GC CRPF office level been done, the above mistake could have easily been detected and rectified before issue of offer of appointment to 23 ineligible SC/ST candidates by GC Lucknow."

(Emphasis by us)

11. It would appear that the presenting officer was also of the view that there was no act of misconduct on the part of the petitioner. On a consideration of the entire matter and the evidence placed before it, the enquiry officer submitted a report dated 7th April, 2008. The relevant extract of the same is reproduced hereunder:

"After going through the above facts in length it may easily be concluded that firstly, confusion on correct interpretation of Para XIV and XV of the Dte. Genl., CRPF letter No. R.II.15/ 2000-Pers-II dated 9/9/2000, persisted not only in the mind of Lucknow Board members, but also in the Rampur and Allahabad Board members, which led the inclusion of 23 candidates having less than cut-off percentage of marks in the final selection list submitted by the Lucknow Rectt. Board, presided by Shri Dinesh Uniyal, then 21/C, 127 Bn, CRPF (now Commandant 79 Bn, CRPF) and secondly due to non scrutiny of the selected lists submitted by the Lucknow Board at the ADIG, GC CRPF Lucknow office, though it was otherwise mandatory before issuing of appointment letter and which ultimately led to issuance of appointment letters to 23 ineligible candidates.

Above mistake never can be declared as an act of remissness on the part of Shri Dinesh Uniyal, then 21/C, 127 Bn in discharge of his duties as Presiding Officer of the Rectt. Board of CT/GD

Male/Female at GC CRPF Lucknow centre held from Dec '2003 to Feb '2004. This mistake occurred only due to different interpretation of instructions issued by Dte. quoted in above paras. Had the scrutiny work at ADIG, GC, CRPF office level been done, above mistake could have easily been detected and rectified.

FINAL ANALYSIS

In my final analysis after assessing the statements of PWs, Exhibits produced and brought on record and also the argument put forth by the charged officer and his defence assistance, it is found that the prosecution has failed to substantiate the charges against the charged officer.

FINDINGS

Having assessed the evidences brought out by the prosecution in the form of Statements/exhibits, replies given by the PWs during cross examination by defence and arguments put forth in the briefs submitted by the PO & DA, I find that:

The charge contained in the Article-1 that charged officer has committed an act of remissions in discharging his duties and has failed to maintain absolute devotion to duty stands not proved."

(Emphasis by us)

12. Unfortunately for the petitioner, the disciplinary authority did not agree with the recommendations of the enquiry officer and issued a tentative disagreement note dated 2nd March, 2009 which was furnished to the petitioner for his comments. The disciplinary authority was of the view that the fact that the same mistake in construction of Clause XV (C) was committed by the Rampur and Allahabad Recruitment Boards was not relevant and also pointing out certain specific recommendations and remarks against candidates which required consideration. The disciplinary authority was of the view that the Recruitment Board at Lucknow had failed to give any remark against the 23 candidates which were erroneously issued offers of appointment in view of the list which had been prepared. The petitioner sent a detailed representation dated 27th March, 2009 pointing out that the compilation which was submitted by the Recruitment Board was required to scrutiny inter alia at the office

of ADIGP. It was also pointed out that even though the action of the Board involved other officers, only the petitioner had been singled out for the disciplinary proceedings.

13. Mr. Ravi Prakash, learned counsel for the petitioner has drawn our attention to the fact that the respondents conducted a departmental enquiry against Sh. Jaidev Kesri one more member of the Lucknow Recruitment Board. With regard to the disciplinary proceedings which were initiated against Sh. Jaidev Kesri, the UPSC had given the following advice vide letter dated 30th March, 2010:

> "3.2.1 However, in terms of the "Notes for meeting regarding recruitment of Ct/GD Male/Female.. The concerned DIGP and Addl. DIGP would ensure that the proceedings have been drawn as per instructions, and only after being satisfied the Boards will be disbursed. Therefore, dispersing the members of the board without scrutiny of board proceedings is contrary to the directions issued by the IGP. These notes also mention that in case discrepancy is found later on, after dispersal of Boards, the concerned ADIG GC would be held responsible. As such, if the merit list was not found correct subsequently then the Members of the Board, including the CO, cannot be held responsible for any such discrepancy. Thus, the mistake occurred not at Board level but only subsequently, firstly by dispersing the Board without ensuring that the proceedings had been drawn properly and secondly by issuing offers of appointment to those SC/ST candidates who had secured less than cut off marks of 33% prescribed for appointment."

(Emphasis supplied)

14. The final order bearing No. D.IX-11(JDK)/2005-CRC dated 25th May, 2010 was issued in the departmental enquiry against Shri Jaidev Kesri whereby the respondents communicated the decision not to impose any penalty on him.

15. We are informed that no enquiry was conducted against Sh. C.M. Thomas who was also a member of the Recruitment Board Lucknow. The other members of the same Board who were party to the drawing up of the merit list who also stood exonerated in the disciplinary proceedings except the petitioner.

16. In the case of the petitioner, the UPSC made 31st recommendations on March, 2010 supporting the point on which the disciplinary authority had disagreed with the report of the enquiry officer. A final order dated 21st May, 2010 was passed by the disciplinary authority holding the charge as having been proved against the petitioner and imposing the penalty of withholding of one increment for a period of one year without cumulative effect.

17. The petitioner submitted a Presidential Memorandum against the order of the disciplinary authority as well as the penalty imposed on him. This Presidential Memorandum was rejected by an order dated 9th June, 2011 resulting in the filing of the present writ petition.

18. The petitioner has contended that the brief of the presenting officer as well as the report of the enquiry officer clearly shows that no case was made out against the petitioner. So far as the construction of the earlier Clause XV (C) of the Recruitment Guideline is concerned, the Boards at Rampur, Allahabad as well as Lucknow interpreted the same identically and no action was taken so far as the Recruitment Boards at Allahabad and Rampur was concerned. The respondents had themselves found that there was ambiguity in the rule resulting in similar error occurring in the Recruitment Board at Lucknow and Rampur.

19. We also find that the respondents have themselves removed the anomaly and amended the guidelines by the circular dated 15th July, 2005 and instruction No.XV(C) has been removed from the guidelines. Learned counsel for the petitioner has drawn our attention to the circular bearing No.R.II.15/2005-Pers.II dated 15th July, 2005 whereby the respondents amended the Recruitment Guidelines and removed the ambiguity in the instructions. Perusal of this circular would show that the respondents had removed instruction XV(C) from the guidelines and the relevant extract thereof reads as follows:

> "XV FINAL SELECTION
>
> A) The final selection of the candidates will be made in order of merit in each category from each centre separately as per allotment of vacancy.
>
> B) The cut off percentage of marks for appointment will be as under:
>
> General and Ex-servicemen : 35%
>
> SC/ST/OBC : 33%"

There is, therefore, substance in the petitioner's contention that the conduct of the petitioner was bonafide and honest.

20. Learned counsel for the petitioner has contended that mere error of judgment or a wrong interpretation of the rules, regulations and guidelines does not tentamount misconduct within the meaning of the expression so far as service jurisprudence is concerned. In support of this contention, reliance is placed on the pronouncement of the Supreme Court reported at (1992) 4 SCC 54 **State of Punjab and Others v. Ram Singh Ex-Constable,** whereby it has observed that:

> "6. Thus it could be seen that the word "misconduct" though not capable of precise definition, on reflection receives its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, wilful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires to maintain strict discipline. Laxity in this behalf erodes discipline in the service causing serious effect in the maintenance of law and order."

21. To buttress the submission that wrong interpretation of a rule or regulation would not tentamount to misconduct inviting disciplinary action, learned counsel for the petitioner has placed reliance on the pronouncement of the Supreme Court reported at (1999) 7 SCC 409, **Zunjarrao Bhikaji Nagarkar v. Union of India and Others,** wherein the Court held as follows:

> "43. If every error of law were to constitute a charge of misconduct, it would impinge upon the independent functioning of quasi-judicial officers like the appellant. Since in sum and substance misconduct is sought to be inferred by the appellant

having committed an error of law, the charge-sheet on the face of it does not proceed on any legal premise rendering it liable to be quashed. In other words, to maintain any charge-sheet against a quasi-judicial authority something more has to be alleged than a mere mistake of law, e.g., in the nature of some extraneous consideration influencing the quasi-judicial order. Since nothing of the sort is alleged herein the impugned charge-sheet is rendered illegal. The charge-sheet, if sustained, will thus impinge upon the confidence and independent functioning of a quasi-judicial authority. The entire system of administrative adjudication whereunder quasi-judicial powers are conferred on administrative authorities, would fall into disrepute if officers performing such functions are inhibited in performing their functions without fear or favour because of the constant threat of disciplinary proceedings.

22. We also find that in para 3.2.1 of the advice tendered by the UPSC dated 31st March, 2010 in the case of Sh. Jaidev Kesri, the UPSC has specifically observed that Members of the Board, including the CO, cannot be held responsible for any such discrepancy and that the mistake occurred not only at level of the Recruitment Board but also subsequently, UPSC makes a reference to the mistake occurring at the first stage thereafter by the order 1st passed by the ADIG on March, 2004 dispersing the Board without ensuring that the proceedings have been drawn up properly and thereafter repeating mistake by issuing offers of appointment to those SC/ST candidates who had secured less than cut off marks of 33% prescribed for appointment. These recommendations were accepted without any reservation by the respondents. The charge against the petitioner was identical to the charge levied against Sh. Jaidev Kesri. The respondents held that Sh. Kesri was not guilty of the charge. In this background, the finding that the petitioner was guilty of misconduct is certainly devoid of any legal merit.

23. The respondents are unable to explain if the Recruitment Board was guilty of misconduct why no proceedings were drawn against Sh. C.M. Thomas and also as to how all other members of the Board against whom disciplinary proceedings were conducted, have been exonerated of charges.

24. In support of the writ petition, learned counsel for the petitioner

has also placed reliance on the pronouncement of the Supreme Court reported at (1999) 8 SCC 582 **Hardwari Lal Vishal Yadav. State of U.P. & Ors.**

25. Placing reliance on (2007) 7 SCC 206 **Bongaigaon Refinery & Petrochemicals Ltd. Vs. Girish Chandar Sarma,** it is urged that if any decision is taken collectively, one person cannot be singled out for disciplinary action. In the instant case, no action at all has been taken against any other person despite the clear and admitted instructions by the petitioner's superior or against the board members who effected the recruitment.

26. Our attention is drawn by learned counsel for the petitioner to a judgment dated 5th September, 2012 passed in WP (C) No.5564/2012 **R.T. Paramhans Vs. Union of India & Anr.** The petitioner had raised a challenge similar to the instant case. The observations and findings of the court in paras 16 to 20 of this judgment are material and read as follows:

"xxx 16. The main contention of the petitioner is that the decisions of the respondents in holding the petitioner liable with respect of para-A of Charge-I are perverse, as there is no evidence on record to prove the guilt against the petitioner. He further states that no action was taken against any member of the Board of Officers who had conducted a recruitment process in Nagpur wherein same recruitment of Fitter (Diesel) has been made as Fitters in CRPF. The petitioner is superceded by his juniors who have already been promoted to the rank of DIGP, as a result of departmental inquiry against him.

17. It is also alleged that the petitioner is suffering since 2008 as a result of departmental enquiry against him and will continue to suffer unless the petitioner be exonerated of the penalty of "Censure" which was imposed upon him.

18. There is no denial that the same process which was adopted by another recruitment Board taken place in Nagpur and the candidates selected by the second Board are currently working in CRPF and no action was taken WP (C) No.5564/2012 by the respondents against any member of the second Board for adopting exactly the same process which was done by the petitioner and

he was charged with. Therefore, it appears from the material placed on record that the respondents have ignored the findings of the Enquiry Officer wherein it was stated that usually, the normal course of action adopted by the authorities in case of procedural errors in the recruitment process is for sending the same back for rectification by the Board of Officers which was not done in the present case.

19. The petitioner was considered by DPC for promotion from the rank of Commandant to DIGP and his recommendation is kept in sealed cover.

20. We are of the view, even if the petitioner was responsible for an error which was made collectively by the Recruitment Board in the present case, no opportunity was given to the petitioner to cure his mistakes. Further, no action was taken against any members of the Board who had conducted a recruitment process in Nagpur wherein similar recruitment of Fitters (Diesel) has been made as Fitters in CRPF."

27. In view of the above discussion, the disciplinary action against the petitioner was unwarranted and the impugned order were clearly contrary to law. The present writ petition has to be allowed.

28. We accordingly direct as follows:

(i) The disciplinary proceedings initiated against him pursuant to a chargesheet dated 18th May, 2007; the disagreement note dated 2nd March, 2009 issued by the disciplinary authority; a final order dated 21st May, 2010 and order dated 9th June, 2011 are hereby set aside. As a result, the petitioner shall be entitled to all consequential reliefs as if the aforesaid orders had never been passed.

(ii) The respondents shall pass appropriate orders with regard to arrears of salary etc. within a period of six weeks which shall be communicated to him forthwith. Payment of the dues shall be positively effected within a further period of six weeks thereafter.

29. This writ petition is allowed in the above terms.

ILR (2013) II DELHI 1508
CO. PET.

CAPT. VIJENDER SINGH CHAUHAN ...PETITIONER

VERSUS

PARSVNATH DEVELOPERS LTD. ....RESPONDENT

(S. MURALIDHAR, J.)

CO. PET. NO. : 118/2013 DATE OF DECISION: 15.03.2013

Companies Act, 1956—Sections 433(e)/434 & 439—Seeking winding up of the Respondent—Issuance of a notice in a winding up petition is not automatic and the Court has discretion not to issue notice if it feels no case is made out by the petitioner. The petitioner cannot contend that the burden of proof is on the respondent to show that its defence is likely to succeed on a point of law, and that it has to prima facie prove the facts on which its defence depends. This stage would arrive after the petitioner is able to satisfy the Court, even prima facie, that the debt is undisputed and the respondent is unable to pay its debt. A winding up petition cannot be converted into one for recovery of money without the essential conditions of Section 433 of the Act being satisfied.

[Di Vi]

APPEARANCES:

FOR THE PETITIONER : Mr. Sarat Chandra, Mr. Sachin Chandra and Mr. M.B. Singh, Advocates.

FOR THE RESPONDENT : None.

CASES REFERRED TO:

1. *Madhusudan Gordhandas and Co.* vs. *Madhu Woollen*

Industries Pvt. Ltd. 1972 (42) Company Cases 125.

2. *National Conduits (P) Ltd.* vs. *S'S. Arora* 1967 (37) Company Cases 786.

3. *Amalgamated Commercial Traders (P) Ltd.* vs. *A.C.K. Krishnaswami* (1965) 35 CC 456 (SC)].

RESULT: Dismissed.

S. MURALIDHAR, J.

CA No. 402 of 2013 (for condonation of delay in re-filing the petition)

For the reasons stated in the application the delay in re-filing the petition is condoned.

The application stands disposed of.

Co. Pet. No. 118 of 2013 and CA No. 401 of 2013 (for appointment of Provisional Liquidator)

1. The Petitioner, Captain Vijender Singh Chauhan who was working as Senior General Manager-Projects of the Respondent company, Parsvnath Developers Limited ('PDL'), seeks its winding up in this petition under Section 433(e) read with Sections 434 and 439 of the Companies Act, 1956 ('Act') on the ground of the inability of PDL to pay the debt owing to him.

2. By a letter dated 28th March 2008, the Petitioner was appointed to the above post with total emoluments of Rs.1,92,333 per month i.e. basic pay Rs.1,28,000 and HRA Rs.64,333 per month besides medical benefits, car with driver, mobile phone and other benefits and perks as applicable to an officer of an equal rank.

3. There was a reduction of the Petitioner's salary from November 2008 to Rs.1,56,247 per month by a letter dated 21st November 2008. According to PDL the Petitioner consented to this re-fixation without any protest at that time.

4. In September 2012, the Vice President-Projects of PDL asked the Petitioner to resign with immediate effect if a lower salary was not acceptable to him. On 10th October 2012, the Petitioner sent in his resignation letter to PDL by e-mail. By a separate mail of the same date addressed to PDL he claimed the arrears of salary to the extent of

Rs.52,77,987.46 by calculating the salary as originally fixed at the time of his appointment. While his resignation was accepted there was no reply by PDL as such to the other letter of the same date claiming arrears of salary.

5. On 1st December 2012, the Petitioner sent a legal notice under Sections 433 and 434 of the Act. In this notice the Petitioner claimed that he had come to know that PDL was having debts to the tune of Rs.2,000 crores and was unable to pay the salary dues of staff and debts to its other creditors. On 8th December 2012, PDL wrote to the Petitioner stating that a sum of Rs.4,45,200 was paid to the Petitioner "as full and final settlement of your claims as former employee of the company". In its reply dated 26th December 2012, PDL took the stand that it had never assured to pay the Petitioner the arrears of salary as claimed by him. In para 7 of the above reply it was stated as under:

> "7. That the contents of Para 8 of your legal notice are wrong and denied. In this regard, we would like to refer to your Client's letter dated 24.11.2012, wherein your Client has duly acknowledged receipt of Rs.4,45,200/-(Rupees Four Lakhs Forty Five Thousand Two Hundred only), which was tendered to your Client pursuant to your Client's resignation. This amount was paid to your Client in full and final settlement of all his dues and claims. It is reiterated that vide letter dated 21.11.2008, your Client's salary was re-fixed from Rs.2,08,309 (Rupees Two Lakhs Eight Thousand Three Hundred Nine Only) to Rs.1,56,247/-(Rupees One Lakhs Fifty Six Thousand Two Hundred Forty Seven Only) due to economic meltdown in the India specially in the real estate sector. It was specifically stated in the said letter that your Client's salary was being re-fixed, the other terms as contained in the Appointment letter remaining the same. It is strange that your Client remained quiet for such a long time since 2008 and now, after having tendered his resignation. Therefore, there is no occasion to make payment of any differential amount for any period, much less the amount claimed on behalf of your Client in the para under reply."

Again in para 9 it was stated as under:

> "9. That the contents of Para 10 of your legal notice are wrong and denied. Our Client has already made the payment of all your

Client's legitimate dues in full and final settlement. In any event, the alleged amount as claimed in the notice under reply is not debt within the meaning of Section 433 & 434 of the Companies Act, 1956 by any legal standards. Hence, it is reiterated that the provisions of Section 433 & 434 of the Companies Act, 1956 are not attracted."

6. Mr. Sarat Chandra, learned counsel appearing for the Petitioner relied on the decision of the Supreme Court in **National Conduits (P) Ltd. v. S'S. Arora** 1967 (37) Company Cases 786 to explain the scope of the powers of the Court in a winding up petition. He referred to Rule 96 of the Companies (Court) Rules, 1959 which reads as under: "96. Admission of petition and directions as to advertisement – Upon the filing of the petition, it shall be posted before the Judge in Chambers for admission of the petition and fixing a date for the hearing thereof and for directions as to the advertisements to be published and the persons, if any, upon whom copies of the petition are to be served. The Judge may, if he thinks fit, direct notice to be given to the company before giving directions as to the advertisement of the petition."

7. Mr. Chandra laid emphasis on the observation of the Supreme Court to the following effect:

"When a petition is filed before the High Court for winding up of a company under the order of the court, the High Court (i) may issue notice to the company to show cause why the petition should not be admitted; (ii) may admit the petition and fix a date for hearing, and issue a notice to the company before giving directions about advertisement of the petition; or (iii) may admit the petition, fix the date of hearing of the petition, and order that the petition be advertised and direct that the petition be served upon persons specified in the order. A petition for winding up cannot be placed for hearing before the court, unless the petition is advertised; that is clear from the terms of rule 24(2). But that is not to say that as soon as the petition is admitted, it must be advertised. In answer to a notice to show cause why a petition for winding up be not admitted, the company may show cause and contend that the filing of the petition amounts to an abuse of the process of the court. If the petition is admitted, it is still open to the company to move the court that in the interest of

justice or to prevent abuse of the process of the court, the petition be not advertised. Such an application may be made where the court has issued notice under the last clause of Rule 96, and even when there is an unconditional admission of the petition for winding up. The power to entertain such an application of the company is inherent in the court, and Rule 9 of the Companies (Court) Rules, 1959, which reads: "Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the court to give such directions or pass such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court," iterates that power."

8. As far as the above decision is concerned, this Court would like to note that it does not suggest that once a winding up petition is filed, notice is to be automatically issued in the petition. The Supreme Court has been careful to observe that "the High Court may issue notice" to the company and "may admit the petition". In other words, nothing in the above decision suggests that issuance of a notice in a winding up petition is automatic. On the other hand, it is clear that the discretion of the Court not to issue notice if it feels that no case is made out by the Petitioner is recognised.

9. Reliance was next placed by Mr. Chandra on the decision of the Supreme Court in **Madhusudan Gordhandas and Co. v. Madhu Woollen Industries Pvt. Ltd.** 1972 (42) Company Cases 125. In the above decision, the Supreme Court explained what would constitute inability of a company to pay its debts and observed as under:

"Two rules are well settled. First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. (See **In re London and Paris Banking Corporation** [1874 L.R. 19 Eq. 444). Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed. (See **In re Brighton Club and Norfolk Hotel Co. Ltd.** [1865] 35 Beav. 204).

Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt. (See In re A Company [1894] 94 S.J. 369). Where, however, there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely. (See In re Tweeds Garages Ltd. [1962] Ch. 406). The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law, and, thirdly, the company adduces prima facie proof of the facts on which the defence depends".

10. In the present case it is not possible to conclude at this stage and in the facts noted hereinbefore that the debt as claimed by the Petitioner is "undisputed". It is also not possible to come to the conclusion at this stage without any further examination of evidence that the defence of PDL is not in good faith and without substance. The submission of Mr. Chandra that even at this stage the burden is on PDL to show that its defence is likely to succeed in a point of law and that it has to prima facie prove the facts on which its defence depends, is not acceptable. That stage would arrive after the Petitioner is able to satisfy the Court, even prima facie, that the debt is undisputed and that the Respondent is unable to pay the debt.

11. It is finally submitted that what is claimed by the Petitioner is not a very substantial sum and that notice should anyway be issued to PDL. A winding up petition cannot be converted into one for recovery of money without the essential conditions of Section 433 of the Act being satisfied. [See **Amalgamated Commercial Traders (P) Ltd. v. A.C.K. Krishnaswami** (1965) 35 CC 456 (SC)].

12. For the aforementioned reasons, the Court is not satisfied that the Petitioner has made out a prima facie case under Section 433 of the Act for grant of relief. Leaving it open to the Petitioner to avail of any other remedy as may be available to him in accordance with law, the petition and the pending application are dismissed.

ILR (2013) II DELHI 1514
CRL. M.C.

SANAGUL **....PETITIONER**

VERSUS

STATE NCT OF DELHI & ANR. **....RESPONDENTS**

(G.P. MITTAL, J.)

CRL. M.C. NO. : 3933/2011 **DATE OF DECISION: 15.03.2013**

Code of Criminal Procedure, 1973—Section 482 quashing of FIR—FIR No. 86/2011 under sections 471/420/463/468 IPC registered—Civil suit for cancellation of sale deed filed by the petitioner against respondent no.2—Alleged respondent no.2 fraudulently got the sale deed executed—Rent receipt signed by respondent no.2 as a tenant placed on record—Signing of rent receipts denied by respondent no.2—On the complaint of respondent no.2 FIR registered—FSL report—Signatures on the rent receipts do not tally with admitted signature of respondent no.2— Petition for quashing of FIR filed—Plea taken that there is no evidence that signature of respondent no.2 forged by petitioner—Registration of FIR is an abuse of the process of Court—Respondent contended complaint specifically states that rent agreement and rent receipts forget by the petitioner to make false ground—who has forget the documents is to be gone into during the trial—Held—It cannot be said that the allegations made in the FIR do not disclose commission of a cognizable offence—Plea of the petitioner cannot be accepted at this stage—Not able to show that FIR is an abuse of the process of the Court—Petition dismissed.

Important Issue Involved: (A) Where the complaint lodged by the complainant whether before the Court or before the jurisdictional police station, makes out a commission of an offence, the High Court should not in the ordinary cause invoke its powers to quash such proceedings except in rare and exceptional circumstances.

(B) The power under section 482 of the Code should be exercised with great caution and the Court should refrain from shifting legitimate prosecution.

(C) For the purpose of a petitioner under section 482 of the Code, the truthness and veracity of the allegatins in the FIR is not to be examined, what is required to be seen is whether on the basis of the allegations made, a cognizable offence has been committed or not.

[Vi Ku]

APPEARANCES:

FOR THE PETITIONER : Ms. Sangita Bhayana, Advocate.

FOR THE RESPONDENTS : Ms. Rajdipa Behura, APP for the State alongwith SI Jagdish Pal, PS Kamla Market, Mr. Amit Gupta, Advocate for the Respondent no.2.

CASES REFERRED TO:

1. *C.P. Subhash* vs. *Inspector of Police Chennai & Ors.,* 2013 II AD (S.C.) 258.
2. *State of Madhya Pradesh* vs. *Awadh Kishore Gupta,* (2004) 1 SCC 691.
3. *Rajesh Bajaj* vs. *State NCT of Delhi* (1999) 3 SCC 259.
4. *J.P. Sharma* vs. *Vinod Kumar Jain & Ors,* (1986) 3 SCC 67.

RESULT: Petition dismissed.

G.P. MITTAL, J. (ORAL)

1. The Petitioner invokes the inherent powers of this Court under section 482 of the Code of Criminal Procedure (Code) for quashing of FIR No.86/2011 under Sections 471/420/463/468 IPC registered in Police Station (PS) Kamla Market.

2. A civil suit for cancellation of a sale deed dated 24.10.2007 in respect of the Second Floor of property No.2325-26, Ward No.7, Gali Meer Madari, Mohalla, Rodgaran, Delhi-110006 was filed by the Petitioner against the Respondent No.2 on the ground that the Respondent No.2 fraudulently got executed the above said sale deed on the pretext of execution of the lease deed in respect of the earlier said property. In support of the Civil Suit, the Petitioner placed on record some rent receipt purported to have been signed by the Respondent No.2 as a tenant. The Respondent No.2 denied that she was a tenant in the premises in question or that she had ever signed any rent receipt for the aforesaid property. On the complaint filed by Respondent No.2, the instant FIR was registered. Forensic Science Laboratory (FSL) report has been received which shows that the signatures appearing on the rent receipt do not tally with her (Respondent No.2) admitted signatures 'A-1' to 'A-9'.

3. Referring to the FSL report, it is urged by the learned counsel for the Petitioner that even though the signatures do not tally with the signatures of Respondent No.2, yet there is no evidence that Respondent No.2's signatures were forged by the Petitioner. Thus, the learned counsel for the Petitioner states that the FSL report is of no consequence and registration of the FIR and any proceedings on its basis would be just an abuse of the process of the Court and an unnecessary harassment to the Petitioner. Thus, the learned counsel for the Petitioner prays for quashing of the FIR.

4. On the other hand, Ms. Rajdipa Behura, the learned APP who is assisted by Mr. Amit Gupta, Advocate for the Respondent No.2 submits that in the FIR it was specifically stated that the rent agreement and the rent receipt have been forged by the accused(Petitioner herein) in order to make a false ground that the complainant was merely a tenant under the accused. Thus, on the allegations as stated in the FIR, it cannot be said that no offence is made out against the Petitioner. The question as to who had forged the documents is to be gone into only during the

course of trial. Suffice it to say, at this stage, that prima facie the forged documents were used by the Petitioner.

5. The case is squarely covered by the report of the Supreme Court in **C.P. Subhash v. Inspector of Police Chennai & Ors.,** 2013 II AD (S.C.) 258 where while setting aside the order of the High Court quashing the FIR, the Supreme Court observed that where the complaint lodged by the complainant whether before the Court or before the jurisdictional police station makes out a commission of an offence, the High Court should not in the ordinary course invoke its power to quash such proceedings except in rare and exceptional circumstances. The Supreme Court quoted with approval the observation in **Rajesh Bajaj v. State NCT of Delhi** (1999) 3 SCC 259, where it was held as under:

> "If factual foundation for the offence has been laid down in the complaint the Court should not hasten to quash criminal proceedings during investigation stage merely on the premise that one or two ingredients have not been stated with details. For quashing an FIR. (a step which is permitted only in extremely rare cases) the information in the complaint must be so bereft of even the basic facts which are absolutely necessary for making out the offence."

6. The Supreme Court further referred to its decision in **State of Madhya Pradesh v. Awadh Kishore Gupta,** (2004) 1 SCC 691 wherein it was observed that the power under Section 482 of the Code should be exercised with great caution and the Court should refrain from stifling legitimate prosecution. The observations of the Supreme Court in Awadh Kishore Gupta are extracted hereunder:

> "The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. High Court being the highest Court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without

> sufficient material, of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage. It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises, arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code."

7. In **J.P. Sharma v. Vinod Kumar Jain & Ors,** (1986) 3 SCC 67, the Supreme Court observed that for the purpose of a Petition under Section 482 of the Code, the truthness and veracity of the allegations made in the FIR is not to be examined, what is required to be seen is whether on the basis of the allegations made a cognizable offence has been committed or not. The report is extracted hereunder:

> "The High Court erred in quashing the criminal proceedings under Section 482 Cr.P.C. on an erroneous basis when on prima facie being satisfied the Metropolitan Magistrate had taken cognizance of the alleged offences. The question at this stage, is, not whether there was any truth in the allegations made but the question is whether on the basis of the allegations, a cognizable offence or offences had been alleged to have been committed. The facts subsequently found out to prove the truth or otherwise on the allegation is not a ground on the basis of which the complaint can be quashed. Taking all the allegations in the complaint to be true, without adding or subtracting anything, at this stage, it can be said that a prima facie case for trial had been made out. That is the limit of the power to be exercised by the High Court under Section 482 Cr.P.C. The High Court in the instant case has exceeded that jurisdiction."

8. Turning to the facts of the instant case. On the basis of the material on record, it cannot be said that the allegations made in the FIR do not disclose commission of a cognizable offence. The Petitioner very much relies on the rent agreement and the rent receipt in the Suit filed by the Petitioner for cancellation of the sale deed. The Petitioner's plea that the rent receipt/rent agreement might have been forged by the Respondent No.2 herself cannot be accepted at this stage. In any case, the Petitioner has not been able to show that prosecution of the FIR in question is an abuse of the process of the Court or is otherwise not in the interest of justice.

9. The Petition, therefore, has to fail; the same is accordingly dismissed.

10. Pending Applications stand disposed of.

ILR (2013) II DELHI 1519
CO. PET.

ZHUHAI HANSEN TECHNOLOGY C. LTD. ....PETITIONER

VERSUS

SHILPI CABLE TECHNOLOGIES LTD. ....RESPONDENT

(S. MURALIDHAR, J.)

CO. PET. NO. : 333/2012 DATE OF DECISION: 19.03.2013

Companies Act, 1956—Sections 433(e) & 434 of the Seeking winding up of the Respondent—Mere refusal or unwillingness to pay debts should not be understood as 'inability' of the Respondent to pay its debts, and does not automatically lead to the inference of inability to pay its debts.—Under Section 434 of the Act, even if it is proved to the satisfaction of the Court that the Respondent company is unable to pay its debts, the

Petitioner would also have to show that the company "neglected to pay the sum or to secure or compound for it to the reasonable satisfaction" of the Petitioner—It is also observed that the pendency of a suit will not *per se* preclude the exercise of the winding up jurisdiction of the Company Court under Sections 433(e) & 434 of the Act.

For the purposes of Section 433(e) of the Act it has to be demonstrated by a Petitioner seeking the winding up of the Respondent company that there is an undisputed debt and that the Respondent company is unable to pay the debt. Section 434 of the Act gives instances where the company is deemed to be unable to pay its debts. Even if it is "proved to the satisfaction" of the Court that the Respondent company is unable to pay its debts, the Petitioner would also have to show that the company "neglected to pay the sum or to secure or compound for it to the reasonable satisfaction" of the Petitioner. It has time and again been emphasized by the Supreme Court that the machinery of winding up should not be utilized for recovery of money. [See **Pradeshiya Industrial & Investment Corporation of U.P. v. North India Petrochemicals Ltd.** (1994) 3 SCC 348.]**(Para 21)**

The 'satisfaction' of the Court under Section 434 (1) (c) of the Act is after the Court takes into account the "contingent and prospective liabilities of the company." The mere refusal to pay debts should not be understood as 'inability' of the Respondent to pay its debts. In other words, the unwillingness of the Respondent to pay its debts does not automatically lead to the inference of inability to pay its debts.

(Para 22)

[Di Vi]

APPEARANCES:

FOR THE PETITIONER : Mr. Amit Bansal with Ms. Manisha Singh and Ms. Ritika Nagpal, Advocates.

FOR THE RESPONDENT : Mr. Amit Sibal with Mr. Ajay Garg, Mr. Rajeev K. Goel and Mr. Gaurav Dudeja, Advocates.

CASES REFERRED TO:

1. *Phulchand Exports Limited* vs. *O.O.O. Patriot* (2011) 10 SCC 300.
2. *Guangdong Fuwa Engineering Manufacturing Co. Ltd.* vs. *ANG Auto Limited* (2010) 4 Comp.LJ 681 (Del).
3. *Indo Alusys Industries Ltd.* vs. *Assotech Contracts (India) Ltd.* 2009 (160) DLT 752.
4. *Paharpur 3P (A division of Paharpur Cooling Towers Limited)* vs. *Dalmia Consumer Care Private Limited* (2008) 3 Comp.LJ 554 (Del).
5. *Tarai Foods Ltd.* vs. *Wimpy International Pvt. Ltd.* 2005 (8) AD (Delhi) 131.
6. *NEPC India Ltd.* vs. *Indian Airlines Limited* 100 (2002) DLT 14.
7. *G.K.W. Ltd.* vs. *Shriram Bearings Ltd.* AIR 1999 Delhi 27.
8. *Pradeshiya Industrial & Investment Corporation of U.P.* vs. *North India Petrochemicals Ltd.* (1994) 3 SCC 348.

RESULT: Dismissed.

S. MURALIDHAR, J.

1. The Petitioner, Zhuhai Hansen Technology Co. Ltd., a company incorporated in People's Republic of China having its office in Guangdong, China, has filed this petition under Sections 433(e) and 434 of the Companies Act, 1956 ('Act') seeking the winding up of the Respondent, Shilpi Cable Technologies Ltd.

Background facts

2. The Petitioner states that it is an acknowledged industry leader in providing antenna-system solutions and service to telecommunication network operators and providing cable operators the last mile connectivity. The Petitioner further states that it offers a complete range of RF and

CATV cables to meet every application and budget requirement. It has a state-of-art manufacturing facility in Zhuhai, China. In 2011 the Petitioner had a turnover of US $ 500 million.

3. The Petitioner states that it had a long standing business relationship with the Respondent dating back to the year 2005 when the Respondent started to purchase cables and accessories from the Petitioner. In February 2009, the Respondent conveyed to the Petitioner its urgent requirement for about 1500 km of 7/8" superflex cables used in the telecom industry. A Memorandum of Understanding ('MOU') was entered into between the parties on 18th February 2009 whereby the Respondent agreed to purchase and the Petitioner agreed to supply 1300-1500 km of 7/8" superflex cables.

4. The terms and conditions of the MOU were that the shipment of the above goods was expected to take place between 1st March and 5th April 2009. Upon receipt of the original standby letter of credit ('L/C') or bank guarantee ('BG'), the Petitioner would immediately arrange for production. The MOU noted that an L/C or BG for a cable length of 100 km had already been provided to the Petitioner. The Respondent was to establish a separate L/C or BG for an additional 150-200 km by 25th February 2009. The material was to be shipped from Zhuhai. The Petitioner was to email to the Respondent the scanned copies of the invoice and packing list. The Respondent was to establish a confirmed irrevocable L/C for 100% invoice value of the despatched materials within "10 working days of On-Board Date." The establishment of the L/C was not to be linked to any possible disputes/claims. The Respondent was responsible for any demurrage, storage, warehousing and handling charges outside Zhuhai. Clause 9 of the MOU stated that the Respondent had also agreed to supply "1.5 M 1/2' S DIN M - DIN F e51 Jumpers, Connectors and Surge Arrestors."

5. A purchase order ('PO') was placed by the Respondent on the Petitioner on 25th February 2009 for supply of 1500 km of 7/8" superflex RF feeder cable at the unit price of US $ 2.14 per metre for a total value of US $ 3,210,000. The payment terms indicated in the PO were that the L/C should be opened with usance credit at 180 days and interest to the account of the "applicant". The delivery had to be completed before 31st March 2009. The goods had to be invoiced to the Respondent.

6. On 2nd March 2009 the Petitioner sent an email to the Respondent asking it to arrange the BG or standby L/C for at least 150 km and extend the validity of the last L/C for 200 km 7/8". The Respondent was asked to speed up the process so that the delivery could be made within time. The Petitioner states that it had shipped a total quantity of 1301.015 km of 7/8" superflex cables to the Respondent between 25th March and 21st May 2009. However, the Respondent failed to establish the L/C. Some of the correspondence exchanged between the parties has been enclosed with the petition. One of them is an email dated 11th May 2009 from the Petitioner to the Respondent stating that around 950 km 7/8" of cables had been shipped without an L/C being furnished, by the Petitioner.

7. The Petitioner states that on 14th May 2009 a schedule was sent by the Respondent to the Petitioner for establishing the balance L/C for the goods despatched till 8th May 2009. According to the Petitioner, since the schedule was under the signature of Mr. Ghanshyam Pandey, Chief Executive Officer ('CEO') of the Respondent it constituted "a clear and unconditional undertaking and commitment" on the part of the Respondent to open the L/C in respect of all supplies made or to be made by the Petitioner. It is further stated that on the basis of the above assurance the Petitioner shipped the remaining quantity of the product, with the last of the shipments being made on 24th May 2009. However, the Respondent failed to establish the L/C in terms of the said schedule and undertaking. It also did not get the goods released from the Indian Customs with whom the goods had been lying since March-May 2009.

8. In para 13 of the petition the Petitioner has given the details of the invoices for the period from 26th March 2009 till 21st May 2009 for a total sum of US $ 1,891,556.70 towards several invoices which remained unpaid by the Respondent till 31st August 2009. According to the Petitioner, the Respondent wrote to it on 3rd September 2009 citing its weak financial condition as the sole reason for not being able to open the L/C for the goods despatched by the Petitioner and its inability to collect the goods from the customers. It is stated that the Respondent suggested an alternate mode of payment for paying the dues of the Petitioner and in order to support the Respondent "in its moment of financial crisis", the Petitioner agreed to the said proposal. A reference is also made to an email dated 4th September 2009 from the Respondent asking the Petitioner to present the documents "under respective L/C only" and that the Respondent would start opening L/Cs from 7th September 2009 onwards.

It is stated that on 8th September 2009 the Respondent opened an irrevocable L/C drawn on State Bank of India ('SBI') in favour of the Petitioner for an amount of US $ 1,891,556.70 thus covering the outstanding balance amount owing by the Respondent to the Petitioner. According to the Petitioner, the Respondent thus made a "clear, unequivocal and categorical admission" of its liability in respect of the aforementioned sum to the Petitioner. A reference is also made to email dated 10th September 2009 whereby the Respondent requested the Petitioner not to present all the documents at one go and to present document of one bill of lading ('B/L') on the third day as this would help the Respondent in honouring the payment on timely basis. This was followed by another email dated 1st October 2009 whereby the Respondent informed the Petitioner that its understanding with SBI could not be worked. It had accordingly decided to cancel the L/C and make upfront payment of the documents. The Petitioner was requested to present one document on 'document against payment' ('DP') basis to Karur Vysya Bank Limited ('KVBL') for payment. The Respondent requested that the documents on DP basis be presented 'one by one' and stated that "it may take some time, but once the process is through, we will come out of this mess."

9. It is stated by the Petitioner that it agreed to the cancellation of the said L/C in lieu of payment on DP basis, in good faith and in order to help the Respondent, believing that the Respondent would make the balance payment against the goods already shipped to it. It is stated that subsequently, on the Respondent's instructions, the Petitioner presented the documents for payment to the banker and received payment towards invoices for the supply of 98.23 km of the product on 23rd October 2009 and another invoice for supply of 98.31 km of cable on 15th November 2009 thereby reducing the outstanding amount from US $ 1,891,556.70 to US $ 1,470,941.84 in respect of 687.365 km. The Petitioner states that despite making payments in October/November 2009, the quantities were collected only in May and July 2010 thus incurring, on daily basis, storage and detention charges by shipping line and demurrage charges by Inland Container Depot ('ICD') at Tughlakabad, New Delhi.

10. According to the Petitioner, after taking delivery of the last two shipments, the Respondent realized that the detention and demurrage charges in respect of the balance amount had escalated well over the value of the goods which therefore, became economically unviable for

the Respondent. According to the Petitioner, in order to avoid making payment the Respondent started raising issues as regards the condition/ quality of goods by email dated 24th May 2010 for the first time. This was replied to by the Petitioner on 26th May 2010 stating that long time storage of the goods and humidity at the port was responsible for the condition of the goods but the same would have no impact on the quality of the goods. It was further pointed out that the Respondent had never rejected any of the shipments on the ground of quality of the goods. The Respondent inquired from the Petitioner by email dated 23rd July 2010 as to how to clear the shipments with minimum loss and this was replied to on 23rd July 2010 itself.

11. On 4th November 2010 the Petitioner sent to the Respondent a notice calling upon the Respondent to make the following payments of the outstanding amounts set out in the form of a table, within 15 days from the date of the receipt of the notice:

S.No.	Particulars	Amount (US $)
1.	Cost of demurrage/detention or other charges incurred in selling 196.255 kms. of the product to Third Party	427,352.00
2.	Loss/Additional expenses incurred for erasing the mark of Shilpi	3,000.00
3.	Cost of 491.110 kms. of the product	1,050,975.40
4.	Additional expenses incurred for the various trips made for resolving the issue with Shilpi	20,000.00
	Total	1,501,327.40
	Interest @ 18% p.a. till the receipt of the full payment as demanded herein above.	

12. The Respondent had by a detailed reply dated 30th November 2010 denied its liability to pay the outstanding amount. Importantly it was stated that neither the MOU dated 18th February 2009 nor the PO dated 25th February 2009 had been acted upon and in any event the Petitioner had failed to adhere to the terms of the PO. Further since the Petitioner

had failed to make delivery of the goods by 31st March 2009, the Respondent had extended time after 15th April 2009. Despite repeated reminders and requests the Petitioner had failed to offer the products by the extended deadline. The Respondent had air lifted certain deliveries in order to despatch the products to its customers. Consequently, the Respondent had suffered huge losses for which it had the right to recover such damages from the Petitioner. It was further noted that the Petitioner had supplied 7/8" superflex cables to the Respondent's competitor, Volex, at a price lesser than the price charged by the Petitioner from the Respondent. A para-wise reply was given to the legal notice dated 4th November 2010 in which it was stated that the proper documentation was a pre-condition for releasing the L/C whereas during the discussions it transpired that the documents presented by the Petitioner were discrepant in various aspects as a result of which the L/C could not be negotiated.

13. In paras 12 and 13 of the letter dated 30th November 2010 the Respondent stated that two lots each comprising of 98.23 km length of cables were released on DP basis and found to be defective. It was decided by the Respondent that no further goods would be released. All the above contentions were vehemently denied by the Petitioner by its letter dated 21st December 2010. Further correspondence was exchanged between the parties.

Submissions of counsel for the Petitioner

14. It is submitted by Mr. Amit Bansal, learned counsel for the Petitioner, that the two reasons given by the Respondent for not making the payments, viz., (a) delayed delivery of goods by the Petitioner and (b) defective quality of goods supplied by the Petitioner, were untenable and an afterthought. These were raised by the Respondent only after the receipt of the legal notice. It is stated that at no point of time did the Respondent ask the Petitioner to stop the shipment on account of delay in delivery and reject any shipment on that basis. The contention that the goods supplied were also defective is also termed as 'baseless and false'. It is reiterated that the goods supplied by the Petitioner were of the highest standard and quality. The Respondent had never raised the issue about defective products for not making payment. The Respondent failed to clear the goods on account of its financial problems. It was inter alia stated that the Petitioner cannot be held responsible for the Respondent's failure to get the goods released from the customs since March-May 2009. While the Petitioner had complied with its obligations as agreed between the parties, the Respondent had defaulted in making the payment

to the Petitioner.

15. A legal notice dated 28th April 2012 sent by the Petitioner to the Respondent under Sections 433 and 434 of the Act calling upon the Respondent to pay a sum of US $ 1,501,327.40 alongwith interest @ 18% p.a. from the date such amount became due till the date of payment was replied to by the Respondent by a reply dated 18th May 2012 which was received by the Petitioner on 21st May 2012. Subsequently, a further reply was given on 30th May 2012 reiterating the above grounds. It was pointed out inter alia that the MOU for purchase of goods was entered into between the Petitioner and M/s. Shilpi Manufacturing Company and not with the Respondent. Even in the counter claim proposed to be raised by the Respondent in the sum of approx. Rs. 6 crores there was no claim as regards the defective goods supplied by the Petitioner. It is further averred that the Respondent is not discharging its admitted liabilities and it has become "commercially insolvent". It is added that "the substratum of the Respondent company is lost and therefore, it is just, equitable and necessary in the interest of justice that the Respondent company be wound up under the provisions of Section 433 and 434 of the Companies Act, 1956."

Submissions of counsel for the Respondent

16. Mr. Amit Sibal, learned counsel for the Respondent, submitted that the Petitioner has deliberately suppressed material facts and has not placed on record the complete documentation and emails exchanged between the parties. Importantly the fact that there were three separate POs placed by the Respondent on the Petitioner, the first being for the supply of 1500 km cables (7/8" RF cables) and the other two POs for accessories (Jumpers and Surge Arresters) was not mentioned by the Petitioner. When in one instance, the accessories were not delivered simultaneous with the delivery of the cables, the Respondent was constrained to air lift the accessories.

17. Mr. Sibal referred to an email dated 6th March 2009 in which the Respondent explained to the Petitioner that supplies of cables went along with Jumpers, Surge Arresters and Connectors. By an email dated 26th March 2009 the Respondent requested the Petitioner to revise the Bill of Lading ('B/L') of five containers of cables on account of heavy demurrage and detention charges that were mounting. Since the original B/L was with the Petitioner, only the Petitioner could carry out the

necessary amendments. This was followed by another email dated 29th March 2009 sent by the Respondent asking the Petitioner to explain the reasons for the delay in deliveries. The Respondent also reminded the Petitioner that "accessories scheduled to be dispatched on 27th March by sea is pending." It was also asserted that any further delay in delivery would have to be compensated by the Petitioner. According to Mr. Sibal, although the delivery period in all the three PO's was before 31st March 2009, not even a single shipment was delivered except two shipments of accessories lifted by air. By an email dated 1st April 2009 the Respondent made it clear that all demurrage and detention charges would be to the account of the Petitioner. 3rd Reference was made to an email dated April 2009 whereby the Respondent complained that even the first container of Jumpers, Surge Arrestors and accessories had not left till then. It is submitted that without Surge Arrestors, Connectors and Jumpers the mere despatch of cables would not serve the purpose of the Respondent. In fact on 9th May 2009 the Respondent sent an email to the Petitioner asking it to stop further supply of cables.

18. On 6th July 2009 the Respondent informed the Petitioner that the documents were refused on the ground that they were issued in favour of Indian Overseas Bank ('IOB'). On 13th July 2009 the Respondent requested the Petitioner to issue an B/L only in favour of "To Order" without 3rd mentioning any banker's name on it. On September 2009 the Respondent suggested for DP mode of payment. It was agreed to by the Petitioner by its written email dated 4th September 2009. He also referred to the decision in **Phulchand Exports Limited v. O.O.O. Patriot** (2011) 10 SCC 300 to explain the most of the documents involved in cost, insurance and freight ('CIF') contracts. Mr. Sibal also referred to Clause 11 of the Accounting Standards ('AS') issued by the Institute of Chartered Accountants of India ('ICAI') which laid down the conditions that had to be fulfilled in a transaction involving the sale of goods. He pointed out that of the nine consignments, the documents in respect of four were in order. The Respondent took delivery of two consignments and the Petitioner sold two other consignments. The delivery of five shipments could not be taken in the absence of proper documentation. Mr. Sibal referred to the minutes of the meeting held on 20th August 2009 to show that it was made clear to the Petitioner by the Respondent that the goods were defective. This was reiterated on 24th May 2010. Therefore, it was incorrect for the Petitioner to suggest that complaint

about quality was an afterthought. Thus delivery was never taken of the five shipments.

19. According to Mr. Sibal, therefore, the essential conditions of supply were not met by the Petitioner. The mere fact that the Respondent agreed to open an L/C did not amount to an admission of liability. It is submitted that these are disputed questions of fact which could not be examined in the present proceedings. The Respondent had filed a suit in this Court in which these questions would be examined. Relying on the decision in **NEPC India Ltd. v. Indian Airlines Limited** 100 (2002) DLT 14, Mr. Sibal submitted that exercise of jurisdiction by the Court under Sections 433 and 434 was discretionary and it is only where the Court comes to a conclusion that there is an admitted liability coupled with the inability of the Respondent to pay its debts that the Court would order winding up.

No admission of liability

20. Arising out of the above submissions, the first issue to be decided by the Court is whether there is any admission of liability by the Respondent and if there is no such admission, whether the denial by the Respondent of its liability constitutes a sham defence? As explained by this Court in **NEPC India Limited v. Indian Airlines Limited** the defence adopted should appear to the Court not to be dishonest and/or a moonshine. The Court in that case drew upon the analogy of a summary suit under Order XXXVII of the Code of Civil Procedure, 1908 ('CPC').

21. For the purposes of Section 433(e) of the Act it has to be demonstrated by a Petitioner seeking the winding up of the Respondent company that there is an undisputed debt and that the Respondent company is unable to pay the debt. Section 434 of the Act gives instances where the company is deemed to be unable to pay its debts. Even if it is "proved to the satisfaction" of the Court that the Respondent company is unable to pay its debts, the Petitioner would also have to show that the company "neglected to pay the sum or to secure or compound for it to the reasonable satisfaction" of the Petitioner. It has time and again been emphasized by the Supreme Court that the machinery of winding up should not be utilized for recovery of money. [See **Pradeshiya Industrial & Investment Corporation of U.P. v. North India Petrochemicals Ltd.** (1994) 3 SCC 348.]

22. The 'satisfaction' of the Court under Section 434 (1) (c) of the Act is after the Court takes into account the "contingent and prospective liabilities of the company." The mere refusal to pay debts should not be understood as 'inability' of the Respondent to pay its debts. In other words, the unwillingness of the Respondent to pay its debts does not automatically lead to the inference of inability to pay its debts.

23. In the present case, there were undoubtedly three separate contracts entered into between the parties. One was for the supply of cables and the other two for supply of accessories, i.e., Jumpers, Connectors and Surge Arrestors. Both the parties have been dealing with each other for over seven years. The Petitioner itself being the manufacturer of cables and accessories knew that for the purpose of the business of the Respondent the mere supply of cables without the accessories could not be sufficient. The Respondent was in turn supplying cables and accessories to the telecom service providers including Tata Tele Services Limited ('TTL'). The mere supply of cables to TTL would not have constituted a complete delivery of goods. The peak period in the telecom industry for the supply of cables was the first three months of the year. Therefore, the failure on the part of the Petitioner to supply the accessories would adversely affect the corresponding obligations of the Respondent to its customers.

24. For some reason the Petitioner has in its narration of facts not referred to two emails, the first dated 26th March 2009 whereby the Respondent asked for reasons why it had not received Jumpers, Surge Arrestors and Connectors by that date. The second was the email dated 3rd April 2009 again adverting to the above issue. This explains the emails dated 9th May 2009 and 22nd May 2009 by which the Respondent asked the Petitioner to stop despatching further cables. It is apparent that there were disputes between the parties on whether the supplies by the Petitioner were complete and whether the Respondent was justified in not accepting delivery of the consignments. It is difficult, in the circumstances, and at this stage, to conclude that the defence of the Respondent is a sham one.

Incomplete documentation

25. The second issue concerns the documents that had to accompany the shipment. In terms of the MOU, L/C had to be opened by the

Respondent. The L/C was opened in its favour by its banker, i.e., SBI. For some reason, despite IOB no longer being the banker of the Respondent, the B/L was made to the order of IOB. The Respondent requested the Petitioner to have the B/L amended so that the payments could be released. Even for DP mode the documents had to be amended by making it 'To Order' without mentioning any banker's name on it. The Petitioner did not manage to do this.

26. Section 25 of the Sale of Goods Act, 1930 ('SGA') underlines the importance of the terms and conditions of delivery of goods having to be fulfilled but clearly states that property in the goods does not pass to the buyer "until the conditions imposed by the seller are fulfilled." In the present case the seller had itself imposed the conditions of opening of L/C. Further, the AS maintained by ICAI also requires the fulfillment of the following two conditions of property in goods to pass from the seller to the buyer:

> "11. In a transaction involving the sale of goods, performance should be regarded as being achieved when the following conditions have been fulfilled:
>
> (i) the seller of goods has transferred to the buyer the property in the goods for a price or all significant risks and rewards of ownership have been transferred to the buyer and the seller retains no effective control of the goods transferred to a degree usually associated with ownership; and
>
> (ii) no significant uncertainty exists regarding the amount of the consideration that will be derived from the sale of the goods."

27. The B/L for the five shipments was made to the order of IOB which was no longer a banker of the Respondent. This was a CIF contract and as explained by the Supreme Court in **Phulchand Exports Limited v. O.O.O. Patriot** one of the requirements was that the shipping documents had to accompany the despatch of the consignments. These include the invoices, B/L and the policy of insurance. In other words, "the essential feature of a CIF contract is that delivery is satisfied by delivery of documents and not by actual physical delivery of the goods. Shipping documents required under a CIF contract are bill of lading, policy of insurance and an invoice." With the documents accompanying the consignments not in order, they had to necessarily be amended as

requested by the Respondent to facilitate the payment even on DP basis. For some reason this was not facilitated by the Petitioner. The contention of the Respondent that the above facts do not reflect any deliberate failure to make payment cannot in the circumstances be rejected as a sham defence.

Defects in quality

28. Under Section 55 SGA one remedy available to the seller of goods is to sue the buyer for the price of the goods. However, under Section 55 (1) SGA the conditions that have to be fulfilled are: (i) the property in the goods has passed to the buyer and (ii) the buyer has wrongfully neglected or has wrongly refused to pay for the goods according to the terms of the contract. Under Section 56 SGA the seller may sue the buyer for damages for non-acceptance where the buyer has wrongfully neglected or refused to accept and pay for the goods. Under Section 42 SGA, the buyer is deemed to have accepted the goods (a) when he intimates to the seller that he has accepted them; or (b) when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or (c) when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

29. Mr. Bansal sought to demonstrate that the conditionality of Section 42 stood attracted since the Respondent had never intimated to the Petitioner that it had rejected the goods. The above submission is unacceptable for the reason that on the facts of the present case the five shipments were never in fact delivered to the Respondent. Mr. Bansal himself stated that the five shipments were sold off by way of auction by the port authorities to recover the detention and demurrage charges. The question of the Respondent in the present case having retained the five shipments without intimating the Petitioner of its rejection does not arise.

30. For the purposes of Sections 55 and 56 SGA, the Petitioner would have to show that the neglect or refusal by the Respondent to pay for the goods was wrongful. This would require the examination of evidence to find out whether the buyer was justified in refusing to pay for the goods. The minutes of meeting dated 20th August 2009 of the Petitioner and the Respondent read as under:

"We have discussed following points during Hansen visit to our factory and conclusions are mentioned:

* Shown 7/8" damaged drums to Hansen team and they have agreed to change to wooden drums/water proof plywood drums with same barrel as using presently.
* 1 +" cable drums with wet condition shown to Hansen team and they have verified even container in which we have received the drums today found badly wet condition.
* 7/8" and 1 +" cable electrical rejection shown to Hansen team and they have agreed to check drums from both end and only cables with return loss more than 20 dB from 400MHz – 1000 MHz and 1700MHz – 2200MHz will be sent to Shilpi.
* Hansen agreed to send test reports of all the drums in soft copy to Shilpi for every lot.
* Informed intermodulation results are falling down in +" Jumpers in every lot. Hansen will improve from next lot onwards and as per them they are checking 40% of lot quantity for intermodulation test at present and may increase in further lots."

31. Subsequently on 24th May 2010 the Respondent raised the issue of defective quality of the cables and attached photographs of the damaged lengths of the cables with nail marks. Thus, it appears that it was not the first time that this objection was raised. Yet, the complete picture will become clear only when the evidence that may be adduced by both parties is examined in detail in the civil suit stated to be pending. It is not possible for this Court to conclude at this stage that the refusal by the Respondent to make payment for the goods was deliberate or wrong.

Decisions cited by the Petitioner

32. In **G.K.W. Ltd. v. Shriram Bearings Ltd.** AIR 1999 Delhi 27, referred to by Mr. Bansal, the delivery of the goods had already taken place. The dispute as to quality was raised long thereafter. In **Paharpur 3P (A division of Paharpur Cooling Towers Limited) v. Dalmia Consumer Care Private Limited** (2008) 3 Comp.LJ 554 (Del) the Respondent was unable to substantiate the alleged poor quality of products

supplied by the Petitioner. There was also sufficient documentation to prove the inability of the Respondent to pay its debts. The decisions in **Tarai Foods Ltd. v. Wimpy International Pvt. Ltd.** 2005 (8) AD (Delhi) 131, **Guangdong Fuwa Engineering Manufacturing Co. Ltd. v. ANG Auto Limited** (2010) 4 Comp.LJ 681 (Del) and **Indo Alusys Industries Ltd. v. Assotech Contracts (India) Ltd.** 2009 (160) DLT 752 also turned on their own facts and do not assist the case of the Petitioner.

Conclusion

33. While the pendency of a suit will not per se preclude the exercise of the winding up jurisdiction of the Company Court, on the facts of the present case, the Court is not persuaded to hold that the Respondent is unable to pay its debts and is, therefore, required to be wound up under Sections 433(e) and 434 of the Act.

34. It is clarified that the present decision is limited to the context of the prayer for winding up of the Respondent and is not intended to prejudice the contentions of the parties on merits in the pending suit.

35. Consequently, the petition is dismissed with costs of Rs. 20,000 which will be paid by the Petitioner to the Respondent within four weeks from today.

ILR (2013) II DELHI 1535
CRL. M.C.

NARCOTICS CONTROL BUREAU ....APPELLANT

VERSUS

SAJESH SHARMA ....RESPONDENT

(G.P. MITTAL, J.)

CRL. M.C. NO. : 2335/2010 DATE OF DECISION: 20.03.2013

Code of Criminal Procedure, 1973—Section 482—Quashing of order—Narcotics Drugs and Psychotropic Substance Act, 1985—Accused/respondent found in possession of bunogesic injections—Prosecution for offence under Section 22(c) NDPS Act—Charge framed by the Spl. Judge, NDPS—Prayer made by accused/respondent for transfer of case to the Metropolitan Magistrate—Stated bunogesic injections not covered under the NDPS but under the Drugs and Cosmetics Act, 1940 triable by MM—Held—Though psychotropic substance but not included in Schedule-I to NDPS Rules 1985—Possession, sale etc. not completely prohibited under the NDPS Act—Violation could be of the D&C Act and the Rules framed thereunder—Remitted the matter to CMM—Aggrieved by the order the petitioner invoked inherent powers of the High Court—Contended that bunogesic injections are psychotropic substance as per the schedule to NDPS Act—The provisions of NDPS Act and case remitted to CMM—Held—Possession of bunogesic injections containing Buprenorphine Hydrichloride not violatice of Section 22 NDPS Act—Petition dismissed.

Important Issue Involved: For the drugs were mentioned in Schedule D and H of the D and C Rules and were being used for medicinal purposes, the Respondent would not be guilty of violation of Section 8 of the NDPS Act.

Section 8 (c) of the NDPS Act prohibits manufacture, possession, transport, inter-state export and import of Narcotic Drugs and Psychotropic Substances except for medicinal or scientific purposes, whereas Section 24 of the NDPS Act makes the export or obtaining of any Narcotic Drugs and Psychotropic Substances in contravention of section 12 of the NDPS Act to be punishable.

Anybody dealing with a psychotropic substance for supplying to any person outside India even if it does not find mention in the NDPS Rules will be punished under the NDPS Act. The exception as provided under Section 8 for use of the psychotropic substance as mentioned in the Schedule (under Section 2(xxiii)) of the NDPS Act for medicinal purposes would not be applicable in case of trade or supply of the psychotropic substance outside India.

Under Section 23 of the NDPS Act again the exemption for possession, sale, purchase, inter-state import and export for medicinal or scientific purposes is not applicable in case of trade or supply of the narcotic drugs outside India.

APPEARANCES:

FOR THE APPELLANT : Mr. Satish Aggarwala, Advocate.

FOR THE RESPONDENT : Mr. Yogesh Saxena, Advocate.

CASES REFERRED TO:

1. *D. Ramkrishnan* vs. *Intelligence Officer, Narcotic Control Bureau,* AIR 2009 SC 2404.
2. *Sanjay Kumar Kedia* vs. *Narcotics Control Bureau &*

Anr. 2008 (1) JCC (Narcotics) 9.

3. *State of Uttaranchal* vs. *Rajesh Kumar Gupta* (2007) 1 SCC 355.

4. *Rajinder Gupta* vs. *State* 123 (2005) DLT 55.

RESULT: Petition dismissed.

G.P. MITTAL, J.

1. The Petitioner Narcotics Control Bureau (NCB) invokes inherent powers of this Court under Section 482 of the Code of Criminal Procedure, 1973 (the Code) for setting aside of the order dated 17.04.2010 passed by the learned Special Judge-NDPS whereby the Respondent's prayer for alteration of the charge and for remitting the case to the Court for trial of the case for the offences under the Drugs and Cosmetics Act, 1940 (D&C Act) was allowed.

2. As per the allegations of the prosecution an information was received from the Delhi Zonal Unit at NCB that huge quantity of bunogesic injections were being supplied by M/s. Rusan Health Care Ltd. to their stockists at Delhi. In pursuance of the information and on receipt of list of stockists, summons were issued to various firms including M/s. International Drugs, Bhagirath Place having licence No.DL.26(1163)20B and 21B which was the Proprietorship Firm of Respondent Sajesh Sharma. In pursuance of the summons Respondent appeared before the officers of NCB who recorded his statement. Statement made by the Respondent led to filing of chargesheet against him for an offence punishable under Section 22 (c) of the Nacrotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). The relevant part of the impugned order which led to the framing of the charge under Section 22 (c) of the Act is extracted hereunder:-

> "2.....Pursuant to the information, summons were issued to Sajesh Sharma who tendered his statement that their firm was mainly selling bunogesic injections, etc. after purchasing it from M/s. Belsons/ Distributor of M/s. Rusan Health Care. A person by the name of Bhardwaj had come at his shop to purchase 25000 to 30000 injections for supply them to a hospital in Patna and paid Rs. 15,000/- as advance. After paying the balance amount, he had taken delivery of 30000 injections on invoice from M/s. Belsons on cash payment and sold it to the said person i.e.

> Shakeel. He was not aware whether Shekeel was having drug licence or not. He stated that whatever consignment had had purchased from M/s. Belsons, he had sold it to Shakeel after taking advance payment on a good margin without bill. He stated that so far as he has sold 250000 injections to Shakeel without bill and Form 6 however, he had purchased all the stock on invoice and Form 6. In the absence of complete information about Shakeel, no further action could be taken. Accused Sajesh Sharma was arrested. After investigation he was sent for trial for offence punishable u/s. 22 (c) NDPS Act. 3. Ld. Predecessor of this Court made out prima facie case against the accused and framed the charge u/s. 22 (c) NDPS Act."

3. While the case was at the stage of evidence, a prayer was made on behalf of the Respondent for transfer of the case on the file of the Metropolitan Magistrate ('MM') as possession of the bunogesic injections was not covered under the NDPS Act but was covered only under the D&C Act which was exclusively triable by the Court of 'MM'.

4. The Respondent's contention found favour with the learned Special Judge who opined that bunogesic injection which contained Buprenorphine Hydrochloride was a Schedule 'H' drug under the D&C Act and though it was a psychotropic substance under the NDPS Act but since it was not included in Schedule I to the Nacrotic Drugs and Psychotropic Substances Rules, 1985 (NDPS Rules), its possession, sale, etc. is not completely prohibited under the NDPS Act. The learned Special Judge relied on a judgment of the learned Single Judge of this Court in **Rajinder Gupta v. State** 123 (2005) DLT 55 which was relied on by the Supreme Court in **State of Uttaranchal v. Rajesh Kumar Gupta** (2007) 1 SCC 355 and opined that on the basis of the allegations levelled, the Respondent cannot be said to have committed an offence punishable under Section 22 (c) of the NDPS Act. The learned Special Judge held that since Buprenorphine Hydrochloride was a Schedule 'H' drug, the violation if any, for possession and sale of bunogesic injections could be of the D&C Act and the D&C Rules framed thereunder. The case was accordingly remitted to the learned Chief Metropolitan Magistrate to deal with the same in accordance with law or to assign the same to any other Court of 'MM'.

5. The learned Special Public Prosecutor for the Petitioner urges

that the decisions in Rajinder Gupta and Rajesh Kumar Gupta were rendered while considering the bail applications filed by the accused persons. Thus, ratio in the earlier said cases would not be applicable to consider whether being in possession of bunogesic injections, which admittedly contained Buprenorphine Hydrochloride, which is a Psychotropic substance as per item No.92 of the Schedule (under Section 2 (xxiii)) to the NDPS Act, the Respondent could not have been discharged for the offence punishable under Section 22 (C) of the NDPS Act and the case could not have been remitted to the learned CMM for its trial for violation of the provision of the D&C Act and Rules framed thereunder.

6. Relying on the decisions in **Sanjay Kumar Kedia v. Narcotics Control Bureau & Anr.** 2008 (1) JCC (Narcotics) 9; and **D. Ramkrishnan v. Intelligence Officer, Narcotic Control Bureau,** AIR 2009 SC 2404, the learned Special P.P. for the Petitioner urges that the decisions in Rajinder Gupta and Rajesh Kumar Gupta were impliedly overruled by the Supreme Court. It is contended that in D. Ramkrishnan, the Supreme Court held that the provisions of Section 80 of the NDPS Act provided that the provisions of NDPS Act or the Rules made thereunder are in addition to, and not in derogation of the D&C Act or the Rules made thereunder. Thus, the Supreme Court declined to interfere with the prosecution of the accused under Section 23 of the NDPS Act.

7. In Rajinder Gupta, the learned Single Judge of this Court posed the following questions for consideration:-

> "(i) Whether Buprenorphine Hydrochloride is a "psychotropic substance" within the meaning of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act)?
>
> (ii) If yes, whether Buprenorphine Hydrochloride is a "psychotropic substance" to which Chapter VII of the Narcotic Drugs and Psychotropic Substances Rules, 1985 (hereinafter referred to as the NDPS Rules) apply? To what effect?"

8. After referring to the opinion of the Chemical Examiner and Joint Director, Central Revenue Control Laboratory, Hill Side Road, Pusa, New Delhi, the learned Single Judge opined that the Buprenorphine Hydrochloride would be a psychotropic substance under the NDPS Act. While dealing with the second question, the learned Single Judge went into the scheme

of NDPS Act and the NDPS Rules and held that the Section 8 (c) prohibits production, manufacture, possess, sale, etc. etc. of any narcotic drug and psychotropic substance except for medicinal or scientific purposes. Since Buprenorphine was not a prohibited psychotropic substance it being absent in Schedule I to the NDPS Rules, its possession by itself cannot be considered to be an offence under Section 22 of the NDPS Act simply because it is included as a psychotropic substance in Schedule (under Section 2 (xxiii)) to the NDPS Act. The learned Single Judge held that as per Rule 65 (1) manufacture of any psychotropic substance other than those specified in Schedule I of the NDPS Rules shall be in accordance with the condition of licence granted under the D&C Rules and D&C Act. The relevant observations in Rajinder Gupta are extracted hereunder:-

> "Section 8(c), which is relevant for our purpose as it deals with psychotropic substances, prohibits the manufacture, possession, sale, use etc., of any psychotropic substance "except for medical or scientific purposes and in the manner and to the extent" provided by the provisions of the NDPS Act or NDPS Rules or orders made thereunder. This means that while there is a general prohibition against the manufacture, possession, sale, use etc., of a psychotropic substance, if the same is a medicine and is to be used for a medical purpose then the manner and extent of its manufacture, possession, sale, use shall be as provided in the NDPS Act or NDPS Rules or orders made thereunder. We must remember that buprenorphine hydrochloride I.P. is a Schedule H drug within the meaning of the D&C Act and Rules. Its manufacture, sale etc., is regulated by the D&C Act and D&C Rules. Coming back to the NDPS Act, I find that in the case of a medication, which also happens to be a psychotropic substance within the meaning of the NDPS Act, its "extent and manner" of use etc., would be governed by the other provisions of the NDPS Act or NDPS Rules.
>
> A11'Section 9 of the NDPS Act empowers the Central Government to permit, control and regulate, inter alia, the manufacture, possession, sale, transportation of psychotropic substances. The NDPS Rules have been formulated by the Central Government in exercise of that power. Chapter VII of the NDPS Rules deals with "Psychotropic Substances". Rules 64 to 67 fall

under this Chapter VII. Rule 64 prescribes the general prohibition. It provides that – "No person shall manufacture, possess, transport, import inter-state, export inter-state, sell, purchase, consume or use any of the psychotropic substances specified in Schedule I." It is to be noted that this "Schedule I" is different to the Schedule to the NDPS Act. This Schedule I is appended to the NDPS Rules and is in two parts —(I) Narcotic Drugs and (II) Psychotropic Substances. We are concerned with psychotropic substances. There is a list of 33 specific psychotropic substances with entry no. 34 being "Salts and preparations of above". It is significant to note that neither buprenorphine hydrochloride nor buprenorphine find mention in this list. This clearly means that Buprenorphine Hydrochloride is not included in Schedule I to the NDPS Rules and therefore the general prohibition contained in Rule 64 of the NDPS Rules does not apply to it.

2.Consequently, rules 65 to 67, which also have reference to psychotropic substances specified in the said Schedule I, would also not be applicable in respect of Buprenorphine Hydrochoride. In this connection, it is pertinent to point out that there are several psychotropic substances which find place both in the schedule to the NDPS Act and in Schedule I to the NDPS Rules. For example: Methaqualone, Delorazepam, Ketazolam, Loprzolam, Pipradrol, Tetrazepam. At the same time, there are others like Buprenorphine, Amphetamine, Bromazepam, Lorazepam, Phenobarbital and Pemoline which, though specified in the Schedule to the NDPS Act, do not find mention in Schedule I to the NDPS Rules. Clearly, by conscious design, all psychotropic substances mentioned in the schedule to the NDPS Act have not been listed in Schedule I to the Rules. The prohibition contained in Rule 64 of the NDPS Rules applies only to those psychotropic substances which are specified in Schedule I to the NDPS Rules. In other words, the prohibition of Rule 64 of the NDPS Rules is not applicable to those psychotropic substances, which, although they are listed in the Schedule to the NDPS Act, are not part of the listed psychotropic substances in Schedule I to the NDPS Rules. It may be mentioned here that the Supreme Court, in the afore-mentioned decisions, was not called upon to examine

this aspect of the matter, namely, whether Rule 66 of the NDPS Rules applied to all psychotropic substances or only those specified in Schedule I to the NDPS Rules. It is, therefore, open to this Court to consider and decide this aspect of the matter.

Rule 65(1), inter alia, provides that the manufacture of any psychotropic substance other than those specified in Schedule I shall be in accordance with the conditions of licence granted under the D&C Rules and D&C Act. In other words, insofar as the psychotropic substances not mentioned in Schedule I to the NDPS Rules but mentioned in the Schedule to the NDPS Act are concerned, their manufacture shall be governed by the DandC Act and Rules and not by the NDPS Act or NDPS Rules. Rule 66 relates to possession etc., of psychotropic substances. Sub-Rule (1) thereof provides that no person shall possess "any psychotropic substance" for any of the purposes covered by the D&C Rules, unless he is lawfully authorised to possess such substance for any of the said purposes under the NDPS Rules. The expression "any psychotropic substance" obviously has reference to those listed in Schedule I to the NDPS Rules. Rule 64 is the governing rule in Chapter VII of the NDPS Rules. When a psychotropic substance does not find mention in Schedule I to the NDPS Rules, the prohibition qua possession contained in Rule 64 does not apply. That being the case, in respect of such a psychotropic substance, Rule 66 would also not apply as it has reference to only those psychotropic substances which are included in Schedule I to the NDPS Rules. Rule 67 of the NDPS Rules relates to transport of psychotropic substances. It is expressly subject to the provisions of Rule 64 and clearly has reference to the transport, import inter-state or export inter-state of those psychotropic substances which are included in Schedule I to the NDPS Rules. The rule would have no applicability in respect of those psychotropic substances which are not to be found in Schedule I to the NDPS Rule. Clearly, then, inasmuch as Buprenorphine Hydrochloride is not included in Schedule I to the NDPS Rules, its manufacture, possession, sale, transport would neither be prohibited nor regulated by the NDPS Rules and consequently by the NDPS Act." (emphasis supplied).

9. In Rajesh Kumar Gupta the Respondent was found in possession

of large quantity of drugs which were included in Schedule H of the D&C Rules as also in entry 36 and 69 of the Schedule to the NDPS Act. The Hon'ble Supreme Court held that since the drugs were mentioned in Schedule D & H of the D&C Rules and were being used for medicinal purposes, the Respondent would not be guilty of violation of Section 8 of the NDPS Act. Paras 21 to 24 of the report are extracted hereunder:-

> 21. The respondent admittedly possesses an Ayurveda Shastri degree. It is stated that by reason of a notification issued by the State of Uttar Pradesh dated 24-2-2003, the practitioners of ayurvedic system of medicines are authorised to prescribe allopathic medicines also. The respondent runs a clinic commonly known as "Neeraj Clinic". He is said to be assisted by eight other medical practitioners being allopathic and ayurvedic doctors. It is also not in dispute that only seven medicines were seized and they are mentioned in Schedules G and H of the Drugs and Cosmetics Rules. In this regard, we may notice the following chart:

Sl. No.	Medicine seized	Schedule H, the Drugs and Cosmetics Rules	The Schedule, the 1985 Act	Schedule I, the 1985 Rules
1.	Epilan C. Phenobarbital	Yes	Entry 69	-
2.	Phensobar-50	Yes	-	-
3.	Chlordiazepoxide	Yes	Entry 36	-
4.	Carbin	Yes	-	-
5.	Wefere (ayurvedic)	-	-	-
6.	Phenso (Schedule-G)	-	-	-
7.	Epibar-30	Yes	-	-

> 22. It is not in dispute that the medicines seized from the said clinic come within the purview of Schedules G and H of the Drugs and Cosmetics Rules. It is furthermore not in dispute that the medicines Epilan C. Phenobarbitone and Chlordiazepoxide are

> mentioned in Entries 69 and 36 of the 1985 Act respectively, whereas none of them finds place in Schedule I appended to the 1985 Rules. If the said drugs do not find place in Schedule I appended to the Rules, the provisions of Section 8 of the 1985 Act would have no application whatsoever. Section 8 of the 1985 Act contains a prohibitory clause, violation whereof leads to penal offences thereunder.
>
> 23. In view of the fact that all the drugs, Items 1, 2, 3, 4, 6 and 7 being allopathic drugs mentioned in Schedules G and H of the Drugs and Cosmetics Rules indisputably are used for medicinal purposes. Once the drugs are said to be used for medicinal purposes, it cannot be denied that they are acknowledged to be the drugs which would come within the purview of description of the expression "medicinal purposes".
>
> 24. The exceptions contained in Section 8 of the 1985 Act must be judged on the touchstone of:
>
> (i) whether drugs are used for medicinal purposes;
>
> (ii) whether they come within the purview of the regulatory provisions contained in Chapters VI and VII of the 1985 Rules."

10. The learned Special PP for the Petitioner argues that in the instant case also there was inter-state export of the psychotropic substance and, therefore, the Respondent would be guilty under the provisions of NDPS Act. Reliance is placed on *Sanjay Kumar Kedia* and *D. Ramkrishnan*.

11. In my view, the contention raised is devoid of any substance. Section 8 (c) of the NDPS Act prohibits manufacture, possession, transport, inter-state export and import of Narcotic Drugs and Psychotropic Substances except for medicinal or scientific purposes, whereas Section 24 of the NDPS Act makes the export or obtaining of any Narcotic Drugs and Psychotropic Substances in contravention of section 12 of the NDPS Act to be punishable. Thus, anybody dealing with a psychotropic substance for supplying to any person outside India even if it does not find mention in the NDPS Rules will be punished under the NDPS Act. The exception as provided under Section 8 for use of the psychotropic substance as mentioned in the Schedule (under Section 2(xxiii)) of the NDPS Act for medicinal purposes would not be applicable in case of trade or supply of the psychotropic substance outside India.

12. In *Sanjay Kumar Kedia* the Supreme Court was not dealing with the possession, manufacture or inter-state export or import of the psychotropic substance but with the supply of psychotropic substance by M/s. Xponse Technologies Ltd. and M/s. Xpose IT Services Pvt. Ltd. outside India which was punishable under Section 24 of the NDPS Act.

13. Similarly, in *D. Ramkrishnan* the Narcotic Drugs were being exported to the customers abroad through airmail and RMS post offices at Coimbatore which was punishable under Section 23 of the NDPS Act, 1985. Under Section 23 of the NDPS Act again the exemption for possession, sale, purchase, inter-state import and export for medicinal or scientific purposes is not applicable in case of trade or supply of the narcotic drugs outside India. It was in these circumstances that the Supreme Court held that the ratio in Rajesh Kumar Gupta would not be applicable in that case.

14. It is true that in *Rajinder Gupta* the learned Single Judge had taken the view while dealing with the bail application. The reasoning, however, as stated by me earlier fully applies even while dealing with the question whether the person is guilty for the offence punishable under Section 22 of the NDPS Act.

15. In this view, I also find support from another judgment of the Coordinate Bench of this Court in *DRI v. Raj Kumar Arora & Anr.* where relying on *Rajinder Gupta* and *Rajesh Kumar Gupta*, the learned Single Judge of this Court held that a person found in possession of Buprenorphine Hydrochloride will not be guilty under Section 22 of the NDPS Act.

16. In view of the foregoing discussion, the Petition is devoid of any merit; the same is accordingly dismissed.

17. Pending Applications stand disposed of.

ILR (2013) II DELHI 1546
W.P. (C)

BABU KHAN ....PETITIONER

VERSUS

UNION OF INDIA & ANR. ....RESPONDENTS

(GITA MITTAL & J.R. MIDHA, JJ.)

W.P. (C) NO. : 6312/2011 DATE OF DECISION: 21.03.2013

Constitution of India, 1950—Article 226—Brief Facts—Petitioner was appointed on the 27th of September 1996 as a Constable in the Railway Protection Special Force ("RPSF" for brevity) and was posted at different places thereafter—Petitioner has claimed that he was suffering from behavioral disorder and had applied for transfer on recommendation of doctors—Yet he was transferred to different places in Orissa, Maharashtra, Punjab, etc.—Petitioner was also treated over this period at various Railway hospitals—On the 14th of September 2009, the Petitioner was sent to the 6th Battalion Dayabasti to undertake the punishment of extra fatigue duty—Medical Board Report of the examination of Petitioner stated that the patient suffers from paranoid schizophrenia—However he is asymptomatic currently and is fit to join duty without arms—He is also advised to continue treatment on OPD basis—No other medical record or opinion is forthcoming on record—Charges were framed against the petitioner vide charge sheet dated 30th September, 2009 which was served upon Petitioner on 4th October, 2009 directing him to appear before the inquiry officer on the 5th of October, 2009—Petitioner assails the disciplinary proceedings conducted against him pursuant to the charge-sheet; inquiry report and; the order of the disciplinary authority agreeing with the

recommendations of the inquiry officer and holding that the petitioner was guilty of the charge and imposing the penalty of compulsory retirement upon him—Petitioner has claimed that he was suffering from behavioural disorder and had applied for transfer on recommendation of doctors—Charge-sheet was issued to him in regard to an alleged incident, in violation of Rule 153.5 of the RPF Rules, 1987—It was also contended that the respondents proceeded post haste with the inquiry proceedings and six witnesses were examined in support of the charges and also that the petitioner was not given any opportunity to engage the services of the defending officer—Held—In the instant case, on 4th October, 2009 the communication was served upon the petitioner enclosing the allegations against the petitioner as well as the charge sheet—By the same communication, the petitioner was informed of the commencement of the inquiry proceedings on the 5th of October 2009 thus giving the petitioner not even twenty hours to prepare his defence—This was not only in violation of the well settled principles of natural justice but of the specific requirements of the provision of Rule 153.5 of the RPF Rules which goes to the root of exercise of jurisdiction by the respondents—The same is an illegality which would vitiate the conduct of the disciplinary proceedings against the petitioner—It is trite that in the disciplinary proceedings it is the duty of the disciplinary authority to ensure that adequate opportunity is given to the charged official to conduct his defence and that the same would include an opportunity to engage the defence officer—Given the facts and circumstances of the instant case, especially the mental condition of the petitioner, it is difficult to believe that the petitioner was conscious that he had a right to seek the assistance of a defence officer—In all fairness as well as to ensure compliance of the principles of natural justice, it was for the respondents

to ensure that the petitioner was made aware of his rights as well as procedural safeguards—The same was essential to ensure that the petitioner had an adequate opportunity to defend the charges made against him—Failure to ensure such opportunity also vitiates the proceedings conducted against the petitioner—In this background, the recommendation dated 6th February, 2010 of the inquiry officer as well as the orders dated 10th August, 2010 passed by the Disciplinary Authority finding the petitioner guilty of the charge; 28th September, 2010 of the Appellate Authority and the order dated 18th March, 2011 of the Revisional Authority are not sustainable in law—Petitioner shall be reinstated in service by the shall not be entitled to any back wages.

In the instant case, on 4th October, 2009, the communication was served upon the petitioner enclosing the allegations against the petitioner as well as the chargesheet. By the same communication, the petitioner was informed of the commencement of the inquiry proceedings on the 5th of October 2009 thus giving the petitioner not even twenty hours to prepare his defence. This was not only in violation of the well settled principles of natural justice but of the specific requirements of the provision of Rule 153.5 of the RPF Rules which goes to the root of exercise of jurisdiction by the respondents. The same is an illegality which would vitiate the conduct of the disciplinary proceedings against the petitioner. **(Para 9)**

The petitioner made applications dated 15th October, 2009 and 16th November, 2009 informing the respondents in writing that on account of his medical condition, he was unable to conduct his defence and that he may be permitted to engage the services of a counsel. There is nothing on record to show that these applications were even considered. **(Para 10)**

Even otherwise, it is trite that in the disciplinary proceedings it is the duty of the disciplinary authority to ensure that adequate opportunity is given to the charged official to conduct his defence and that the same would include an opportunity to engage the defence officer. **(Para 11)**

Given the facts and circumstances of the instant case, especially the mental condition of the petitioner, we find it difficult to believe that the petitioner was conscious that he had a right to seek the assistance of a defence officer. In all fairness as well as to ensure compliance of the principles of natural justice, it was for the respondents to ensure that the petitioner was made aware of his rights as well as procedural safeguards. The same was essential to ensure that the petitioner had an adequate opportunity to defend the charges made against him. Failure to ensure such opportunity also vitiates the proceedings conducted against the petitioner. **(Para 12)**

Important Issue Involved: It is trite that in the disciplinary proceedings it is the duty of the disciplinary authority to ensure that adequate opportunity is given to the charged official to conduct his defence and that the same would include an opportunity to engage the defence officer.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Rajat Aneja with Mr. Ishaan Chhaya, Advocates.

FOR THE RESPONDENTS : Mr. R.V. Sinha and Mr. R.N. Singh, Advocates.

CASE REFERRED TO:

1. *Chairman, LIC of India & Ors.* vs. *A. Masilamani* JT 2012 (11) SC 533.

RESULT: Petition allowed.

GITA MITTAL (Oral)

1. The petitioner assails the disciplinary proceedings conducted against him pursuant to the chargesheet dated 30th September, 2009; inquiry report dated 6th February, 2010 and; the order dated 10th August, 2010 of the disciplinary authority agreeing with the recommendations of the inquiry officer and holding that the petitioner was guilty of the charge and imposing the penalty of compulsory retirement upon him. The writ petitioner also assails the order dated 28th September, 2010 passed by the DIG, Railway Protection Special Force whereby the petitioner's appeal was dismissed, as well as order dated 18th March, 2010 passed by the Senior Commanding Officer dismissing the revision petition filed by the petitioner.

2. The undisputed facts giving rise to the present writ petition are briefly stated hereafter.

3. The petitioner was appointed on the 27th of September 1996 as a Constable in the Railway Protection Special Force ('RPSF. for brevity) and was posted at different places thereafter. The petitioner has claimed that he was suffering from behavioural disorder and had applied for transfer on recommendation of doctors. Yet he was transferred to different places in Orissa, Maharashtra, Punjab, etc. The petitioner was also treated over this period at various Railway hospitals. On the 14th of September 2009, the petitioner was sent to the 6th Battalion Dayabasti to undertake the punishment of extra fatigue duty.

4. Our attention has been drawn by Mr. Rajat Aneja, learned counsel for the petitioner to the Medical Board Report of the examination of the petitioner dated 25th August, 2008 conducted by the Institute of Human Behaviour and Allied Sciences which opines as follows:

"MEDICAL BOARD REPORT OF PATIENT BABU KHAN (CRF#2006-05-9796)

The patient was taken up for medical board on 2305-2007. The board opines the patient suffers from paranoid schizophrenia. However he is asymptomatic currently and is fit to join duty without arms. He is also advised to continue treatment on OPD basis"

No other medical record or opinion is forthcoming on record.

5. With regard to an alleged incident with the Adjutant of the battalion, charges were framed against the petitioner vide chargesheet dated 30th September, 2009 which was served upon the petitioner on 4th October, 2009 directing him to appear before the inquiry officer on the 5th of October 2009. Learned counsel for the petitioner has vehemently complained that the service of the chargesheet on the eve of the inquiry proceedings was in violation of Rule 153.5 of the RPF Rules, 1987 which mandates that the chargesheet should be served at least 72 hours before the commencement of the inquiry. It is urged that the petitioner was deprived of an adequate opportunity of taking steps for his defence in the inquiry proceedings.

6. A challenge is laid to the proceedings conducted by the inquiry officer. It is pointed out that despite the aforenoted confirmed medical condition of the writ petitioner and his mental health, the respondents proceeded post haste with the inquiry proceedings and six witnesses were examined in support of the charges. The petitioner was not given any opportunity to engage the services of the defending officer.

7. We may at this stage also notice the mandate of Rule 153.5 of the RPF Rules which reads as follows:

> "153.5 The disciplinary authority shall deliver or cause to be delivered to the delinquent member, at least seventy-two hours before the commencement of the enquiry, a copy of the articles of charge, the statement of imputations of misconduct or misbehaviour and a list of documents and witnesses by each article of charge is proposed to be sustained and fix a date when the inquiry is to commence; subsequent dates being fixed by the Inquiry Officer."

8. The requirement of the Rule is salutary and mandatory. The same has been provided to enable a charged person to a fair opportunity to prepare his defence.

9. In the instant case, on 4th October, 2009, the communication was served upon the petitioner enclosing the allegations against the petitioner as well as the chargesheet. By the same communication, the petitioner was informed of the commencement of the inquiry proceedings on the 5th of October 2009 thus giving the petitioner not even twenty hours to prepare his defence. This was not only in violation of the well settled

principles of natural justice but of the specific requirements of the provision of Rule 153.5 of the RPF Rules which goes to the root of exercise of jurisdiction by the respondents. The same is an illegality which would vitiate the conduct of the disciplinary proceedings against the petitioner.

10. The petitioner made applications dated 15th October, 2009 and 16th November, 2009 informing the respondents in writing that on account of his medical condition, he was unable to conduct his defence and that he may be permitted to engage the services of a counsel. There is nothing on record to show that these applications were even considered.

11. Even otherwise, it is trite that in the disciplinary proceedings it is the duty of the disciplinary authority to ensure that adequate opportunity is given to the charged official to conduct his defence and that the same would include an opportunity to engage the defence officer.

12. Given the facts and circumstances of the instant case, especially the mental condition of the petitioner, we find it difficult to believe that the petitioner was conscious that he had a right to seek the assistance of a defence officer. In all fairness as well as to ensure compliance of the principles of natural justice, it was for the respondents to ensure that the petitioner was made aware of his rights as well as procedural safeguards. The same was essential to ensure that the petitioner had an adequate opportunity to defend the charges made against him. Failure to ensure such opportunity also vitiates the proceedings conducted against the petitioner.

13. The petitioner has placed before us the entire record of evidence recorded by the respondents. Against the examination-inchief of six witnesses, the inquiry officer has merely noted that the party charged declined to cross-examine the prosecution witnesses. The respondents have pointed out nothing to show that the petitioner was in a position or able to conduct the cross-examination. Given his communications dated 15th October, 2009 and 16th November, 2009, it is apparent as to why the petitioner would have so stated. Given the finding recorded in the medical opinion dated the 25th of August, 2008, no medical evidence is placed before us to support that the petitioner was mentally and medically fit at the time of the enquiry.

14. In view of the above discussion, we are of the view that the inquiry proceedings were conducted in violation of the well settled

requirements of administrative law jurisdiction as well as violation of the principles of natural justice. The petitioner has been deprived of a fair and adequate opportunity to defend himself.

15. In this background, the recommendation dated 6th February, 2010 of the inquiry officer as well as the orders dated 10th August, 2010 passed by the Disciplinary Authority finding the petitioner guilty of the charge; 28th September, 2010 of the Appellate Authority and the order dated 18th March, 2011 of the Revisional Authority are not sustainable in law.

16. The learned counsel for the respondents has placed before us a pronouncement of the Supreme Court reported at JT 2012 (11) SC 533 titled **Chairman, LIC of India & Ors. vs. A. Masilamani** wherein a challenge similar to the instant case was raised and accepted by the Court. Learned counsel for the respondents has drawn our attention to the following directions made by the Supreme Court after considering the entire law on the subject matter:"

> 12. The instant case requires to be considered in the light of the aforesaid settled legal propositions.
>
> 12.1 ...The matter is remitted to the disciplinary authority to enable it to take a fresh decision, taking into consideration the gravity of the charges involved, as with respect to whether it may still be required to hold a de novo enquiry, from the stage that it stood vitiated, i.e., after issuance of charge-sheet.
>
> 12.2 xxx xxx xxx
>
> 12.3 In the event the authority takes a view, that the facts and circumstances of the case require a fresh enquiry, it may proceed accordingly and conclude the said enquiry, most expeditiously." officer as well as the orders dated 10August, 2010 passed by the

17. Following the above, we direct as follows:-

(i) The recommendation dated 6th February, 2010 of the inquiry the Disciplinary Authority; 28th September, 2010 of the Appellate Authority and the order dated 18th March, 2011 of the Revisional Authority are hereby set aside and quashed.

(ii) In view of the above, the petitioner shall be reinstated in service. However, the petitioner shall not be entitled to any backwages.

(iii) The matter is remitted to the disciplinary authority to take a fresh view in the matter and make appropriate directions taking into consideration all circumstances including the medical status of the petitioner; nature of charges involved as well as the period which is lapsed since issuance of the charge sheet. The disciplinary authority shall thereupon take a decision whether it still requires to hold a de novo enquiry, from the stage that it stood vitiated, i.e., after issuance of charge-sheet.

(iv) In the event the authority takes a view, that the facts and circumstances of the case require a fresh enquiry, the authority shall ensure that the principle of law and natural justice are strictly complied with.

(v) Given the findings of the medical examination which we have noticed hereinbefore, it shall be open for the disciplinary authority to direct appropriate medical examination.

(vi) In view of the time which has elapsed, the disciplinary authority shall proceed expeditiously in the matter.

This writ petition is allowed in the above terms.

ILR (2013) II DELHI 1555
LPA

APEEJAY SCHOOL ....APPELLANT

VERSUS

SURESH CHANDER KALRA ....RESPONDENT

(N.V. RAMANA, CJ. & JAYANT NATH, J.)

LPA NO. : 349/2008 DATE OF DECISION: 18.04.2013

Delhi School Education Act, 1973—Section 11 (6), Section 8 (3) read with Rule 121 of the Delhi School Education Rules, 1973—Appeal against the order of the Ld. Single Judge dated 30/05/2008 whereby the order dated 17/12/2007 of the Delhi School Tribunal was upheld—Vide the said order the Tribunal while reinstating the respondent with the appellant school directed the payment of back wages along with order consequential benefits with effect from the date of his illegal termination. Held: The impugned order to the extent of back wages cannot be sustained. The respondent failed to plead and prove that he was not gainfully employed for the period when he was not working with the appellant school. In the absence of any such averment or evidence, back wages and other benefits could not have been granted by the Tribunal.

The learned counsel appearing for the respondent admits that in the Petition filed under Section 11 of the Delhi School Education Act, before the Tribunal there is no averment whatsoever about the respondent being unemployed during the period after he had ceased to work for the Appellant School. He further states that his client would not like to accept the offer of the Appellant School for retention of 50%

back wages already withdrawn by him to sort out the matter. **(Para 8)**

In view of the above, in our opinion the Delhi School Tribunal while directing payment of arrears of salary alongwith other consequential benefits has failed to consider whether in the facts of the case the said relief ought to have been granted to the respondent. The Tribunal has proceeded on the basis that back wages would follow the relief of re-instatement. The respondent failed to plead or prove that he was not gainfully employed during the period in question. In the absence of any such averment or evidence to the effect the back wages and other consequential benefits could not have been granted by the Tribunal to the respondent. The impugned order to the extent of back wages cannot be sustained. **(Para 13)**

Important Issue Involved: Back wages can only be granted on proof of ungainful employment and do not automatically follow reinstatement.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. H.L. Tikku, Senior Advocate with Ms. Yashmeet, Advocate.

FOR THE RESPONDENT : Mr. Ankur Arora, Advocate.

CASES REFERRED TO:

1. *Managing Director, Balasaheb Desai Sahakari S.K.Limited* vs. *Kashinath Ganapati Kambale,* (2009) 2 SCC 288.
2. *U.P. State Brassware Corpn.Ltd* vs. *Uday Narain Pandey,* (2006) 1 SCC 479.
3. *Kendriya Vidyalaya Sangathan and another* vs. *S.C'Sharma,* (2005) 2 SCC 363.

RESULT: Disposed of.

JAYANT NATH, J. (ORAL)

1. By this Appeal the petitioner Apeejay School seeks to challenge the Order of the learned Single Judge dated 30.05.2008 whereby the Order dated 17.12.2007 of the Delhi School Tribunal was upheld. The Delhi School Tribunal vide its said order directed that the respondent was an employee of the appellant i.e. Apeejay School, Sheikh Sarai-I, New Delhi and he continues to be an employee of the appellant. The Tribunal hence rejected the contention of the appellant that the respondent had abandoned the job and directed that the appellant be allowed to join his service and he would be entitled to arrears of salary alongwith other consequential benefits.

2. It is the case of the appellant that the respondent herein was appointed by the Society as an Internal Auditor. It is stated that the respondent worked with the Society's School at Saket from October 1997 to 16.06.1998 and thereafter was deputed to the Society's School at Sheikh Sarai, New Delhi w.e.f. 08.06.1998 and worked there till 21.09.2004. It is stated that he was thereafter asked to resume his duty w.e.f. 22.09.2004 at Head Office of the Society. It is further stated that the respondent absented himself from duty w.e.f.11.10.2004 without any prior intimation or permission and thus abandoned his job voluntarily.

3. The respondent has denied the said contentions and allegations made by the Appellant. It is the contention of the respondent that he was an employee of the School and that the Management illegally instructed him that he will be retained in the Society itself and he was asked to start signing the attendance register of the Society w.e.f. 1.10.2004. He further claims that on 11.10.2004 when the respondent joined his duty in the School at Sheikh Sarai, the Principal and other officials of the Society orally informed him that his services are terminated forthwith.

4. By the Order dated 17.12.2007 the Delhi School Tribunal held that the respondent continued to be an employee of Apeejay School and directed the Petitioner School to allow the respondent to join his service and also directed payment of his arrears of salary with consequential benefits. This Order was upheld by the learned Single Judge vide Order dated 30.05.2008.

5. At the outset, Mr.H.L.Tikku, learned Senior Counsel for the appellant submits that the respondent has been reinstated in service and

the Appellant does not in any way challenge the order of the Tribunal to the extent it directs the respondent to be taken back in service. He, however, submits that the Appellant seeks to challenge the direction of the Tribunal for grant of full back wages and consequential benefits inasmuch as the order of the Delhi School Tribunal granting the said relief is erroneous.

6. Learned senior counsel for the appellant relies on Section 11(6) read with Section 8(3) of the Delhi School Education Act, 1973 readwith Rule 121 of the Delhi School Education Rules, 1973 to submit that the Delhi School Tribunal while ordering reinstatement has no powers to grant back wages. The learned senior counsel relies upon judgment of this Court in the case of Manager A'S.G.H'S' **School v. Smt'Sunrita Thakur,** 43(1991) DLT 139 to argue that the said Judgment categorically holds that the Tribunal has no jurisdiction to make any order with regard to the salary and allowances to be paid to the employee on reinstatement. In the alternative, it is the next submission of learned senior counsel for the appellant that even otherwise there was no basis for grant of back wages and consequential benefits as the respondent had failed to plead or prove that he was not gainfully employed for the period when he was not working with the Appellant School.

7. Next, the learned senior counsel for the Appellant submits that by the Order dated 16.09.2008 of this Court, the Appellant was directed to deposit the entire amount in Court in terms of the Order of the Tribunal, out of which 50% amount was to be released in favour of the respondent subject to his filing an undertaking that in the event the Appeal is allowed he will refund the amount subject to orders of this Court. He further submits that the Appellant has deposited Rs.5.98 lacs pursuant to the said directions of the Hon'ble Court and 50% of the said amount has been released in favour of the respondent. He submits that as the respondent is an employee of the appellant, they would be willing to sort out the present matter if the 50% of the amount which is lying deposited in the Court is refunded to them and balance 50% amount which has already been withdrawn by the respondent is retained by the respondent.

8. The learned counsel appearing for the respondent admits that in the Petition filed under Section 11 of the Delhi School Education Act, before the Tribunal there is no averment whatsoever about the respondent

being unemployed during the period after he had ceased to work for the Appellant School. He further states that his client would not like to accept the offer of the Appellant School for retention of 50% back wages already withdrawn by him to sort out the matter.

9. We do not propose to deal with the submissions of the learned senior counsel for the Appellant regarding powers of the Delhi School Tribunal to direct payment of back wages and consequential benefits in view of the facts of this case. Admittedly there is no attempt on the part of the respondent to plead or prove that he was not gainfully employed subsequent to his cessation of employment with the Appellant School w.e.f. 11.10.2004 till filing of the Appeal before the Delhi School Tribunal and thereafter. This is admitted by the counsel for the respondent.

10. The legal position regarding payment of back wages while ordering reinstatement is well settled. Reference may be had to the Judgment of the Hon'ble Supreme Court in the case of **U.P. State Brassware Corpn.Ltd vs. Uday Narain Pandey,** (2006) 1 SCC 479 wherein in para 22 the Hon'ble Supreme Court has held as follows:-

> "No precise formula can be laid down as to under what circumstances payment of entire back wages should be allowed. Indisputably, it depends upon the facts and circumstances of each case. It would, however, not be correct to contend that it is automatic. It should not be granted mechanically only because on technical grounds or otherwise an order of termination is found to be in contravention of the provisions of Section 6-N of the U.P.Industrial Disputes Act."

11. Reference may also be made to the judgment of the Hon'ble Supreme Court in the case of **Kendriya Vidyalaya Sangathan and another vs. S.C. Sharma,** (2005) 2 SCC 363 where the Hon'ble Supreme Court has held as follows:-

> "Applying the above principle, the inevitable conclusion is that the respondent was not entitled to full back wages which according to the High Court was a natural consequence. That part of the High Court order is set aside. When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he placed

> materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard."

12. Reliance may also be made to the judgment of the Hon'ble Supreme Court titled **Managing Director, Balasaheb Desai Sahakari S.K.Limited vs. Kashinath Ganapati Kambale,** (2009) 2 SCC 288.

13. In view of the above, in our opinion the Delhi School Tribunal while directing payment of arrears of salary alongwith other consequential benefits has failed to consider whether in the facts of the case the said relief ought to have been granted to the respondent. The Tribunal has proceeded on the basis that back wages would follow the relief of re-instatement. The respondent failed to plead or prove that he was not gainfully employed during the period in question. In the absence of any such averment or evidence to the effect the back wages and other consequential benefits could not have been granted by the Tribunal to the respondent. The impugned order to the extent of back wages cannot be sustained.

14. In view of the above, we set aside the impugned order only to the extent it directs payment of arrears of salary alongwith other consequential benefits to the respondent. The present Writ Petition is accordingly disposed of . The stay order dated 16.09.2008 stands vacated.

ILR (2013) II DELHI 1561
CO. PET.

IN THE MATTER OF

VODAFONE INFRASTRUCTURE LTD. & ORS. ....PETITIONERS

(S. MURALIDHAR, J.)

CO. PET. NO. : 14/2012 DATE OF DECISION: 18.04.2013

(A) Companies Act, 1956—Section 391, 394, 394A—Petitioners no.1, 2 & 3 (transferor companies) along with petitioners no. 4 (transferee company) jointly filed petition seeking sanction of Scheme of Arrangement amongst them and their respective shareholders and creditors—Certain objections were raised by Income Tax Department (ITD) averring that no separate notice was issued to Central Government as contemplated U/s 394A of Act. Held:- For may years now the practice of the RD accepting notices in petitions under Section 384A of the Act on behalf of both the MCA and the Central Government has had the statutory backing by way of the notifications issued under the Act. The very purport of the notification under Section 637 (1) of the Act is to obviate multiple notices having to be issued to different departments and Ministries of the Central Government.

The first substantive objection of the ITD is that no separate notice was issued in the petition to the Central Government as contemplated under Section 394A of the Act which reads as under:

> **"394A Notice to be given to Central Government for applications under Sections 491 and 394:** The Tribunal shall give notice of every application made to it under Section 391 or 394 to the Central Government,

> and shall take into consideration the representations, if any, made to it by that Government before passing any order under any of these Sections." **(Para 34)**

At the first hearing of the present petition, notice was directed to issue to the RD, Northern Region, Ministry of Corporate Affairs ('MCA') as well as the OL. The authority of the RD, Northern Region having his office in Noida in Uttar Pradesh, to accept notice not just on behalf of the MCA but also on behalf of the Central Government is traceable to a notification dated 17th March 2011 issued by the MCA under Section 637 (1) of the Act delegating to the RDs at Mumbai, Kolkata, Chennai, Noida and Ahmedabad the powers and functions of the Central Government under several provisions of the Act including Section 394A. The precursor to the said notification was another one dated 31st May 1991 whereby again the Central Government had in exercise of its power under Section 637 (1) of the Act delegated to the RDs at Mumbai, Kolkata, Chennai, Kanpur the power and functions of the Central Government under several provisions of the Act including Section 394A. Therefore, for many years now the practice of the RD accepting notices in petitions under Sections 394A of the Act on behalf of both the MCA and the Central Government has had the statutory backing by way of the notifications issued under the Act. The very purport of the notification under Section 637 (1) of the Act is to obviate multiple notices having to be issued to different departments and Ministries of the Central Government. It is expected that the RD would seek instructions from the concerned departments and Ministries as regards the Scheme submitted for approval. Consequently, this Court rejects the contention of the ITD that the present petition cannot proceed for want of separate notice to the Central Government. **(Para 35)**

(B) Companies Act, 1956—Section 391, 394, 394A—Petitioners no. 1, 2 & 3 (transferor companies) along with petitioner no. 4 (transferee company) jointly filed

petition seeking sanction of scheme of arrangement amongst them and their respective shareholders and creditors—Certain objections were raised by Income Tax Department (ITD) contending that ITD should be permitted to proceed with recovery in respect of any existing or future liability of transferrer company or transferor company in respect of assets sought to be transferred under the scheme. Held:- It is not open to his Court, in the exercise of company jurisdiction, to sit over the views of the shareholders and board of directors of the Petitioner companies, unless their views were against the framework of law and public policy. The grant of sanction of the Scheme by way of the present judgment will not defeat the right of the ITD to take appropriate recourse for recovery of the previous liabilities of any of the Transferor companies or Transferee company.

In view of the approval accorded by the equity shareholders, secured and unsecured creditors of the Petitioner and the Regional Director, Western Region to the proposed Scheme of Arrangement, as well as the submissions of the Income Tax Department, there appear to be no further impediments to the grant of sanction to the Scheme of Arrangement. Consequently, sanction is hereby granted to the Scheme of Arrangement under Sections 391 and 394 of the Companies At, 1956 while protecting the right of the Income Tax Department to recover the dues in accordance with law irrespective of the sanction of the Scheme. However, while sanctioning the Scheme it is observed that said sanction shall not defeat the right of the Income Tax Department to take appropriate recourse for recovering the existing or previous liability of the Transferor company and the Transferor company is directed not to raise any issue regarding maintainability of such proceedings in respect of assets sought to be transferred under the proposed Scheme and the same shall bind to Transferor and Transferee company. The pending proceedings against the Transferor company shall not be affected in view of the sanction given to the

Scheme by this Court. In short, the right of the Income Tax Department is kept intact to take out appropriate proceedings regarding recovery of any tax from the Transferor or Transferee company as the case may be and pending cases before the Tribunal shall not be affected in view of the sanction of the Scheme." **(Para 44)**

Important Issue Involved: (A) For many years now the practice of the RD accepting notices in petitions under Section 394A of the Act on behalf of both the MCA and the Central Government has had the statutory backing by way of the notifications issued under the Act. The very purport of the notification under Section 637 (1) of the Ac is to obviate multiple notices having to be issued to different departments and Ministries of the Central Government.

(B) It is not open to this Court, in the exercise of company jurisdiction, to sit over the views of the shareholders and board of directors of the Petitioner companies, unless their views were against the framework of law and public policy.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONERS : Mr. Rajiv Nayar, Senior Advocate. Mr. Mihir Joshi, Senior Advocate with Ms. Niti Dixit, Mr. Sandeep Singhi, Mr. Vidur P. Bhatia, Ms. Raunaq B. Mathur & Ms. Samiksha Godiyal, Advocates for Petitioner No.1. Mr. Gopal Jain & Mr. Kunal Kaul, Advocates for Petitioner No.2. Mr. Rajiv Nayar, Senior Advocate, Mr. Mihir Joshi, Senior Advocate with Mr. Sandeep Singhi, Mr. Rishi Agrawala & Mr. Rajeev Kumar, Advocates for Petitioner No. 3. Mr. Rajiv Nayar, Senior Advocate, Mr.

Mihir Joshi, Senior Advocate with Mr. Milanka Chaudhury, Mr. Sarojanand Jha, Mr. Siddharth Mehra & Mr. Abhishek Sharma, Advocates for Petitoner No.4. Mr. A'S. Chandhiok, Additional Solicitor General of India with Mr. Abhishek Maratha, Senior Standing Counsel, Mr. Nitin Mehta and Mr. Vidit Gupta, Advocates for Income Tax Department. Mr. Rajiv Bahl and Mr. Manish K. Bishnoi, Advocates for Official Liquidator.

CASES REFERRED TO:

1. *Vodafone Essar Gujarat Ltd.* vs. *Department of Income Tax* (2013) 2 Comp LJ 155 (Guj).
2. *Vodafone Essar Limited and Vodafone Essar Infrastructure Ltd.* (2011) 2 Comp LJ 317 (Del).
3. *Bharti Infratel Ltd. and Bharti Inratel Ventures Ltd.* (2011) 2 Comp LJ 400 (Del).
4. *Advance Plastics (P) Ltd. & Dynamic Plastics (P) Ltd.* 138 Com Cas 1006.

RESULT: Petition allowed.

S. MURALIDHAR, J.

1. Vodafone Infrastructure Limited ('VIL'), Bharti Infratel Ventures Limited ('BIVL'), Idea Cellular Towers Infrastructure Limited ('ICTIL'), Petitioner Nos. 1, 2 and 3 ('Transferor companies') respectively along with Indus Towers Limited ('Indus'), Petitioner No. 4 ('Transferee company') have jointly filed this petition under Sections 391 to 394 of the Companies Act, 1956 ('Act') seeking sanction of the Scheme of Arrangement ('Scheme') among them and their respective shareholders and creditors. A copy of the Scheme is enclosed with the petition as Annexure 'A'.

2. The background to the present petition is that in October 2006 a report was prepared by the Working Group on the Telecom Sector for

the Eleventh Five Year Plan (2007-2012). In para 5.5, among the recommendations to achieve Vision 2012 there was one recommendation that sharing of infrastructure of telecom companies must be promoted "so that costs can be kept down." It was also recommended that such share should be incentivized. This was considered essential for rural penetration. In the same report, in Chapter 10 (Recommendations and Suggestions) it was stated under the Sub Head 'Mobile Towers' that "there is an urgent need to bring an appropriate legislation so that the towers are shared by mobile operators resulting in reduction in cost." Under the Sub Head 'Rural Telecom Development' it was recommended that sharing of infrastructure should be promoted to keep the costs low for the provision of rural telephony.

3. On 19th January 2007 VIL was incorporated under the Act with the Registrar of Companies ('ROC'), Maharashtra under the name of Perfect Tribute Impex Private Limited ('PTIPL'). Later the name was changed to Vodafone Essar Infrastructure Private Limited ('Vodafone Essar') on 18th October 2007. On 20th November 2007 Indus was incorporated with the ROC, Delhi and Haryana. ICTIL was incorporated with the ROC, Delhi and Haryana on 3rd December 2007 and BIVL was incorporated with the ROC, Delhi and Haryana on 31st December 2007.

4. As part of the requirements, Indus, [formerly known as Indus Infratel Limited ('IIL')] was registered with the Department of Telecommunications ('DoT') on 10th January 2008 as Infrastructure Provider Category-I ('IP-I'). On 17th January 2008 Vodafone Essar was converted into a public limited company and the word "Private" was deleted from its name. The name of IIL was changed to Indus on 28th March 2008. On 23rd April 2008 ICTIL came to be registered as IP-I with DoT. On 17th June 2008 VIL was likewise registered as IP-I with the DoT.

5. The Scheme was entered into by VIL, BIVL, ICTIL with Indus in terms of which the effective date of the Scheme was 1st April 2009. The Scheme was to promote infrastructure sharing among telecommunications service providers as envisaged in the report of the Working Group on the Telecom Sector referred to above. The Scheme noted that the transfer and vesting of the undertakings of the Transferor companies to the Transferee company "reflects the global trend of segregating telecommunications services and the telecommunications

infrastructure business, with a view to adopt good management practices, establish high operational standards, provide a good value proposition to other wireless service providers and enable stakeholders to differentiate between the passive infrastructure assets business and the telecommunications services business." As a result it was proposed in Clause 1.5.4 of the Scheme that "the undertakings of the Transferor companies will be vested and consolidated in the Transferee company, the main objects of which are to provide telecommunications network infrastructure support services on a non-discriminatory basis to all telecommunications operators in India." It was stated that the Scheme would benefit the companies, their respective stakeholders as well as the telecommunications industry since it would lower the cost of operations for telecommunications service providers; improved quality of services being rendered, increase in the speed of roll-out, efficiency and "administrative convenience through the centralization of infrastructure sharing and planning." It was further expected to improve the network quality and greater coverage, especially in rural areas and contributing to the economic development of India. It was stated that the Scheme was in the interests of the parties as well as their respective shareholders and creditors.

6. Clause 2.2.1 provided that upon the Scheme becoming effective on the 'record date' Indus would issue and allot to the equity shareholders of each of the Transferor companies, whose names were registered in the register of members of those Transferor companies on the record date, an aggregate of 1,200 equity shares of Indus of the face value of Re. 1 each credited as fully paid-up in a manner that the shareholding ratio among the shareholders of the first, second and third Transferor companies in Indus, i.e., Transferee company would remain at 42:42:16 ('share ratio'). It was mentioned in Clause 2.2.3 that the share ratio was based inter alia upon the proportion in which Passive Infrastructure Assets ('PIA') were proposed to be contributed by each of the Transferor companies. It has been agreed among the shareholders of both the Transferor and Transferee companies that the PIA proposed to be contributed by them would be evaluated in accordance with a points-based system. It was further stated that the PIA proposed to be contributed by each of the Transferor companies to the Transferee company had been verified by an independent technical agency appointed by the Transferee company. It was further stated in Clause 2.2.4 that the

shareholders of each of the Transferor companies and the respective subsidiaries and/or affiliates of such shareholders have consolidated, or "are in the process of consolidating, the agreed Passive Infrastructure Assets in the Transferor companies by way of Court approved schemes of arrangement under Section 391 to 394 of the Act or in any other appropriate manner (such consolidation, the "Pre-Merger Reorganization")." In Clause 2.2.5 it was discussed in some detail that in the event that the pre-merger reorganization in respect of one or more of the Transferor companies could not be completed as a result of which any of the three Transferor companies was unable to contribute the agreed PIA to Indus (Transferee company), then the Scheme may be modified "such that it may be effectively implemented in respect of the Transferor company(ies) which is/are able to contribute some or all of its/their Passive Infrastructure Assets to the Transferee Company pursuant to this Scheme. The share ratio may be suitably modified by the Board of Directors of the Transferor companies and the Transferee company." The accounting treatment to be given in the books of the Transferee company was set out in Clause 3.2 of the Scheme.

7. ICTIL is a wholly owned subsidiary of Aditya Birla Telecom Limited ('ABTL') which, in turn, was a wholly owned subsidiary of Idea Cellular Limited ('Idea'). ICTIL was registered with DoT as an IP-I. Idea and ICTIL filed petitions in the Gujarat High Court and this Court for approval of the Scheme of Arrangement to demerge the PIA of some of the circles owned by Idea into ICTIL. By orders dated 3rd August 2009 and 31st August 2009 this Court and the Gujarat High Court granted sanction to the Scheme pursuant to which some of the circles of Idea had been transferred to and vested in ICTIL. BIVL is a wholly owned subsidiary of Bharti Infratel Limited ('BIL').

8. VIL is a wholly owned subsidiary of Vodafone India Limited, formerly known as Vodafone Essar Limited, a leading mobile telecommunications service provider across India. Vodafone Essar Limited and certain of its subsidiaries hold Unified Access Service ('UAS') licences issued by the DoT for providing mobile telephony services in 23 telecom circles in India. Vodafone Essar Limited along with its sister concerns ('Vodafone Entities') and VIL as well as their respective shareholders filed petitions before the Bombay High Court, Calcutta High Court, Madras High Court and this Court for approval of the Scheme of Arrangement to demerge certain PIA owned by Vodafone Entities (hereinafter referred

to as 'Vodafone Demerger Scheme') into VIL. The Calcutta High Court approved the Vodafone Demerger Scheme on 28th October 2009 in respect of Vodafone East Limited. On 17th November 2009 the Madras High Court approved the Vodafone Demerger Scheme in respect of Vodafone Cellular Limited. On 17th December 2009 the Bombay High Court approved the Vodafone Demerger Scheme in respect of Vodafone Essar Limited.

9. On 9th December 2010 a learned Single Judge of the Gujarat High Court accepted the objections filed by the Income Tax Department ('ITD'), Ahmedabad and rejected the petition filed by Vodafone West Limited (formerly known as Vodafone Essar Gujarat Ltd.) seeking sanction of the Vodafone Demerger Scheme. Aggrieved by the aforementioned order dated 9th December 2010 Vodafone West Limited filed an appeal before the Division Bench ('DB') of the Gujarat High Court. The DB of the Gujarat High Court by its judgment dated 27th August 2012 in **Vodafone Essar Gujarat Ltd. v. Department of Income Tax** (2013) 2 Comp LJ 155 (Guj) reversed the judgment of the learned Single Judge and approved the Scheme filed by Vodafone Essar Gujarat Limited.

10. By judgment dated 29th March 2011 in Co. Petition No. 334 of 2009 [In re: **Vodafone Essar Limited and Vodafone Essar Infrastructure Ltd.** (2011) 2 Comp LJ 317 (Del)], the learned Company Judge of this Court approved the Vodafone Demerger Scheme in respect of Vodafone Mobile Services Limited, Vodafone South Limited, Vodafone Digilink Limited and VIL. While passing the above judgment, this Court heard and negatived the objections of the ITD. By a separate judgment on the same day, i.e., 29th March 2011 in Co. Petition No. 324 of 2009 [In re: **Bharti Infratel Ltd. and Bharti Inratel Ventures Ltd.** (2011) 2 Comp LJ 400 (Del)], this Court also approved the Bharti Demerger Scheme.

11. On 10th May 2011 Vodafone South Limited, Vodafone Digilink Limited, Vodafone Mobile Services Limited and VIL filed certified copies of the judgment dated 29th March 2011 of this Court approving the Vodafone Demerger Scheme. The said Scheme became effective vis-a-vis six Transferor companies as well as the Transferee company upon such filing.

12. On 23rd May 2011 and 30th May 2011 the Scheme, forming the subject matter of the present petition, was approved by the Board of

Directors ('BoD') of BIVL and ICTIL respectively. On 30th May 2011 the BoD of Indus also approved the Scheme. On 31st May 2011 the BoD of VIL have also approved the Scheme. On the same date, i.e., 31st May 2011 ICTIL filed Co. Appl. (M) No. 142 of 2011 seeking inter alia directions for dispensation of the requirement of convening the meetings of the equity shareholders and the secured creditors and for directions for convening the meeting of the unsecured creditors of ICTIL. BIVL filed Co. Appl. (M) No. 140 of 2011 seeking directions for dispensation of the requirement of convening the meetings of the shareholders, secured and unsecured creditors. Indus filed Co. Appl. (M) No. 143 of 2011 seeking same directions. On 23rd August 2011 BIVL was registered as IP-I with the DoT. VIL filed Co. Appl. (M) No. 141 of 2011 in this Court on 31st October 2011 for dispensation of the requirement of convening the meetings of the equity shareholders, secured and unsecured creditors.

13. On 9th November 2011 a common order was passed by the learned Company Judge allowing the applications filed by the Transferor companies and the Transferee company. It was directed that a meeting of the unsecured creditors of ICTIL be held. A Chairperson and Alternate Chairperson of the meeting were appointed. Likewise, Indus was directed to hold a meeting of its unsecured creditors and for that purpose the Chairperson and Alternate Chairperson were appointed. Liberty was granted to the Petitioner companies to file a joint petition after the conclusion of the meetings. Pursuant to the above directions, meetings were convened of the unsecured creditors of ICTIL and Indus and the reports of the Chairpersons of the meetings have been placed on record.

14. Thereafter the present petition was filed seeking the reliefs as noted hereinbefore. Pursuant to the notices issued in this petition on 9th January 2012, the Regional Director ('RD'), Northern Region filed an affidavit dated 27th March 2012 stating as under:

(i) The Scheme does not mention whether the Petitioner companies have complied with the Accounting Standard ('AS')-14 issued by the Institute of Chartered Accountants of India ('ICAI').

(ii) The Transferee company has not submitted a valuation report.

(iii) The Transferee company may be directed to obtain the necessary approvals from the Ministry of Telecommunications.

(iv) Prointeractive Services (India) Pvt. Ltd. ('PSIPL') is an unsecured creditor of Indus and has opposed the Scheme and registered its objections.

(v) ROC has received a complaint dated 14th December 2011 from Karnataka Engineering Pvt. Ltd., Mumbai ('KEPL').

15. Pursuant to the notice issued, the Official Liquidator ('OL') filed a report in the Court stating inter alia that: (i) Valuation of all the shares of all the Petitioner companies should have been done to ascertain the exact exchange ratio. (ii) By issuing just 1200 equity shares against the net assets of Rs. 2,174.43 crores of the Transferor companies, huge general reserves will be created in the books of the Transferee company. The purpose of issuing shares of Rs. 1200 against assets of Rs. 2,174.43 crores is not clear. (iii) If this Court deems fit, the comments of the DoT may be called for. (iv) The affairs of the Transferor companies appear not to have been conducted in a manner prejudicial to the interests of its members or to public interest.

16. On 2nd July 2012 an additional affidavit was filed on behalf of the RD bringing on record the letter dated 29th June 2012 issued by the Commissioner of Income Tax, Mumbai. On 3rd July 2012 the Court took note of the above development and the contention of the Petitioners that the ITD had no locus standi to object to the Scheme.

17. Aggrieved by the rejection of its contentions by the learned Company Judge by the judgment dated 29th March 2011, the ITD filed Company Appeal No. 63 of 2012. The said appeal was admitted by the DB. Subsequently, on 11th September 2012, in an application filed by the Respondents in the appeal, the DB passed the following order:

> **"CM No.15491/2012**
>
> In this application filed by the respondents, modification is sought of order dated 28.8.2012 whereby this Court had observed that the learned Company Court would adjourn the matters coming before it on 4th September, 2012. It is pointed out that the matters which were listed before the Company Judge on 4.9.2012 are totally independent. It is also argued that even this appeal is time barred and delay has not been condoned as yet; that even if the appeal is ultimately allowed, that will have no bearing on the matters which are listed before the Company Judge.

> The matter before the learned Company Judge is now coming up for hearing on 5th October, 2012. It will be for the parties to make their submissions on the aforesaid aspect before the learned Company Judge.
>
> The Company Judge, if convinced that two matters are independent, would be free to go ahead with the matter. The application stands disposed of."

18. This Court has heard the submissions of Mr. Rajiv Nayar and Mr. Mihir Joshi, learned Senior counsel for Petitioner Nos.1, 3 and 4, Mr. Gopal Jain, learned counsel for Petitioner No.2, Mr. A'S. Chandhiok, learned Additional Solicitor General of India ('ASG'), Mr. Abhishek Maratha, learned Senior Standing counsel and Mr. Nitin Mehta, learned counsel for the ITD, Mr. Rajiv Bahl and Mr. Manish K. Bishnoi, learned counsel for the OL and Mr. K'S. Pradhan, Deputy ROC.

19. In the first instance, the objections raised by the RD are dealt with. In the affidavit dated 26th March 2012 it is stated by the RD that as per Clause 4.4.1 of the Scheme, all the permanent employees of the Transferor companies would become the employees of the Transferee company without any break or interruption in their services upon sanctioning of the Scheme. In para 4 it is stated that there is no mention whether the Transferor companies have complied with the AS-14 issued by ICAI. It is next pointed out in para 5 that despite a letter being written to Indus by the RD on 16th January 2012, Indus has not submitted any valuation report.

20. The third objection of the RD in para 6 of the affidavit is that Indus should be asked to obtain approvals of the DoT for transfer of licences from the Transferor companies to it after sanction of the Scheme by this Court. A reference is made to a letter dated 9th June 2003 issued by the DoT which clarifies that the licensee may transfer the licence with prior written approval of the licensor, even in the cases of a scheme under Section 391 or 394 of the Act. The fourth objection is that one of the unsecured creditors of Indus, PSIPL had, in the meeting of unsecured creditors held on 24th December 2011, opposed the Scheme. Lastly, it is pointed out in para 8 of the affidavit of the RD that the ROC, Delhi had informed that a complaint dated 14th December 2011 against Indus had been made by KEPL seeking certain outstanding payment and

interest thereon and objecting to the Scheme. In response to the above affidavit of the RD, the Petitioners filed an affidavit dated 11th April 2012.

21. As regards AS-14, in para 5 of the affidavit dated 11th April 2012 the Petitioner companies have undertaken that to the extent that the Scheme deviates from AS-14, the Transferee company will make proper disclosures of such deviation in its profit and loss account and balance sheet in terms of Section 211 (3B) of the Act read with AS-14. Further it would be placed before the shareholders of Indus for adoption. In **Hindalco Industries Limited** (2009) 151 Comp Cas 446 (Bom), the Bombay High Court has, while approving a scheme, inter alia held that deviation from the AS per se could not be a ground to reject the scheme. This Court is satisfied with the undertaking given by the Petitioners to the above extent. Consequently, this objection of the RD does not survive.

22. The second objection concerns the shareholding of the Transferor companies in Indus. Indus has, by its letter dated 12th March 2012, stated that it was a closely held public limited company and that shares were held in it by the three Transferor companies. The aggregate number of equity shares held by them were to be issued in the same proportion as contribution of PIA by a ratio of 42:42:16 and therefore, in terms of Clauses 2.2.2 and 2.2.3 of the Scheme there was no requirement for the submission of a valuation report. A perusal of the said clauses substantiates the contentions of the Petitioners that there is no requirement of a valuation report. Clauses 2.2.2 and 2.2.3 of the Scheme read as under:

> "2.2.2 The aggregate number of equity shares of the Transferee company to be issued pursuant to Clause 2.2.1 above to the shareholders of the Transferor companies has been mutually agreed by the shareholders of the Transferor companies with the Transferee company.
>
> 2.2.3 The share ratio is based, *inter alia,* upon the proportion in which Passive Infrastructure Assets are proposed to be contributed by the First Transferor company, the Second Transferor company and the Third Transferor company, to the Transferee company, namely 42:42:16. It has been agreed among the shareholders of the Transferor companies that the Passive Infrastructure Assets proposed to be contributed by each of the Transferor companies to the Transferee company would be evaluated in accordance with a points-based system. The shareholders of the Transferor companies have agreed to certain weighting factors based upon (i) the telecommunications circle in which the relevant Passive Infrastructure Asset is located and (ii) the type of the relevant Passive Infrastructure Asset, that is, whether the Passive Infrastructure Asset is classified as a Ground Based Tower, a Roof Top Tower, a Roof Top Pole or a micro site. The Passive Infrastructure Assets proposed to be contributed by each of the Transferor companies to the Transferee company have been verified by an independent technical agency appointed by the Transferee company. The points attributable to such Passive Infrastructure Assets have been calculated in the manner set out above by the Transferor companies and the Transferee company."

23. It seems that there is no change in the overall position of the assets in any of the shares in the Transferee company being issued to the Transferor companies in the same ratio as their contribution of the PIA. Further the PIA proposed to be contributed has been verified by an independent technical agency appointed by it. The explanation offered by the Petitioner companies that no valuation report is required is accepted and this objection of the RD is negatived.

24. As regards the third objection concerning the transfer of licences from the Transferor companies to the Transferee company, i.e., Indus, it is already noted that each of the three Transferor companies as well as Indus are separately registered with the DoT as IP-I. In fact, none of the Petitioner companies holds any telecom licence issued by the DoT. The question of therefore, any of the Petitioner companies transferring any telecom licences to Indus pursuant to the Scheme does not arise. Consequently, the letter dated 9th June 2003 issued by the DoT is of no consequence. It may be noted that while approving the Vodafone Demerger Scheme for merger of Vodafone Entities with VIL by a judgment dated 29th March 2011 this Court negatived a similar objection raised by the RD. Although the appeal against the said judgment had been admitted there has been no stay of the said judgment.

25. It may also be noted that Indus itself has registration as IP-I. Therefore, the question of transfer of registration of certificates from the Transferor companies to Indus does not arise. Further a perusal of the registration certificates shows that this is a complete compliance under

the requirements of the Indian Telegraph Act, 1885. The change of name of the companies has also been duly recorded by the authority issuing the certificates.

26. In a decision dated 6th July 2009 in Co. Petition No. 160 of 2009 [In re: **Keane International (India) Private Limited**] this Court in similar circumstances noted that there was no third party interest involved in the scheme of merger. The shareholders, secured and unsecured creditors had also given their written consents to the scheme and the share exchange ratio proposed therein. The following passage in the decision of the Bombay High Court in **Advance Plastics (P) Ltd. & Dynamic Plastics (P) Ltd.** 138 Com Cas 1006 was quoted with approval:

> "The shares are the properties of the shareholders and they are the ultimate and the best judge of the value they would put on their charges. There is no requirement in the Companies Act, 1956 that in such a case the ratio of exchange has to be determined on a valuation made by a chartered accountant and the auditor. In the present case, no shareholder has challenged the amalgamation. In the circumstances, valuation report is not necessary."

27. Reference may also made to the decision in re: **Bharti Infratel Limited** where the objection to the same effect had been rejected. In view of the above, the objection of the RD does not survive.

28. As regards the last objection of the RD concerning the stand of PSIPL, it requires to be noted that majority of the unsecured creditors approved the Scheme at a meeting convened for that purpose on 24th December 2011. The report of the Chairperson of the said meeting was perused by this Court and has been enclosed with the affidavit filed by the Petitioners. Indeed, when the requisite majority had approved the Scheme, the fact that one unsecured creditor had objected to it will not make a difference. It has been clarified by the Petitioners in the affidavit dated 11th April 2012 that Indus has no creditor by the name of KEPL however, it has a creditor by the name of Karamtara Engineering Private Limited ('Karamtara Engineering') which served notice under the Act. The reply sent by Indus to Karamtara Engineering denying its claim has been enclosed with the affidavit and no further correspondence resulted from the said exchange. It is further submitted that Indus has a sound financial position and the Scheme has been approved by 99.892% in

value of the unsecured creditors. In the circumstances, the above objection of the RD is negatived.

29. The objections of the ITD are considered next. By a separate affidavit dated 29th June 2012 the RD has placed on record a copy of the letter dated 29th June 2012 received from the ITD, Mumbai. It is the said objection of the ITD which has been reiterated in the objections dated 24th August 2012. These objections are which the Court now proceeds to deal with.

30. On behalf of the ITD, this Court was addressed arguments by Mr. A'S. Chandhiok, learned ASG, on some of the dates. On some other dates the arguments were addressed for the ITD by Mr. Nitin Mehta, learned counsel and on the final date of arguments by Mr. Abhishek Maratha, learned Senior Standing counsel for the ITD.

31. The first contention of the ITD is that the Court should not proceed with the present matter unless it comes to a determination that the present petition and the appeal pending before the DB against the decision dated 29th March 2011 of the Company Court in Co. Petition No. 334 of 2009 pertain to independent issues. The attention in this regard is drawn to the order passed by the DB of this Court on 11th September 2012 in Company Appeal No. 63 of 2012.

32. It is seen that the said order was passed in an application filed by the Petitioners herein before the DB contending that the present petition is independent of the appeal. In that context, the DB clarified that the said submission should be made before this Court and that "the Company Judge, if convinced that two matters are independent, would be free to go ahead with the matter."

33. The arguments concerning the issue whether both the matters are independent have necessitated the Court having to hear extensive arguments on the merits of the present petition itself. As a result, the Court proposes to deal with the said issue as part of the present judgment, which, it is clarified, is subject to the decision in the appeal pending before the DB.

34. The first substantive objection of the ITD is that no separate notice was issued in the petition to the Central Government as contemplated under Section 394A of the Act which reads as under:

> **"394A Notice to be given to Central Government for applications under Sections 491 and 394:** The Tribunal shall give notice of every application made to it under Section 391 or 394 to the Central Government, and shall take into consideration the representations, if any, made to it by that Government before passing any order under any of these Sections."

35. At the first hearing of the present petition, notice was directed to issue to the RD, Northern Region, Ministry of Corporate Affairs ('MCA') as well as the OL. The authority of the RD, Northern Region having his office in Noida in Uttar Pradesh, to accept notice not just on behalf of the MCA but also on behalf of the Central Government is traceable to a notification dated 17th March 2011 issued by the MCA under Section 637 (1) of the Act delegating to the RDs at Mumbai, Kolkata, Chennai, Noida and Ahmedabad the powers and functions of the Central Government under several provisions of the Act including Section 394A. The precursor to the said notification was another one dated 31st May 1991 whereby again the Central Government had in exercise of its power under Section 637 (1) of the Act delegated to the RDs at Mumbai, Kolkata, Chennai, Kanpur the power and functions of the Central Government under several provisions of the Act including Section 394A. Therefore, for many years now the practice of the RD accepting notices in petitions under Sections 394A of the Act on behalf of both the MCA and the Central Government has had the statutory backing by way of the notifications issued under the Act. The very purport of the notification under Section 637 (1) of the Act is to obviate multiple notices having to be issued to different departments and Ministries of the Central Government. It is expected that the RD would seek instructions from the concerned departments and Ministries as regards the Scheme submitted for approval. Consequently, this Court rejects the contention of the ITD that the present petition cannot proceed for want of separate notice to the Central Government.

36. The ITD has apart from filing its objections on 24th August 2012 filed additional documents as well as an affidavit on 9th January 2013. Further, in the Court learned counsel for the ITD has handed over a note titled 'Assuming that M/s. Bharti Infratel Ltd. gives its assets to M/s. Indus Towers Ltd. without creating a vehicle namely M/s. Bharti Infratel Ventures Ltd. The ITD has also filed its written submissions.

37. The first substantive objection to the Scheme on merits is that the Petitioner companies have suppressed the fact that the Petitioners 1 to 3 had entered into an 'Indefeasible Right to Use Agreement' ('IRU Agreement') with Indus in 2008 with an effective date of 1st January 2009. Under the said IRU Agreement, Indus acquired an exclusive, unrestricted and indefeasible right to use the passive infrastructure until such time it was transferred to Indus by way of one or more Schemes of Arrangement under Sections 391 to 394 of the Act. The ITD accordingly points out that in terms of the IRU Agreement, Indus not only had the operational and physical control but had absolute, complete, unfettered and irrevocable right over the PIA and for all practical purposes the PIA vested in Indus with effect from 1st January 2009. The stand of the ITD is that the Demerger Schemes involving VIL, BIVL and ICTIL and the present Scheme are inter-connected and interdependent. It is pointed out that in 2008 itself it had been contemplated that the PIA should be ultimately transferred to Indus by way of Demerger Schemes under Sections 391 to 394 of the Act as the Demerger Schemes were devised as a first step to transfer the PIA to intermediate companies for its ultimate transfer. It is accordingly, submitted that the Demerger Schemes and the present Scheme are part of a 'single transaction'.

38. The above submissions have been considered. As already noted hereinabove, even if it were to be assumed that the Schemes are interconnected and inter-dependent, if for some reason any part of the Demerger Schemes do not go through then such eventuality has been accounted for under Clause 2.2.5 of the Scheme. To the extent that some parts of the Demerger Schemes are not ultimately approved the present Scheme would correspondingly stand modified. Depending on the ultimate orders that may be passed concerning any part of the Demerger Schemes, applications can be filed in this Court for modification in terms of Section 392(1)(b) or Section 392(2) of the Act.

39. It is then submitted that the ITD should be permitted to proceed with recovery in respect of any existing or future tax liability of the Transferor companies or the Transferee company in respect of the assets sought to be transferred under the Scheme. It is submitted that there should be no limitation on the powers of the ITD to effect recovery of tax and penalties etc.

40. A similar contention was addressed by this Court in its judgment dated 29th March 2011 while approving the Vodafone Demerger Scheme. The submission made by learned Senior counsel for the Petitioners before the Court in para 29 of the decision dated 29th March 2011 [re: **Vodafone Essar Limited**], reads as under:

> "29. At the outset, it is necessary to record that Dr. Singhvi, counsel for the Petitioners, submitted, on instructions, that notwithstanding any sanction or approval that may be granted by this Court to the proposed scheme, his clients would be bound by all obligations that may be imposed on them under the applicable provisions of the Income Tax Act, 1961. By standing this, the Petitioners clearly outlined their stand at the beginning of these proceedings, to the effect that the sanctioning of the scheme would not ipso facto grant any immunity to the Petitioners qua any liability that may be imposed on them under the relevant provisions of the Income Tax Act, in accordance with law."

41. It was further observed in paras 69 and 70 of the said judgment as under:

> "69. Further, the Petitioners have fairly admitted that any question of tax liability is within the purview of the income-tax department and that it is free to pursue either the Transferor companies or of the Transferee company, as it may be advised, notwithstanding the sanction of the scheme by this Court. Neither counsel seeks a finding by this Court with regard to the tax implications of the proposed Scheme. It is agreed that the scheme may be sanctioned whilst relegating the parties to the appropriate fora to determine the tax liability, if any, that may arise. No action which may be violative of a statute is being legitimized by approval of the scheme, and the income tax authorities are free to move against any of the parties concerned, in case they are of the belief that there has been any impermissible evasion of payment of tax by the Petitioners.
>
> 70. In my view, if the Court is indeed to sanction the scheme, the powers of the income-tax department must remain intact. The authorities relied on by the Petitioners also support this proposition, with the only exception being a situation where the scheme itself has only one purpose, which is to create a vehicle to evade the payment of tax, rather than mere avoidance of tax. It is also true that the scope of objection that may be raised by the Central Government and the Regional Director is larger, and that of the tax authorities is confined to the question of revenue. It is not open to this Court, in the exercise of company jurisdiction, to sit over the views of the shareholders and board of directors of the Petitioner companies, unless their views were against the framework of law and public policy, which, as discussed above, is not the conclusion reached here. It is purely a business decision based on commercial considerations."

42. In the operative portion of the judgment dated 29th March 2011, sanction was granted to the Scheme of Arrangement "reserving the right of the income tax authorities to the extent stated above." Therefore, throughout it has been made clear that the right, if any, that the income tax authorities may have under the Income-Tax Act, 1961 ('ITA') to proceed against the Petitioner companies was not in any manner curtailed.

43. Mr. Rajiv Nayar, learned Senior counsel for Petitioner Nos.1, 3 and 4 has reiterated the undertaking made by them as noted in para 29 of the aforementioned judgment dated 29th March 2011. Towards the end of the hearing, Mr. Abhishek Maratha, learned Senior Standing counsel for the ITD produced before the Court copies of four assessment orders ('AOs') passed by the ITD Circles at Mumbai (concerning VIL) and New Delhi (concerning Indus and Idea). Mr. Mihir Joshi, learned Senior counsel appearing for some of the Petitioners submitted that their defence, if any, in the proceedings arising out of the aforementioned AOs also ought not to be curtailed by the present judgment.

44. As far as the above submissions are concerned, this Court clarifies that it does not express any opinion whatsoever on the AOs that have been passed against the Petitioner companies. Their correctness would be decided in other appropriate fora, when challenged, in accordance with law. All the contentions of the Petitioner companies as well as the ITD in that behalf are left open to be decided in those proceedings. Further, it is seen that the DB of the Gujarat High Court has while approving the Scheme of demerger of Vodafone Essar Gujarat Limited by its judgment dated 27th August 2012 observed in para 55 as under:

"55. In view of the approval accorded by the equity shareholders, secured and unsecured creditors of the Petitioner and the Regional Director, Western Region to the proposed Scheme of Arrangement, as well as the submissions of the Income Tax Department, there appear to be no further impediments to the grant of sanction to the Scheme of Arrangement. Consequently, sanction is hereby granted to the Scheme of Arrangement under Sections 391 and 394 of the Companies At, 1956 while protecting the right of the Income Tax Department to recover the dues in accordance with law irrespective of the sanction of the Scheme. However, while sanctioning the Scheme it is observed that said sanction shall not defeat the right of the Income Tax Department to take appropriate recourse for recovering the existing or previous liability of the Transferor company and the Transferor company is directed not to raise any issue regarding maintainability of such proceedings in respect of assets sought to be transferred under the proposed Scheme and the same shall bind to Transferor and Transferee company. The pending proceedings against the Transferor company shall not be affected in view of the sanction given to the Scheme by this Court. In short, the right of the Income Tax Department is kept intact to take out appropriate proceedings regarding recovery of any tax from the Transferor or Transferee company as the case may be and pending cases before the Tribunal shall not be affected in view of the sanction of the Scheme."

45. Taking a cue from the above observations, this Court further clarifies that the grant of sanction of the Scheme by way of the present judgment will not defeat the right of the ITD to take appropriate recourse for recovery of the previous liabilities of any of the Transferor companies or Transferee company. The proceedings arising out of the AOs passed against the Transferor companies or Transferee company will not be affected by the present judgment.

46. In view of the above conclusions, this Court does not consider it necessary to deal with the objection of the Petitioner companies regarding the *locus standi* of the ITD to oppose the Scheme.

47. With no other objections remaining to be dealt with, there appears to be no impediment to the grant of sanction to the Scheme.

Accordingly, this Court grants sanction to the Scheme under Sections 391 to 394 of the Act. It is made clear that the grant of sanction to the Scheme is subject to the final order in Company Appeal No. 63 of 2012 pending before the DB of this Court and any other orders in any further proceedings thereafter.

48. In terms of Sections 391 to 394 of the Act and in terms of the Scheme, the whole of the undertaking, the property, rights and powers of the Transferor companies shall be transferred to and vest in the Transferee company without any further act or deed. Similarly, in terms of the Scheme, all the liabilities and duties of the Transferor companies shall be transferred to the Transferee company without any further act or deed. Upon the Scheme coming into effect, the Transferor companies shall stand dissolved without winding up. It is, however, clarified that this judgment will not be construed as granting exemption from payment of stamp duty or taxes or any other charges, if payable in accordance with any law; or permission/compliance with any other requirement which may be specifically required under any law. The Petitioner companies will comply with the statutory requirements in accordance with law. A certified copy of this judgment shall be filed with the ROC within 30 days from its receipt.

49. The petition is allowed in the above terms.

ILR (2013) II DELHI 1583
LPA

VIPIN MALIK **....APPELLANT**

VERSUS

THE INSTITUTE OF CHARTERED ACCOUNTANT OF INDIA **....RESPONDENT**

(N.V. RAMANA, CJ. & JAYANT NATH, J.)

LPA NO. : 240/2013 **DATE OF DECISION: 22.04.2013**

Constitution of India, 1950—Article 226—Disciplinary proceedings initiated against the appellant by the respondent in June, 1997 with respect to some advertisement published in the Accountancy Journal in August, 1996—Disciplinary Committee appointed by respondent exonerated the appellant in January 2001—In the writ petition filed before this Ld. Single Judge, appellant claimed that vide a communication dated 8/3/2013 the respondent is seeking to re-open the issue by causing further inquiry on the same allegations and prayed for a stay of the said communication pending the writ proceedings—Ld. Single Judge refused to stay the said communication on the ground that the appellant had suppressed a letter dated 18/4/2002 vide which he had been informed about the decision of the respondent for referring the matter back to the Disciplinary Committee for further inquiry. Held The document dated 18/4/2002 does not go to the root of the matter and given the unexplained delay in re-initiating the matter and the prejudice that would be caused to the appellant due to pendency of the disciplinary proceedings, respondent not to proceed with the inquiry till the pendency of the main writ petition.

A perusal of the facts shows that there is gross delay on the part of the respondent in conduct of the proceedings. The first communication regarding the alleged misconduct was issued by the respondent is dated 23.06.1997 where the respondent was asked to submit his reply. The Disciplinary Committee exonerated the appellant vide its report dated 17.01.2001. Thereafter, the Council vide its communication dated 18.04.2002 informed the appellant that the report of the Disciplinary Committee has not been accepted and the matter is being referred back to the Disciplinary Committee for further enquiry. No doubt, this communication dated 18.04.2002 has not been placed on record by the Appellant. However, after a gap of about 16 years from the date of the alleged misconduct and 11 years from the date of the decision of the Council, the respondent has now sought to re-start the procedure to cause further enquiry by the Disciplinary Committee. **(Para 10)**

Important Issue Involved: A charge of misconduct against a professional has to be disposed of with utmost expedition for long unexplained delay in concluding the matter causes prejudice to the professional.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. V.P. Singh, Sr. Advocate with Mr. Ashish Mahija and Ms. Yukti Gupta, Advocate.

FOR THE RESPONDENT : Mr. J'S. Bakshi and Mr. A'S. Bakshi, Advocate.

CASES REFERRED TO:

1. *Niranjan Hemchandra Sashital and Anr.* vs. *State of Maharashtra,* WP(Crl.)50/2012, dated 15.03.2013.
2. *Ranjan Dwivedi* vs. *CBI, Through the Director General,*WP(Crl.) 200/2011, dated 17.08.2012.

3. *The Council of the Institute of Chartered Accountants of India* vs. *Shri. D.R. Bahl and Anr.* 117 (2011) DLT 332.

RESULT: Disposed of.

JAYANT NATH, J. (ORAL)

CM No. 6364-6365/2013 (exemption)

Exemption is allowed subject to just exceptions.

LPA 240/2013

1. By the present appeal the appellant seeks to impugn the order dated 08.04.2013 passed by the learned Single Judge whereby the application for stay being CM No. 4199/2013 has been dismissed.

2. By the writ petition the appellant impugned a communication dated 08.03.2013 issued by the respondent whereby the respondent decided to cause further enquiry by the Disciplinary Committee on the specific issue stated. It is the contention of the appellant that for the first time he received a letter dated 23.06.1997 from the respondent where he was requested to send his comments on the information received against his firm and he was informed that the respondent was prima facie of the opinion that the appellant was guilty of professional/other misconduct and has decided to cause an enquiry to be made by the Disciplinary Committee. The Disciplinary Committee constituted by the respondent vide its report dated 17.01.2001exonerated the appellant and recorded that there is no evidence on record to show that the advertisement that was published in the Accountancy Journal in August, 1996 was at the instance of the appellant.

3. It is further contended by the appellant that on 24.02.2006 after a gap of five years, another communication was sent by the respondent seeking his comments on the copy of the advertisement. It was submitted that the issue stood concluded by the Disciplinary Committee pursuant to report dated 17.01.2001 and the same was sought to be re-opened now.

4. When the matter came up before the learned Single Judge, the counsel for the respondent pointed out that the appellant has withheld vital information and has suppressed communication dated 18.04.2002 which had been received by the appellant and which letter stated that the

Council has decided not to accept the report of the Disciplinary Committee and has decided to refer it back to the Disciplinary Committee for further enquiry.

5. Based on the said submission of the counsel for the respondent, the impugned order holds that there is no reference in the writ petition or list of dates to the said crucial date and communication. The Court hence declined any interim stay to the appellant. A direction was issued to the Disciplinary Committee to conclude the proceedings expeditiously. In the main writ petition, the respondent was given an opportunity to file its counter affidavit. Hence the appellant has preferred the present appeal impugning the said order declining a stay of the proceedings.

6. The learned senior counsel for the appellant also relies upon a judgment of the Division Bench of this High Court in the case of The Council of the Institute of Accountants of India, **New Delhi vs. Dinesh Kumar and Anr.,** 1991(21) DRJ 238. This Court held that there is nothing on record to show as to why it took four years for the Council to deliberate upon the report of the Disciplinary Committee and keep the matter pending to the extreme prejudice of the respondent. The Hon'ble Court noted as follows:-

> ".....A case like the present one where there is a charge of misconduct against a professional has to be disposed of with utmost expedition. The approach, in the present case, of the Council appears to us to be rather lackluster and the delay inexcusable. We are told that all these years respondent has not been able to get any work of public undertakings and other institutions because of pendency of the disciplinary proceedings....."

The Court finally directed the proceedings to be filed.

7. The learned senior counsel for the appellant also points out that the above judgment was relied upon by the Division Bench of this Court in the case of **The Council of the Institute of Chartered Accountants of India vs. Shri. D.R. Bahl and Anr.** 117 (2011) DLT 332. In the said case, the complaint was made in the year 1992, the meeting of the Council took place in December, 1996 and the reference to the High Court was made in July 2000. Hence the Court came to the conclusion that there were latches and delay that remained unexplained. Relying on

the above judgment of **Dinesh Kumar** (supra), this Court directed the reference to be filed.

8. Counsel for the respondent states that the letter of 24.02.2006 pertains to a different disciplinary proceeding and does not concern the present proceedings. He relies on the impugned order to argue that the appellant has suppressed material facts and is not entitled to any interim protection.

9. The learned counsel appearing for the respondent has also relied upon the judgments of the Hon'ble Supreme Court in the case of **Niranjan Hemchandra Sashital and Anr. Vs. State of Maharashtra,** WP(Crl.)50/2012, dated 15.03.2013 and **Ranjan Dwivedi vs. CBI, Through the Director General,** WP(Crl.) 200/2011, dated 17.08.2012. He has contended that in these judgments, the consistent view of the Hon'ble Supreme Court has been that the trial in criminal cases cannot be terminated merely on the ground of delay.

10. A perusal of the facts shows that there is gross delay on the part of the respondent in conduct of the proceedings. The first communication regarding the alleged misconduct was issued by the respondent is dated 23.06.1997 where the respondent was asked to submit his reply. The Disciplinary Committee exonerated the appellant vide its report dated 17.01.2001. Thereafter, the Council vide its communication dated 18.04.2002 informed the appellant that the report of the Disciplinary Committee has not been accepted and the matter is being referred back to the Disciplinary Committee for further enquiry. No doubt, this communication dated 18.04.2002 has not been placed on record by the Appellant. However, after a gap of about 16 years from the date of the alleged misconduct and 11 years from the date of the decision of the Council, the respondent has now sought to re-start the procedure to cause further enquiry by the Disciplinary Committee.

11. A perusal of the judgment of the Hon'ble Supreme Court in the case of **Niranjan Hemchandra Sashital** (supra) cited by learned counsel for the respondent shows that the said matter pertains to quashing of criminal proceedings on the ground of delay in investigation, filing of charge-sheet, etc. The matter pertains to the criminal prosecution of a public servant under the Prevention of Corruption Act, 1988. In para 19, the Hon'ble Supreme Court held as follows:-

> "19. It is to be kept in mind that on one hand, the right of the accused is to have a speedy trial and on the other, the quashment of the indictment or the acquittal or refusal for sending the matter for re-trial has to be weighed, regard being had to the impact of the crime on the society and the confidence of the people in the judicial system. There cannot be a mechanical approach. From the principles laid down in many an authority of this Court, it is clear as crystal that no time limit can be stipulated for disposal of the criminal trial. The delay caused has to be weighed on the factual score, regard being had to the nature of the offence and the concept of social justice and the cry of the collective. In the case at hand, the appellant has been charge-sheeted under the Prevention of Corruption Act, 1988 for disproportionate assets. The said Act has a purpose to serve. The Parliament intended to eradicate corruption and provide deterrent punishment when criminal culpability is proven. The intendment of the legislature has an immense social relevance. In the present day scenario, corruption has been treated to have the potentiality of corroding the marrows of the economy. ...."

The Hon'ble Court thus concluded that the balance to continue the proceedings against the accused tilts in favour of the prosecution and hence Hon'ble Court did not quash the proceedings.

12. Similarly in the case of **Ranjan Dwivedi** (supra) cited by learned counsel for respondent, the Hon'ble Supreme Court reiterated the legal position that the Constitution does not expressly declare the right to speedy trial as a fundamental right. However, the right to speedy trial is implicit in the broad sweep of content of Article 21 of the Constitution. In para 19, the Hon'ble Court held as follows:

> "19. The reasons for the delay is one of the factors which courts would normally assess in determining as to whether a particular accused has been deprived of his her right to speedy trial, including the party to whom the delay is attributable. Delay, which occasioned by action or inaction of the prosecution is one of the main factors which will be taken note by the courts while interjecting a criminal trial. A deliberate attempt to delay the trial, in order to hamper the accused, is weighed heavily against the prosecution. However, unintentional and unavoidable delays or

administrative factors over which prosecution has no control, such as, over-crowded court dockets, absence of the presiding officers, strike by the lawyers, delay by the superior forum in notifying the designated Judge, (in the present case only), the matterpending before the other forums, including High Courts and Supreme Courts and adjournment of the criminal trial at the instance of the accused, may be a good cause for the failure to complete the trail within a reasonable time. This is only illustrative and not exhaustive. Such delay or delays cannot be violative of accused's right to a speedy trial and needs to be excluded while deciding whether there is unreasonable and unexplained delay. The good cause exception to the speedy trial requirement focuses on only one factor i.e. the reason for the delay and the attending circumstances bear on the inquiry only to the extent to the sufficiency of the reason itself..."

The above petition pertains to prosecution against the accused for alleged assassination of Shri L.N. Mishra, the then Union Railway Minister. Hence, the Hon'ble Court concluded that the trial could not be terminated merely on the ground of delay without considering the reasons thereof.

13. A reading of the above judgments cited by learned counsel for the respondent makes it clear that they would not apply to the facts of the present case. The above judgments relate to serious criminal offences said to have been committed by the accused. The Hon'ble Court declined to quash the criminal proceedings on the ground of delay based on the facts of those cases. In the present case the issue pertains to issue of an advertisement published in the Accountancy Journal of the Institute of Chartered Accountants of England and Wales in the month of August 1996 wherein details as regards the professional attainment of the principal of the appellant firm have been mentioned. The two judgments of the Division Bench cited by the learned senior counsel for the appellant would apply to the facts of the present case. Further in the present case there is at the moment unexplained delay of nearly 12 years in re-starting the disciplinary proceedings.

14. The main writ petition is still pending before the learned Single Judge. Pleadings are yet to be completed. Given the unexplained delay and the prejudice that would be caused to the appellant due to pendency of the present disciplinary proceedings, we are of the view that it will be

appropriate that respondent does not proceed with the enquiry till the pendency of the said noted writ petition. It is true that the appellant had failed to point out communication dated 18.04.2002 in his writ petition. There could be various reasons for the same. On first reading, the said document does not go to the root of the submissions of the appellant regarding long unexplained delay in re-initiating the matter.

15. In view of the above, we set aside the order of the learned Single Judge to the extent that no interim stay was granted to the appellant. We direct stay of the communication dated 08.03.2013 issued by the respondent and consequential proceeding till the pendency of the writ petition.

16. However it is clarified that whatever we have said herein is only a prima facie view for the purpose of decision of the present appeal. The parties are free to raise all submissions and contentions before the learned Single Judge before whom the Writ Petition is pending as available in law.

17. Appeal is disposed of in the above terms.

ILR (2013) II DELHI 1590
FAO (OS)

SUSHOBAN LUTHRA & ANR. ....APPELLANTS

VERSUS

MAJOR RAVINDRA MOHAN KAPUR & ORS. ....RESPONDENTS

(SANJAY KISHAN KAUL & SANJEEV SACHDEVA, JJ.)

FAO (OS) NO. : 54/2012 DATE OF DECISION: 25.04.2013

Registration Act, 1908—Section 52 (1) (c) Delhi Registration Rules—Rule 29—Probate was granted on Will executed by late Smt. Shakuntala Kapur on petition filed by respondents—Objections filed by appellants

dismissed—Aggrieved appellants preferred appeal mainly alleging, certified copy of will did not satisfy requirements of Act. Held:- If a Will is prepared in duplicate either by using a carbon or by printing the same twice from a computer and signed in duplicate and then the carbon copy duly signed in original or the computer printout duly signed in original is pasted in the records of the Sub-Registrar, it would satisfy the requirements of both Section 52 (1) (c) of the said Act, 1908 and Rule 29 of the said Rules, Further, a Will is not compulsorily registerable under the said Act and, thus a mere irregularity in the certified copy would not render the original Will invalid.

On examination of the original Will (Ex.PW2/DX) and the certified copy of the Will (EX.PW-1/2) it is seen that the contents of both the Wills are identical. The submission of the learned counsel that in the office of the Sub-Registrar, a photocopy of the duly executed original Will has to be pasted in the records of the Sub-Registrar merits rejection inasmuch as neither Section 52(1) (c) of the said Act nor Rule 29 of the said Rules stipulate pasting of a photocopy of the duly executed original Will. What Section 52 (1) (c) of the said Act and Rule 29 of the said Rules stipulate is that a copy of the Original has to be pasted in the Book maintained in the office of the Sub-Registrar. If a Will is prepared in duplicate either by using a carbon or by printing the same twice from a computer and signed in duplicate and then the carbon copy duly signed in original or the computer printout duly signed in original is pasted in the records of the Sub-Registrar, it would satisfy the requirements of both Section 52(1)(c) of the said Act, 1908 and Rule 29 of the said Rules. **(Para 12)**

In the present case, since the certified copy of the Will is identical to the original Will, the requirements of both Section 52(1)(c) of the said Act and Rule 29 of the said Rules have been duly complied with. We may further note that the appellants have neither led any evidence on this issue nor

have they chosen to cross-examine PW3, the officer from the office of the Sub-Registrar on this issue. Further, a Will is not compulsorily registerable under the said Act and, thus, a mere irregularity in the certified copy would not render the original Will invalid more so in view of the fact that the Original Will has been duly produced and proved on the records of the case. **(Para 13)**

Important Issue Involved: If a Will is prepared in duplicate either by using a carbon or by printing the same twice from a computer and signed in duplicate and then the carbon copy duly signed in original or the computer printout duly singed in original is pasted in the records of the Sub-Registrar, it would satisfy the requirements of both Section 52 (1) (c) of the said Act, 1908 and Rule 29 of the said Rules. Further, a Will is not compulsorily registerable under the said Act and, thus, a mere irregularity in the certified copy would not render the original Will invalid.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANTS : Mr. Rajiv Bahl, Advocate with Mr. Pankaj Aggarwal, Advocate.

FOR THE RESPONDENTS : Mr. Sanjeev Anand, Advocate with Ms. Anubha Surana, Advocate.

RESULT: Appeal dismissed.

SANJEEV SACHDEVA, J.

1. This is an appeal arising out of judgment dated 12.7.2011. By the impugned judgment, the objections filed by the appellants to the probate petition filed by the respondents in respect of the Will dated 25.10.2000 executed by late Smt. Shakuntala Kapur have been dismissed and the probate has been granted of the said Will. The appellants herein are the children of the pre-deceased daughter of late Smt. Shakuntala Kapur and the respondents (the probate petitioners) are the sons of late Smt. Shakuntala Kapur.

2. The learned counsel for the appellants has impugned the judgment on the following grounds:

> "(i) The Will has been executed in suspicious circumstances which are evident from :
>
> (a) The signatures of the Sub-Registrar on the original Will and on the certified copy of the Will do not tally;
>
> (b) The signatures of the attesting witnesses are not in the same order in the original Will and in the certified copy of the Will;
>
> (c) The evidence of PW-2 is unreliable as there are contradictions and both the Wills are not identical, as on the one of the Wills no date has been mentioned, whereas on the other date has been mentioned; and (d) That the certified copy should be the replica of the Original Will.
>
> (ii) There was undue influence in the execution of the Will in as much as the husband of late Smt. Shakuntala Kapur was present at the time of execution and registration of the Will and;
>
> (iii) The Certified Copy of the Will produced by the Respondents herein does not satisfy the requirements of Section 52 (1) (c) of the Registration Act, 1908 and Rule 29 of the Delhi Registration Rules."

3. We had summoned the original suit record and have examined the evidence led and the documents proved on record of the case.

4. The respondents have produced three witnesses in support of their Petition for grant of probate. On the other hand, the appellants have not led any evidence in support of the objections filed by them and have neither filed their affidavits by way of evidence nor have they entered the witness box.

5. We find no merit in the submission of the learned counsel for the appellants with respect to the alleged suspicious circumstances in the execution of the Will. We have examined the original Will (Ex.PW2/DX) and the certified copy (EX.PW-1/2) produced on records of the case. The original Will (Ex. PW2/DX) bears the signatures of the Sub-Registrar at three places on the back of page 1 and at one place on the back of the last page of the Will. On the back of the last page of the certified

copy of the Will (EX-PW1/2), the signatures that appear of the Sub-Registrar tallies with the signatures of the Sub-Registrar on the original Will. No doubt, the signatures on the back of the first page of the certified copy appear to be somewhat different but in our view nothing really turns on it because the original Will produced and duly exhibited in the records of the case bears the signatures of the Sub-Registrar and the last page of the certified copy of the Will also bears the same signatures. The appellants have led no evidence in support of this plea raised by them. Further when the officer of the Sub-Registrar appeared in the Witness Box, not even a suggestion was put to him in his cross-examination. This submission of the learned counsel for the appellant being unsustainable is hereby rejected.

6. We also find no merit in the submission of the learned counsel for the appellants that the Will has been executed in suspicious circumstances as the signatures of the attesting witnesses are not in the same order in the original Will and in the certified copy. There is no doubt that order of signing of the witnesses in the original Will and in the certified copy of the Will is not same, the explanation rendered by the counsel for the respondents is that where the Will is prepared in duplicate and both the Wills are given simultaneously to the witnesses to sign and then exchanged between the attesting witnesses for their signatures, the order of signatures of the attesting witnesses may interchange. We find that the explanation is cogent, plausible and corroborated by the evidence of the witnesses of the respondents (the probate petitioners). This submission of the learned counsel for the appellant, being unsustainable, is rejected.

7. In the Impugned Judgment, the learned Single Judge has returned findings as under:

> " 20. I have carefully examined the original Will and the certified copy of the Will. The submission made by counsel for the objector have no force. On perusing with the Wills with the naked eye it is evidence that the certified copy is a photocopy of the original Will and the typing on both the Wills - the font, typing, the end of the page and end of each of paragraph – are identical. The contents of the Wills are also identical. While the original Will bears the signatures of the Sub-Registrar, the certified copy does not bear the signatures of the Sub-Registrar, but the

word ...sd/- .... (signed) has been scrolled and thus, it cannot be said that the signatures of the Sub-Registrar vary in both the Wills. The certified copy has not been signed at all. The objection so taken is baseless and unfounded. There is no doubt that order of signing of the witnesses in both the Wills is not the same. The explanation rendered by Mr. Anand, counsel for the petitioner is cogent and plausible and is corroborated by the evidence of PW-2, who has stated that both the Wills were signed in the presence of Sub-Registrar, hence, merely because the witnesses have not signed in the same order would not make the Will invalid or fabricated, especially in view of the evidence of PW-2, which is truthful and reliable. The evidence of the witnesses is duly supported by the evidence of PW-3, record keeper from the office of Sub-Registrar. No doubt the date of 25.10.2000 is not mentioned on the certified copy of the Will, but having regard to the fact that the Will was registered on the same date, non appearance of the date on the certified copy has no bearing in the present matter.

21. The contradictions pointed out by counsel for the Objectors does not got to the root of the matter, as PW-2 who was more than 80 years of age at the time of recording of his evidence has clearly stated that he had signed only one Will and when he was shown the original Will and the certified copy, he has rightly and truthfully identified the signatures on both the Wills.

22. It is clear from the facts noted above and evidence on record that PW-2 Mr. Mehra had correctly deposed that he had signed only will of late Smt. Shakuntla Kapur dated 25.10.2000 as a consequence of which neither does the objection raised by the objector regarding the suspicious circumstances surrounding the certified copy of the Will go the root of the matter, nor can it be entertained by this Court."

We agree with the findings of the Learned Single Judge and find no reason to take a different view and as such the submission of the learned counsel for the appellants with regard to suspicious circumstances is rejected.

8. The submission of the learned counsel for the appellants that the presence of the husband of late Smt. Shakuntala Kapur at the time of

execution and registration of the Will amounted to undue influence in the execution of the Will, has no merit and is liable to be rejected. The Husband of late Smt. Shakuntala Kapur is a Class-I legal heir and in the absence of a Will would have inherited 1/4th share in the estate of late Smt. Shakuntala Kapur. By the Will dated 25.10.2000, Smt. Shakuntala Kapur had given only a life interest to her husband in one of the properties. The fact that the beneficiary receives a share under a Will less than what he would have inherited in the absence of the Will dispels the plea of undue influence. The submission of the learned counsel for the appellants that the presence of husband of late Smt. Shakuntala Kapur at the time of execution and registration of Will amounts to undue influence merits outright rejection. In the Indian Society, it is quite normal for a wife to execute a Will in consultation and in presence of her husband and vice-versa. The mere fact that the husband was present at the time of execution and registration of the Will would not per se establish that undue influence was used in the execution of the Will. To substantiate the plea of undue influence, the objector would have to lead cogent evidence; in the present case, there is no such evidence on record on behalf of the Objectors.

9. The submission of the learned counsel for the appellants that the Certified Copy of the Will produced by the Respondents herein does not satisfy the requirements of Section 52 (1) (c) of the Registration Act, 1908 (for short .....the said Act.) and Rule 29 of the Delhi Registration Rules (for short, 'the said Rules') also merits outright rejection.

10. Section 52(1) (c) of the said Act, as amended for the State of Delhi, lays down as under: "Section 52 Duties of registering officers when document presented. .... (c) Subject to the provisions contained in section 62, a copy of every document admitted to registration shall, without unnecessary delay, be pasted in the book appropriated therefor according to the order of admission of the document."

11. Rule 29 of the said Rules lays down as under: "29. Authentication of entries in Register Books- Every copy pasted in Book I or Additional Book I, III or IV shall be a carbon copy of the original and shall be carefully compared with it; all interlineations, blanks, erasures or alterations which appear in the original shall be shown in the copy pasted in the Book. The Registering officer shall satisfy himself that this has been done, verifying by his signature or initial. The Registering Officer shall also see that the copy has been pasted in the book to which it belongs,

that the number offered to it is that which it ought to bear in order to maintain the consecutive series required by section 53 of the Act and that the book, the volume and the page entered in the certificate of registration are correctly stated. Copies of endorsements shall also be initialed and signed by the Registering Officer. A duplicate copy shall also be signed by the Registering Officer. A duplicate copy shall also be signed by the Registering Officer."

12. On examination of the original Will (Ex.PW2/DX) and the certified copy of the Will (EX.PW-1/2) it is seen that the contents of both the Wills are identical. The submission of the learned counsel that in the office of the Sub-Registrar, a photocopy of the duly executed original Will has to be pasted in the records of the Sub-Registrar merits rejection inasmuch as neither Section 52(1) (c) of the said Act nor Rule 29 of the said Rules stipulate pasting of a photocopy of the duly executed original Will. What Section 52 (1) (c) of the said Act and Rule 29 of the said Rules stipulate is that a copy of the Original has to be pasted in the Book maintained in the office of the Sub-Registrar. If a Will is prepared in duplicate either by using a carbon or by printing the same twice from a computer and signed in duplicate and then the carbon copy duly signed in original or the computer printout duly signed in original is pasted in the records of the Sub-Registrar, it would satisfy the requirements of both Section 52(1)(c) of the said Act, 1908 and Rule 29 of the said Rules.

13. In the present case, since the certified copy of the Will is identical to the original Will, the requirements of both Section 52(1)(c) of the said Act and Rule 29 of the said Rules have been duly complied with. We may further note that the appellants have neither led any evidence on this issue nor have they chosen to cross-examine PW3, the officer from the office of the Sub-Registrar on this issue. Further, a Will is not compulsorily registerable under the said Act and, thus, a mere irregularity in the certified copy would not render the original Will invalid more so in view of the fact that the Original Will has been duly produced and proved on the records of the case.

14. In view of the above, we find no infirmity in the impugned order and find no merit in the submissions of the learned counsel for the appellant. The appeal is, therefore, dismissed leaving the parties to bear their own costs.

ILR (2013) II DELHI 1598

CRL. A.

VINOD ....APPELLANT

VERSUS

STATE ....RESPONDENT

(SANJIV KHANNA & SIDDHARTH MRIDUL, JJ.)

CRL. A. NO. : 1470/2011 DATE OF DECISION: 26.04.2013

Indian Penal Code, 1860—Sections 302 and 34—Murder—PCR information received—DD registered—Police reached the spot—Injured already removed to hospital—Declared brought dead—Police reached hospital—Collected MLC—Came back to the spot—Recorded the statement of eye-witnesses—FIR registered—Injuries sufficient to cause death—injuries ante mortem—The complainant PW1 supported the prosecution case—Another eye-witness turned hostile—Held guilty of murder—Convicted and sentenced to undergo rigorous imprisonment for life and fine—Co-accused sent to juveline justice Board preferred appeal contended testimony of PW1 is not reliable and trustworthy discrepancies in the deposition of PW1—Conviction cannot be based on the sole testimony of PW1 when the other eye-witnesses has turned hostile prosecution has failed to establish motive against the appellant—Held—PW1 is a natural and normal witness presence at the spot cannot be doubted—Statement is clear and categorical and has not been demolished in cross examination deposed on similar lines as was recorded by the police—Minor discrepancies as to the time and place of recording of statement—PW1 bore no animosity or ill will against

the appellant—PW1 is a credible and truthful witness—Recovery of knife at the instance of appellant is disbelieved issue of motive loses significance in view of direct trustworthy testimony of PW1—Appellant possessed requisite intention and knowledge attacked in a brutal manner and caused death—Appeal dismissed—Conviction and sentence maintained.

Important Issue Involved: It is the quality and not the quantity of evidence which is necessary for proving or disproving a fact. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence.

—The issue of motive becomes irrelevant when there is direct evidence of a trustworthy witness regarding the commission of the crime.

—Motive is a thing which is primarily known to the accused himself and it may not be possible for the prosecution to explain what actually prompted or excited him to commit a particular crime. Even if the absence of motive is accepted, that is of no consequence and pales into insignificance when direct evidence establishes the crime.

—Even if the genesis of motive of the occurrence is not fully established, the ocular testimony of the witness as to the occurrence could not be discarded only be reason of the absence of motive if otherwise the evidence is worthy of reliance.

—The factum of one of the witness turning hostile does not in any manner creators suspicion on the testimony of other witness if the testimony of other witness can stand on its own and does not require a crutch.

—Conviction can be made on the basis of sole testimony of an eye witness.

[Vi Ku]

APPEARANCES:

FOR THE APPELLANT : Mr. Ajay Verma, Advocate.

FOR THE RESPONDENT : Ms. Richa Kapoor, APP.

CASES REFERRED TO:

1. *Bipin Kumar Mondal* vs. *State of West Bengal,* 2010 (12) SCC 91.
2. *Namdeo* vs. *State of Maharashtra,* (2007) 14 SCC 150.
3. *Sunil Kumar* vs. *State (Govt. of NCT of Delhi),* (2003) 11 SCC 367.

RESULT: Appeal dismissed.

SIDDHARTH MRIDUL, J.

1. The present appeal is directed against the judgment dated 13.07.2011 whereby the appellant has been convicted under Section 302 read with Section 34 of the Indian Penal Code, 1860 (for short 'IPC') for committing the murder of deceased Sanjay on 30.07.2007 by inflicting multiple stabs injuries. By order of sentence dated 15.07.2011, the appellant is sentenced to undergo rigorous imprisonment for life and a fine of Rs. 2000/- has also been imposed. In default of payment of fine, the appellant is to undergo Simple Imprisonment for a period of one month.

2. We note that co-accused Kushal was declared juvenile by the Sessions Court vide order dated 04.12.2007 and was sent to Juvenile Justice Board for further proceedings.

3. On 30.07.2007, at about 10:13/10:15 p.m., a PCR information (Ex.PW-17/A) was received about a stabbing incident near Saishankar School, IIIrd, 60 Foota Road, Molarband Extension, Badarpur. On receipt of the said information, DD No.38A (Ex.PW-31/A) was registered at about 10:20 p.m. Sub Inspector Hiralal (PW-16) proceeded to the spot and found that the injured was already taken to AIIMS Hospital. Blood was lying at the spot. Informal inquiries were made from eye witness Rajpal Bhatti (PW-1) and other persons present at the spot. Thereafter, SI Hiralal along with Constable Kaptan Singh (PW-5) went to AIIMS Hospital wherein it was found that injured Sanjay was admitted and was declared brought dead at 1:10 a.m. The MLC report, Ex.PW-24/A of the deceased Sanjay was collected which revealed presence of multiple stab wounds over the chest, lumbar region and gluteal region. SI Hiralal (PW-16) came back to the spot and recorded the statement (Ex.PW-1/A) of the eye witness PW-1 Rajpal Bhatti. In his statement Ex.PW-1/A, Rajpal Bhatti stated that he was a regular medical practitioner and had been running his clinic in a shop located at F Block, IIIrd, 60 Foota Road, Molarbandh Extension, Badarpur, Delhi for the last five years. He was well aware of the people in the locality. On 30.07.2007, he opened his clinic at about 5:00 p.m. in the evening. He knew deceased Sanjay from before as they were neighbours. Sanjay being his regular customer came to his shop on a motor cycle at about 9:15 p.m. to purchase medicines and both of them started talking to each other. At 9:30 p.m., two boys namely, Kushal (declared juvenile) and Vinod (appellant) came to his shop and started conversing with Sanjay. A quarrel ensued between Sanjay and the two boys. Kushal and Vinod took Sanjay outside the shop and started beating him. Rajpal Bhatti tried to intervene and rescue Sanjay but both Kushal and Vinod did not listen or stop. The accused pushed Rajpal Bhatti aside. In the meanwhile, shopkeeper from the nearby kerosene oil shop called the Telwala chacha also reached the spot. Telwala chacha also tried to pacify the assailants but in vain. Vinod and Kushal took out knives and started giving knife blows to Sanjay on various part of his body. Both Kushal and Vinod brutally assaulted Sanjay with knives. On seeing this, Rajpal Bhatti went to his friend Vijay asking for help. When he along with Vijay returned to the spot, he saw that Sanjay was lying in a pool of blood at some distance from his shop. Crowd had gathered on the spot. Vinod (appellant) and Kushal had ran away from the spot. The assailants attacked Sanjay because of some past enmity and it was a planned assault to commit murder of Sanjay. On the basis of the said

statement, rukka, Ex.PW16/ A, was prepared on 31.07.2007 at around 1:30 a.m. which led to the registration of FIR No. 586/07, Ex.PW-2/A, under Section 302 read with Section 34 IPC.

4. Inspector K.L. Yadav (PW-31) was handed over the investigation of the instant FIR. Spot inspection and photographs were taken by the Crime Team. Crime Team Report, Ex.PW-26/A was prepared. Site plan without scale Ex.PW-16/C was made at the instance of Rajpal Bhatti (PW-1). The appellant was arrested on 09.08.2007 vide arrest memo Ex.PW-16/D.

5. The homicidal death of Sanjay is not under dispute. The post-mortem on the dead body of Sanjay was conducted by PW-25 Dr. B. L. Chaudhary on 31.07.2007. PW-25 by his testimony before court proved the post-mortem report Ex.PW-25/A. According to PW-25, when he started the post-mortem there was no sign of decomposition on the dead body and both the eyes were open. The following injuries were delineated in the post-mortem report:-

"Ante-mortem injuries:

1. A stab wound of size 2.5 X 1 cm X cavity deep was present on right side of the chest obliquely placed medial end was upper and out end was lower. The medical end of the wound was 1 cm lateral to the midline. The upper margin of wound was 17 cm below from medial end of right clavicle. Both the angles of wound were acute. The margins were regular and clean cut. On the dissection of wound a track of wound was established passing through chest wall, peritoneal cavity and then entering into the lever at anterior surface of left lobe which was measuring 1 X 0.2 X 3 cm.

2. A stab wound of size 3.3 X 1.5 cm with maximum depth 7 cm was placed on the right chest wall. The wound was obliquely placed outer end was lower and medial end was upper. The medial end was 11 cm lateral from midline. Upper margin was 13 cm below to right nipple and lower margin was 18 cm above to anterior superior iliac spine. On dissection of wound, a track was established passing into the chest wall running medially in chest wall muscle. Later angle was acute.

3. A stab wound of size 3 X 1.5 cm X cavity deep was present on the abdomen on the right at lateral aspect. The wound was horizontally placed. The medial end of the wound was 29 cm lateral to the midline, 20 cm below from anterior axillary fold. Outer angle of the wound was more acute than inner angle. On the dissection of the wound, a track of wound was established passing through abdominal wall peritoneum and entering into the lateral surface of right lobe of liver with size 2.5 X 0.2 X 2 cm.

4. A stab wound of size 3 X 1.4 X 7 cm is present on the right side of abdomen. The medial end of the wound was 14 cm lateral to the midline, 10 cm above to interior superior iliac spine. The wound was obliquely placed with medial end was upper and lateral end was lower. The outer angle was more acute than inner end. On dissection, the track of wound was running medially and upward in the abdominal wall.

5. A stab wound of size 3 X 1 cm X cavity deep was present on the lateral aspect of the abdomen on the right. The wound was horizontally placed and 21 cm lateral to the midline, 7 cm below to injury number 3. On dissection, a track of wound was established passing through abdominal wall, peritoneum and entering into the peritoneal cavity.

6. A stab wound of size 3 X 1 X 9 cm was present on right gluteal region on outer portion. The wound was obliquely placed medial end was lower and outer end was upper. Both the angles were acute. Medial end was 20 cm lateral to midline. The upper margin of wound was 5 cm below to injury no.5.

7. A stab wound of size 4 X 1.5 X 6 cm was present on interior aspect of right thigh. The wound was placed vertically. The upper end of the wound was 19 cm below to anterior superior iliac spine and lower end was 25 cm above to right knee joint. Outer margin was exposed and inner margin was under-mind. On dissection the track was running inward and medially.

8. A stab wound of size 2.5 X 0.5 X 3 cm was present on dorsal aspect of left forearm vertically placed. The lower end of wound was 5 cm above to radial styloid process. Both the angles were acute.

9. A stab wound of size 8 X 2 X 11 cm was present on the back in the midline. The wound was horizontally placed, upper margin was 41 cm below the occipital pruturberance and lower margin was 106 cm above to right heel. The right angle was acute with tailing of wound and left end was rounded. On the dissection, the track of wound was running upward lateral on the left into the chest wall.

10. A horizontally placed stab wound of size 4.5 X 1.5 cm X cavity deep was present on the back in the midline. The upper margin of the wound was 14 cm below to external occipital proturbrance and lower margin of the wound was 101 cm above the right heel. The left side angle of the wound was more acute than right angle. On the dissection, a track of wound was established passing through posterior abdominal wall, entering into the right kidney and passing through and through at lower part of kidney. Perineal area containing haemotoma.

11. A stab wound of size 1.5 X 0.5 X 7 cm was present on the back in the right of abdomen. The wound was obliquely placed outer and was lower and medial end was upper. The outer angle of the wound was more acute than inner angle. The medical end of the wound was 5 cm from midline. The upper margin of the wound was 45 cm below to right acromion process. On the dissection of wound, the track of wound was established which ws running medially into the posterior abdominal wall.

12. A stab wound of size 2 X 0.4 X 7 cm was present on the posterior aspect of right gluteal region. The medial end of the wound was 10 cm lateral to the midline. Upper margin of the wound was 7 cm below to posterior superior iliac spine. The wound was obliquely placed, outer end ws lower and medial end of the wound was upper side. The outer angle of the wound was more acute than inner angle."

6. PW-25 found that the peritoneal cavity was filled with two liters of blood. The cause of death was opined to be shock as a result of haemorrage due to injuries mentioned above and injuries No.1, 3 & 10 were sufficient to cause death in ordinary course of nature individually or collectively. All the injuries were produced by sharp pointed weapon. Injuries were ante-mortem in nature and fresh in duration. The time of death was calculated to be 12-16 hours before conducting the post mortem.

7. The only question which subsists is whether the appellant is responsible for causing death of Sanjay by inflicting stab injuries on his person. In his statement under Section 313 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C'), the appellant abjured his guilt and pleaded that he was falsely implicated.

OCULAR TESTIMONIES

8. In support of its case, the prosecution examined 31 witnesses. The prosecution story rests on the ocular evidence of PW-1 Rajpal Bhatti who is the complainant. PW-30 Sheoraj Singh (Telwala Chacha) was examined by the prosecution as another eye witness but he resiled from his earlier statement made to the police and was declared hostile.

9. PW-1 in examination-in-chief has made the following deposition:-

> "I am a RMP Doctor by profession and my clinic/shop is situated at F-Block, 60 Foota Road, Molarband Colony Extension, Badarpur. I opened this shop in the year 2002. I used to know nearby shopkeepers. On 30.07.2007 I opened my shop at about 5 p.m. At about 9.15 p.m. deceased Sanjay came to my clinic who earlier used to reside in my neighbourhood. At about 9.30 p.m. two persons namely Kushal (who is facing trial in Juvenile Justice Board) and other accused Vinod present in court (correctly identified) came to my clinic and both the accused persons started talking with Sanjay and shouted at Sanjay and both the accused persons took Sanjay outside my shop and thereafter started beating. I intervened into the matter but both the accused persons did not stop. Accused persons pushed me and again started bearing Sanjay. Meanwhile one person from the shop adjacent to my shop who is called Telwala Chacha also reached at the spot, he also intervened into the matter but of no avail. Accused Vinod present in court today and other accused Kushal took out knives and started giving knife blows on the person of Sanjay many times. I became nervous and ran towards my friend Vijay who resides just opposite the place of occurrence. I along with Vijay came at the spot and saw deceased Sanjay was lying in a pool of blood about a distance of about 10 yards from my clinic. Both the accused persons had ran away from the spot. I called at 100 number. Police reached at the spot. I also informed the family members of Sanjay. My statement was recorded by the IO same is Ex.PW-1/A which bears my signatures at point A. Sanjay had expired at the spot due to injuries caused by the accused persons. Deceased Sanjay was taken to hospital. After about one month, one Sardar police officer along with Insp. K.L. Yadav came to me and I had shown the place of incident to them."

In the cross examination, PW-1 has admitted that he knew appellant from the last 5-6 years as he used to purchase medicines from his shop. PW-1 has stated that his statement, Ex.PW-1/A was recorded by the police officials in the police station on the day of the incident at about 10/10:15 p.m. but he could remember the name of person who recorded his statement. The incident lasted for about 5-7 minutes. Deceased Sanjay had come to his shop on Hero Honda Splendor motorcycle but he did not remember the registration number. PW-1 stated that he was taken to the police station in the PCR Van and remained in the police station for the whole night. PW-1 denied the suggestion that he was not present at the spot when the incident occurred.

10. The Counsel for the Appellant has contended that testimony of PW-1 Rajpal Bhatti is not reliable or trustworthy and the same deserves to be rejected. We do not agree with the said contention and the same merits rejection. We have gone through the testimony of PW-1 Rajpal Bhatti. PW-1 is a natural and normal witness. His presence at the spot cannot be doubted as the incident occurred in front of his shop. On the question of involvement of the appellant Vinod, PW-1's statement is clear and categorical which has not been demolished in cross examination. The appellant, as per PW-1, was involved and had actually caused stab injuries to Sanjay. PW-1 has deposed on the similar lines as was contemporaneously recorded in Ex.PW-1/A by the police soon after the incident.

11. It is submitted that the rukka (Ex.PW-16/A) was prepared on the statement of PW-1 at about 1:30 a.m. on 31.07.2007 whereas PW-1 has stated in his cross examination that his statement under Section 161Cr.P.C. was recorded by the police at about 10/10:15 p.m. It is further contended that PW-1 in his cross examination has stated that his statement (Ex.PW-1/A) was recorded at the police station whereas as per PW-16 SI Hiralal and PW-5 Constable Kaptan Singh in their testimony have stated that the PW-1's statement was recorded at the spot.

12. PW-16 SI Hiralal has stated that after collecting the MLC, Ex.PW24/ A of the deceased, he went back to the spot along Constable Kaptan Singh (PW-5). At the spot, he recorded the statement of eye witness Rajpal Bhatti (PW-1) and prepared the rukka, Ex.PW-16/A. He, thereafter, sent the rukka through Constable Kaptan Singh at around 1:30 a.m. for registration of FIR. In his cross-examination, PW-16 has stated that he returned to spot from the hospital at about 12:15 a.m.

13. Similarly, PW-5 HC Kaptan Singh has deposed that he went to the AIIMS Hospital along with SI Hiralal and obtained the MLC of the deceased. Subsequently, he came back to the spot. Pursuant thereto, statement of PW-1 Rajpal Bhatti was recorded in his presence by SI Hiralal (PW-16). There is nothing in the cross examination to dent his testimony.

14. Ex.PW-16/A rukka clearly records that statement of PW-1 was recorded by the police at about 1:30 a.m. on the night intervening 30/31.07.2007 at the place where the incident took place. Thereupon, FIR No. 586/2007 (Ex.PW-2/A) was promptly registered on the basis of said rukka at about 1:50 a.m. vide DD No.19/A.

15. From the testimonies of official witnesses, it is clear that the statement of PW-1 Rajpal Bhatti which Ex.PW-1/A was recorded by the police officials on the spot soon after the incident. This is corroborated from official documents in form of FIR and DD entries wherein time is mentioned.

16. It appears that there is a minor discrepancy as to the time and place of recording the statement (Ex.PW-1/A) of PW-1 by the police under Section 161 Cr.P.C. In this regard, we note that the cross examination of PW-1 was conducted nearly two year after the incident. It is possible that PW-1 may not have remembered the exact time and

place as to when and where his statement was recorded by the police. Human memory tends to fade away with time. Even if for the sake of argument, we accept that the statement, Ex.PW-1/A was recorded at the police station and not at the spot, the same does not in any manner create a doubt or nullify the contents of the statement by PW-1. It is noteworthy that in Ex.PW-1/A, PW-1 has in clear and categorical terms deposed that the appellant Vinod along with co-accused Kushal attacked the deceased Sanjay and inflicted multiple knife blows on his person. Before the court as well, PW-1 has categorically named the appellant as the perpetrator of the crime. The place of offence/incident was outside PW-1's clinic.

17. It is next submitted that the conviction cannot be based on the sole testimony of PW-1 Rajpal Bhatti as the other alleged eye witness namely PW-30 Sheoraj Singh (telwala chacha) has turned hostile and not supported the prosecution case.

18. In **Sunil Kumar vs. State (Govt. of NCT of Delhi),** (2003) 11 SCC 367 Supreme Court repelled a similar submission observing:

> "9. .... as a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But, if there are doubts about the testimony the courts will insist on corroboration."

In **Namdeo vs. State of Maharashtra,** (2007) 14 SCC 150, this Court reiterated the similar view observing that it is the quality and not the quantity of evidence which is necessary for proving or disproving a fact. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence.

In **Bipin Kumar Mondal vs. State of West Bengal,** 2010 (12) SCC 91, the Supreme Court held:

> "In fact, it is not the number, the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence

has a ring of truth, is cogent, credible and trustworthy, or otherwise."

19. Thus, in view of the law laid down above, the contention of the appellant that no conviction can be made on the basis of sole testimony of an eye witness cannot be accepted and accordingly the same is rejected. We also note that there is nothing in the cross examination of PW-1 to suggest that he bore animosity or ill will towards the appellant so as to falsely implicate him. In fact, PW-1 is a credible and truthful witness. His testimony reveals that he knew both the appellant and the deceased from before as he was running his clinic in the same locality for the last five years. The factum of PW-30 Sheoraj Singh turning hostile does not any manner creates suspicion on the testimony of PW-1. PW-1's testimony can stand on its own and does not require a crutch. It is also relevant that PW-10 Vijay to whom the PW-1 rushed for help at the time of the incident has supported the said fact. PW-10 Vijay has deposed that on the night of the incident he was present in his home. At about 9:30 p.m., Dr. Bhatti (PW-1) came to his house and informed him that stab wounds by knives were caused to deceased Sanjay by appellant Vinod and Kushal. He immediately proceeded to the spot along with PW-1. PW-10 saw that Sanjay had died on the spot and crowd had gathered there. He stated that he knew the appellant from before. In cross examination, PW-10 has stated that the place of occurrence was 5 minutes walking distance from his house. Nothing significant has emerged in the cross-examination which casts a doubt on PW-10's testimony. Thus, the testimony of PW-10 further corroborates the fact that PW-1 on witnessing the incident had approached him at night.

RECOVERIES PURSUANT TO DISCLOSURE STATEMENT

20. It is the case of the prosecution that after the appellant Vinod was arrested, he made a disclosure statement, Ex.PW-16/H, before Inspector K.L. Yadav (PW-31), the Investigating Officer. Pursuant to the said disclosure, one of the weapons of offence i.e., a blood stained knife (Ex. P-1) and blood stained shirt (Ex.P-2) of appellant Vinod were recovered.

21. In order to prove recoveries, the prosecution examined PW-16 SI Hiralal, PW-31 Insp. K.L Yadav and PW-23 HC Mahesh Kumar as official witnesses whereas PW-3 Ram Singh and PW-4 Pradeep were produced as independent witnesses.

22. PW-16 SI Hiralal has deposed that the disclosure statement, Ex.PW16/ H of the appellant Vinod was recorded in his presence and said disclosure bears his signature at point A. The appellant was wearing the same shirt which he was wearing at the time of incident and the same was seized vide Ex.PW-16/J. Both the accused Vinod and Kushal disclosed that they could get the weapon of offence recovered. Thereafter, he along with the IO and HC Mahesh Kumar (PW-23) reached Gali No. 22, Plot No. 420-B, F Block, Molarbandh where one knife was recovered under the bricks at the said plot. The said knife was recovered at the instance of Appellant Vinod. Two public witnesses namely Ram Singh (PW-3) and Pradeep (PW-4) were witnesses to the recovery. One photographer Brajesh (PW-15) was also called by the IO who took the photographs of the knife. In cross examination, PW-16 has stated that the IO gave another shirt to appellant Vinod after seizing his shirt but he could not remember from where the IO got the shirt which he gave to the appellant. PW-16 reached the recovery spot at 5:30 p.m. where around 15-20 people were gathered there. Pradeep (PW-4) and Ram Singh (PW-3) came forward to join the investigation. The knife was recovered beneath 100-150 bricks from the south east direction of the plot.

23. Similarly, PW-31 Inspector K.L Yadav, the Investigating Officer has deposed that appellant Vinod vide his disclosure, Ex.PW-16/H stated that he could get the weapon of offence recovered. The appellant at the time arrest was wearing the same shirt as he was wearing on the date of incident. The shirt of the appellant on which blood stains were present were seized vide Ex.PW-16/J. Accused Kushal made a statement that he had thrown the knife in Agra Canal, Sector 37, Faridabad and could get the same recovered. Thereafter, the appellant Vinod took PW-31 to Gali No. 22, Plot No. 420-B, Molarband Extension in a vacant plot and a churri (Ex.P-1) was recovered from inside the bricks. Two public witnesses namely Pradeep (PW-4) and Ram Singh (PW-3) were witnesses to the recovery. The knife was blood stained and was seized vide seizure memo Ex.PW-3/A. The other weapon of offence could not be recovered despite conducting search in Agra Canal. In cross examination, PW-31 denied the suggestion that no knife was recovered at the instance Appellant Vinod. He admitted that no opinion from the doctor regarding the weapon of offence was obtained.

24. PW-23 HC Mahesh deposed that knife, Ex.P-1 and shirt Ex.P-

2 were recovered at the instance of appellant Vinod. In cross examination, PW-23 stated the shirt which the appellant was wearing was seized at the police station. The shirt had blood stains as can be noticed after washing. The knife was recovered from plot ad measuring 75 sq. yards from the south east direction. There were approximately 150 bricks lying there but PW-31 did not remember the numbers of bricks which were removed to recover the knife.

25. PW-3 Ram Singh in examination-in-chief did not support the recovery of knife at the instance of appellant Vinod. In cross examination, he admitted that Plot bearing No. 420 B, Gali No.22, F Block, Molarbandh Extension was a vacant plot. However, he denied that appellant Vinod got recovered the old iron knife after removing the bricks lying at the South East corner of the said plot. He denied that the knife was smeared with soil, blood and rust. He voluntarily admitted that he had seen the knife at the police station and that seizure memo, Ex.PW-3/A, of the knife bears his signature at point A. Similarly, PW-4 Pradeep did not support the prosecution regarding the recovery.

26. From the testimonies of the police witnesses, it emerges that the appellant at the time of arrest was wearing the same shirt he was wearing when the incident took place. It is highly unlikely and improbable that a person involved in a brutal crime on the date of arrest would wear the same shirt as he was wearing on the date of occurrence. The depositions of the police officials show that the shirt (Ex.P-2) was washed and there were efforts to wash away the blood stains. It is implausible and unbelievable that the appellant after the incident would not have destroyed/washed the shirt/clothes which he was wearing at the time the incident occurred and reuse the same shirt with blood stains. The incident took place on 30.07.2007 and the appellant was arrested on 09.08.2007, nearly 10 days after the incident. It is not that the appellant was arrested immediately after the incident. The appellant had sufficient time to get rid of the blood stains on the clothes. Therefore, the circumstance of recovery of the shirt at the instance of the appellant is rejected. As regards recovery of knife (Ex.P-1) at the instance of the accused, we note that as per the prosecution version, the other co-accused had thrown the knife in the Agra Canal. Now as per the testimony of PW-1 Rajpal Bhatti both the accused ran away from the spot together. It is highly doubtful and questionable that one accused (Kushal) would throw the knife in the water and other accused, the appellant herein would carry the knife to

a vacant plot near the place of incident and hide it underneath 100-150 bricks. What is also noticeable that both PW-3 Ram Singh and PW-4 Pradeep, the so called independent witnesses joined by the police at the time of effecting recovery, have not supported that prosecution version that the knife was recovered at the instance of the appellant Vinod from the said plot. Therefore, in these circumstances, the probability of knife being planted cannot be eliminated and the said recovery is disbelieved and rejected.

MOTIVE

27. As per the prosecution, the motive behind the commission of the crime was that deceased Sanjay had developed friendship with one girl namely Drishti Jain (PW-12) with whom the appellant also wanted to establish a relationship. PW-12 refused proposal by the appellant Vinod. On account of PW-12, quarrel took place between the deceased and the appellant. In order to establish motive, prosecution produced PW-12 Drishti Jain and PW-9 Sanjay Kamath. It is contended by the Counsel for the Appellant that both PW-12 and PW-9 did not support the prosecution case and therefore, the prosecution has failed to establish motive against the appellant. PW-12 Drishti and PW-22 Sanjay Kamath have both stated that they were neither aware about the incident or existence of any enmity between the appellant and the deceased. However, PW-22 Rambir in his cross examination by the Public Prosecutor admitted that there was enmity between the appellant and the deceased. He stated that one week prior to the incident, a quarrel took place between the groups of the deceased and the appellant. Before the police, PW-22 had revealed the cause of quarrel to be a girl named Drishti who used to sell vegetables. He had complained about the incident to the brother of Drishti. In cross examination by the counsel for the accused Vinod, PW-22 admitted that he knew both the deceased and the Appellant for the last 15 years and a verbal altercation had taken place between them prior to the incident. PW-10 Vijay who arrived at the spot on calling of PW-1 Rajpal Bhatti also deposed in his cross examination that he had informed the police about the altercation that took place between the deceased and the appellant over the love affair with PW-12 Drishti. PW-10 further admitted that Appellant Vinod had extended threat to Sanjay.

28. It is evident that PW-12 Dhristi who was primarily produced by the prosecution to establish motive has denied the prosecution case.

PW-12 Dhristi was a young girl. Her deposition in the Court is debatable, in view of the testimonies of other witnesses. However, it is trite law that the issue of motive becomes totally irrelevant when there is direct evidence of a trustworthy witness regarding the commission of the crime. In fact, motive is a thing which is primarily known to the accused himself and it may not be possible for the prosecution to explain what actually prompted or excited him to commit a particular crime. Even if the absence of motive as alleged is accepted, that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of PW-1 Rajpal Bhatti as to commission of an offence, the motive part loses its significance. Therefore, even if the genesis of the motive of the occurrence is not fully established, the ocular testimony of the witness as to the occurrence could not be discarded only by the reason of the absence of motive, if otherwise the evidence is worthy of reliance.[See **Bipin Kumar Mondal vs. State of W.B.,** (2010) 12 SCC 91]

29. In the instant case, though the prosecution has been unable to prove the recovery of knife at the instance of the appellant Vinod, the guilt of the appellant stands established beyond reasonable doubt by virtue of the testimony of PW-1 Rajpal Bhati. PW-1 as discussed above is a credible, trustworthy and reliable witness. He has unequivocally pointed out towards the fact that the appellant Vinod had inflicted stab injuries on the deceased pursuant to which the latter died.

30. The last contention raised by the counsel for the appellant is regarding quantum of sentence. It is submitted that the appellant's conviction should be converted from under Section 302 IPC to Section 304 IPC. The appellant did not attack the deceased with premeditation and as per the testimony of PW-1 Rajpal Bhatti, appellants inflicted knife injuries after a quarrel erupted between the deceased and the appellant and co-accused Kushal on the spot. We cannot agree with said contention. From the post mortem report Ex.PW25/ A, it is evident that 12 stab injuries were found on the entire body of the deceased. The medical record clearly demonstrates that the deceased was attacked and stabbed repeatedly. The injuries as confirmed from the autopsy report were on the vital parts and Sanjay had died on the spot itself. The attack was premeditated in as much as the appellant and Kushal both had knives in their possession. The deceased was unarmed and the appellant along with

Kushal attacked him with knives. There is nothing on record to show that the appellant had received any grave or sudden provocation from the appellant or that the appellant had lost his power of self-control from any action of the deceased Sanjay. All these circumstances manifestly point that the appellant had intended to cause death of Sanjay and not bodily injuries. The Appellant possessed the requisite intention and the knowledge and consequent thereto, attacked Sanjay in a brutal manner and caused his death.

31. In view of aforesaid discussion, the appeal is dismissed. The conviction and sentence is maintained and upheld.

ILR (2013) II DELHI 1614
OMP.

UNION OF INDIA ....PETITIONER

VERSUS

PT. MUNSHI RAM & ASSOCIATES PVT. LTD. ....RESPONDENT

(MANMOHAN SINGH, J.)

OMP. NO. : 421/2011 DATE OF DECISION: 03.05.2013

(A) The Arbitration and Conciliation Act, 1996—Sec. 34—Whether the Arbitrator acted in excess of jurisdiction.

In order to determine whether the Arbitrator has acted in excess of jurisdiction what has to be seen is whether the Claimant could raise a particular dispute or claim before an Arbitrator. If the answer is in the affirmative then it is clear that the Arbitrator would have the jurisdiction to deal with such a claim. On the other hand if the arbitration clause or a specific term in the contact or the law does not permit or give the Arbitrator the power to decide or to adjudicate on a dispute raised by the Claimant or there is a specific bar

to the raising of a particular dispute or claim then any decision given by the Arbitrator in respect thereof would be clearly in excess of jurisdiction. Referred to **Himachal Pradesh State Electricity Board v. R.J. Shah & Co.,** 1999 (2) Arbitration Law Reporter 316. **(Para 19)**

This Court will not sit in appeal over the matter/award and re-appraise the evidence adduced by the parties as there is no error apparent on the face of the record of the award and the objections are frivolous, vexatious and are liable to be rejected forthwith as it fails to show any error apparent on the fact of the award and/or any legal misconduct on the part of the learned Arbitrator. As per the settled law by the Supreme Court, the reasonability of the reasons of the award made by the learned Arbitrator will not be looked into or appreciated by this Court in any manner whatsoever. **(Para 20)**

In another judgment the Supreme Court stated. Even if the decision of the Arbitrator does not accord with the view of the Court, the award cannot be set aside on the sole ground that there is an error of law apparent on the face of it. Referred to **M/s. Tarapore & Co. v. Cochin Shipyard Ltd.,** AIR 1984 SC 1072. **(Para 21)**

(B) The Arbitration and Conciliation Act, 1996—Sec. 34—Challenge to appointment of arbitral tribunal.

It is submitted that the Court after due consideration of all the facts and circumstances of the case appointed Mr.R.J. Bakhru as sole arbitrator in the present matter vide its order dated 27th October, 2009 with the consent of both the parties. It was already in the knowledge of the Court that the petitioner had appointed the Arbitrator as is apparent from the order dated 27th October, 2009. However, as the appointment was made after 30 days were over from the date of notice and after the respondent had approached the High Court on 8th April, 2009 for appointment of an independent and impartial arbitrator under Section 11,

therefore, the High Court held that the petitioner was no longer entitled for appointment of the Arbitrator and the High Court appointed the Arbitrator with the consent of both the parties. It is also pertinent to point out here that the Arbitrator appointed by the Chief Engineer, Shri Divaker Garg, resigned vide his letter dated 6th November, 2009 after the appointment of arbitrator by the High Court. **(Para 15)**

It is evident that the High Court after hearing both the parties and with the consent of both the parties appointed Shri R.J. Bakhru (Retd. Chief Engineer) as Sole Arbitrator. It is pertinent to point out that the said order dated 27th October, 2009 was a consented order and had not been challenged before any forum and infact has been acted upon by both the parties without any reservation/protests. The petitioner never raised the jurisdiction issue before the Arbitrator. The petitioner after the appointment of the sole Arbitrator has conceded to his arbitration and have filed their counter statement of facts and other relevant documents and have also attended all hearings in the matter, the petitioners have also filed their written submissions before the said Arbitrator for the purposes of adjudication upon the matter. Therefore, the objection raised by the petitioner is not tenable. **(Para 16)**

[Di Vi]

APPEARANCES:

FOR THE PETITIONER : Mr. Saqib, Advocate.

FOR THE RESPONDENT : Mr. Sudhir Nandrajog Sr. Advocate with Mr. P.R. Chatterji, Advocate.

CASES REFERRED TO:

1. *Delhi Development Authority* vs. *Amita Nand Aggarwal Associates,* OMP No.115/2007.
2. *Sanyukt Nirmata* vs. *Delhi Development Authority,* 125 (2005) DLT 550.

3. *J.G. Engineers Pvt. Ltd.* vs. *Union of India and Anr.,* Civil Appeal No.3349 of 2005.

4. *DDA* vs. *Bhagat Construction Co. (P) Ltd. and Anr.,* 2004 (3) Arb.LR 548.

5. *Pt. Munchi Ram & Associates (P) Ltd.* vs. *Delhi Development Authority,* FAO(OS) 147/2002.

6. *Arosan Enterprises Ltd.* vs. *Union of India & Anr.,* (1999) 9 SCC 499.

7. *Himachal Pradesh State Electricity Board* vs. *R.J. Shah & Co.,* 1999 (2) Arbitration Law Reporter 316.

8. *Goa Daman and Diu Housing Board* vs. *Ramakant V.P. Darvotkar,* (1991) 4 SCC 293.

9. *M/s. Tarapore & Co.* vs. *Cochin Shipyard Ltd.,* AIR 1984 SC 1072.

RESULT: Award upheld.

MANMOHAN SINGH, J.

1. The abovementioned petition has been filed by the petitioner under Section 34 of The Arbitration and Conciliation Act,1996 (hereinafter referred to as 'the Act') challenging the award dated 31st January, 2011 passed in Arb. P. No.139/2009.

2. Brief facts of the petition are that on 11th February, 2002 the petitioner had called for tenders for construction of Compound Wall around Govt. Qtrs. at Nanakpura, Pocket B, New Delhi.

3. The respondent was awarded the work vide agreement dated 28th February, 2002 executed between the parties. The date of start of work was 1st March, 2002 while the stipulated date of completion as per contract was 30th April, 2002 but according to the petitioner the work was delayed. The same was completed on 15th February, 2006. Admittedly, there was a delay of about 45.5 months.

4. On 28th February, 2009 the respondents invoked clause No. 25 of their contract seeking appointment of an arbitrator within a period of 30 days to adjudicate the disputes that had arisen between the parties and Sh. Divakar Garg was appointed as Sole Arbitrator by Chief Engineer, NDZ-III CPWD vide letter dated 6th April, 2009 as per the terms of the

said contract.

5. On 8th April, 2009 the respondent had approached this court by way of filling Arb.P. No.139/2009 for appointment of arbitrator under Sector 11 of the said Act to adjudicate the disputes between the parties. The prayer made in the petition was allowed. Er. R.J. Bakhru was appointed as a Sole Arbitrator vide order dated 27th October, 2009. The petitioner submits that the above said order was obtained by the respondent by submitting totally wrong facts.

6. The respondent filed its statement of claim before the sole arbitrator on 27th November, 2009 to which the petitioner filed the Counter Statement of facts. After completing formalities, the award was published in favour of the respondent.

7. The petitioner has challenged the award in relation to Claim No. 1,3,4,5,7,8,9 and 10 of the Ld. Sole Arbitrator, inter alia, on the following grounds :

i) Arbitrator has no jurisdiction to make award against the specific terms of contract between the parties. Acceptance of claim of contractor by arbitrator without assigning reasons and ignoring agreement clause amounts to error apparent on face of record as well as contrary to terms of agreement.

ii) Arbitrator has travelled beyond the scope of Arbitration Agreement in granting compensation for delay in supply of material and payment of interest which is forbidden under agreement.

iii) The impugned award is perverse and illegal in so far as the same gives unjust advantage and benefit to the respondent which is in total disregard to the contractual terms between the parties.

iv) Arbitrator has deliberately ignored the preliminary submissions of the petitioner regarding disclosure of his impartiality and interest and also the factum of the appointment of Sh.Diwakar Garg as Sole Arbitrator by the Chief Engineer on 6th April, 2009. Arbitrator was duty bound to furnish his response/decision on his jurisdiction, based on the preliminary objections raised by

the petitioner before proceeding further with the adjudication. But the arbitrator deliberately chose not to respond to the same and this act of the arbitrator is totally unfair and amounts to legal misconduct.

v) Even in the impugned award, there is no mention of the appointment of Sh.Diwakar Garg as sole arbitrator by the Chief Engineer on 6th April, 2009. It is submitted that the said arbitrator Sh.R.J. Bakhru has totally misconducted himself in the most unfair and improper manner and deliberately chose not to deal with the said aspect.

vi) Arbitrator committed a grave error in ignoring clause 25 of the contract which stipulates that cost of arbitration is to be equally paid by both the parties. Interest @12% p.a. (simple) awarded by the Arbitrator is exorbitant, unsubstantiated and against the well settled judicial decisions of the Apex Court.

vii) The award is also against the .public policy. of India and as such is also liable to be set aside under Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996. The respondent's request for appointment of arbitrator under Clause 25 of the Contract was sent to the Chief Engineer, CPWD on 23rd March, 2009 (not on 28th February, 2009 as being contended by the respondent) and the same was received in the office of the Chief Engineer, CPWD on 3rd March, 2009. The respondent did not disclose the true and correct facts before this Court in Arb.P.No.139/2009. By letter dated 6th April, 2009, the Chief Engineer had duly appointed Sh.Diwakar Garg as sole arbitrator to adjudicate the dispute between the parties. It is relevant to point out that the said arbitrator duly communicated his appointment to both the parties concerned vide notice dated 22nd April, 2009. The date of preliminary hearing was also fixed for 18th May, 2009. But this fact as well was also not brought to the notice of this Court in the proceedings in Arb.P.No.139/2009.

8. On merit, it is alleged by the petitioner in its objections that the learned Arbitrator has incorrectly held that the measurements have been

recorded unilaterally by petitioner without considering that it was specifically pointed out in Exhibit R-55 to 57 filed by the petitioner in the counter statement of claim, that bill was clearly accepted by the respondent. The substitution of item was correctly done as is evident from the item executed, but he chose to ignore the same and conveniently considered agreement item No.10 to the benefit of the respondent when the welding is clearly included in agreement item No.10. The Ld. Arbitrator failed to appreciate that notice was given by the petitioner to the respondent-claimant vide Exhibits R-51, R-58 of the Counter to Statement of Claim for joint measurement, but no response was received by the petitioner. All the executed work at site was measured by the field staff in M.B and same was paid in final bill.

9. The learned Arbitrator has gone beyond the contractual terms and provisions by accepting the analysis of rates of the claimant-respondent in total disregard to Clause 12 of the contract as the analysis of rates submitted by the respondent is not as per Clause 12 of the agreement. As per Clause12.12(ii) the extra/substitute item is to be derived from the nearest similar item in the schedule of quantity of the agreement but the respondent has incorrectly held that recoveries made by the petitioner from the respondent is illegal as the respondent did not submit the fortnighty labour return as per Clause 19.D of the contract and no notice of default was required to be given by the petitioner to the respondent. He also failed to consider that compensation has been levied twice as under: (i) For the period 7th December, 2002 to 11th November, 2003 for Rs.2,28,450/- (ii) For the period 12th March, 2003 to 15th February, 2006 for Rs.1,82,760/- Respondent-claimant has not preferred any claim for Rs.2,28,450/- and had accepted for the delay in completion of the work on his part. Similarly, delay during the period 12th March, 2003 to 15th February, 2006 was also on their account only. As per Clause 13 of contract, the respondent was free to opt for foreclosure of the contract if it felt that there is any element of force to stop the work at site. Hence the award of Rs.4,65,000/- given for T&P, Rs.7,44,000/- for salary of staff for supervision etc. and Rs.5,19,724/- for overheads are totally unjustified. The respondent's claim for the loss due to under utilization of man/material is not justified for the period upto 11th November, 2003 though he has worked out an amount for this period also and the delay for remaining period is also on part of claimant for which compensation was rightly levied.

10. It is alleged by the petitioner that the learned Single Judge failed to consider that as per the terms of contract, the salary of project in-charge and others are not to be included in the award, since the service of the engineer is only required as per agreement and remaining personnel can be considered as part of overhead charges which were calculated incorrectly by him to be 5 % instead of 2.5%.

11. It is also stated by the petitioner that the the rate of Interest @ 12 % p.a. (simple) awarded by the learned Arbitrator is exorbitant , against the well settled judicial decisions of the Apex Court and Section 3 of the Interest Act, 1978 which provides for current rate of interest @ 4% to 6% p.a. The arbitral award deals with disputes not contemplated by and not falling within the terms of the submissions to arbitration proceeding contains decisions on matters beyond the scope of the submissions to arbitration proceedings therefore, the same ought to be set aside under Section 34(2)(a)(iv) of the Act. The award is also against the .Public Policy. of India and is also liable to be set aside under Section 34(2)(b)(ii) of the Act.

12. After hearing learned counsel appearing on behalf of respondent, I feel that it is necessary to refer some dates and events before dealing with the matter, the same are as follows :

Dates	Events
01.03.2002	Date of start of work
30.04.2002	Stipulated date of completion
15.02.2006	Actual date of completion as recorded by the UOI/ petitioner i.e. delay of 45.50 months.
15.09.2006	Request to Executive Engineer for release of final bill and claims.
23.10.2006	Request to Superintending Engineer for release of final bill and claims.
04.12.2006	Request to Chief Engineer for release of final bill and claims.
18.01.2007	Request to Chief Engineer for release of final bill and claims.

28.02.2009	Arbitration invoked.
08.04.2009	AA-139/2009(S-11) filed in court for appointment of independent and impartial Arbitrator as 30 days had expired since invocation of Arbitration and Chief Engineer failed to appoint the Arbitrator.
12.04.2009	Letter from Chief Engineer posted on 09.04.2009 appointing Shri Divaker Garg as Arbitrator received.
27.10.2009	This court appointed Arbitrator with the consent of parties holding that Chief Engineer is no longer entitled to appoint the Arbitrator and the Arbitrator has to be appointed by the Court.
06.11.2009	Sh. Divaker Garg resigned as Sole Arbitrator.
27.11.2009	Statement of Fact/Claim filed by Respondent before Arbitrator.
11.02.2010	Petitioner paid the admitted amount of their alleged final bill and paid Rs.34,200/- vide cheque No.697222 dated 6th February, 2010
18.02.2010	Petitioner paid the Security Deposit vide cheque no. 697233 dated 18.02.2010 for Rs. 2,84,265/-
05.03.2010	Petitioner submitted their submission RP/2, wherein at page 35, 48, 49, 113 they admitted late decision on their part.
13.04.2010	Counter Statement of Fact filed by the petitioner.

13. At the time of hearing of matter no one appeared on behalf of petitioner, however, later on Mr. Saqib, Advocate appeared and only made his submission while challenging the appointment of Arbitral Tribunal. His submission is that the order passed on 27th October, 2009 for appointment was contrary to the law as the petitioner before passing the said order on 12th April, 2009 already appointed Sh.Diwakar Garg, Chief Engineer as Arbitrator in terms of contract. According to him the respondent had misled the Court at the time of passing Order dated 27th October, 2009. Thus, the Award rendered by new Arbitrator is liable to be set aside on this ground itself.

14. The case of the respondent in nutshell is that as the petitioner failed to finalise the bill of the respondent even after repeated requests, the respondent therefore was constrained to approach the Chief Engineer for appointment of Arbitrator vide letter dated 28th February, 2009 posted on 2nd March, 2009. The Chief Engineer even after 30 days were over did not appoint any Arbitrator. The respondent then filed the petition under Section 11 on 8th April, 2009 in the High Court for appointment of independent and impartial Arbitrator. The letter of appointment by the petitioner was received on 12th April, 2009 and was posted on 9th April, 2009 after 30 days were over from the date of notice and after the respondent had approached the High Court on 8th April, 2009 for appointment of an independent and impartial arbitrator under Section 11. Therefore the petitioner appointed the arbitrator after 30 days were over (from the date of notice) and after the respondent had approached the Court seeking appointment of impartial and independent Arbitrator.

15. It is submitted that the Court after due consideration of all the facts and circumstances of the case appointed Mr.R.J. Bakhru as sole arbitrator in the present matter vide its order dated 27th October, 2009 with the consent of both the parties. It was already in the knowledge of the Court that the petitioner had appointed the Arbitrator as is apparent from the order dated 27th October, 2009. However, as the appointment was made after 30 days were over from the date of notice and after the respondent had approached the High Court on 8th April, 2009 for appointment of an independent and impartial arbitrator under Section 11, therefore, the High Court held that the petitioner was no longer entitled for appointment of the Arbitrator and the High Court appointed the Arbitrator with the consent of both the parties. It is also pertinent to point out here that the Arbitrator appointed by the Chief Engineer, Shri Divaker Garg, resigned vide his letter dated 6th November, 2009 after the appointment of arbitrator by the High Court.

16. It is evident that the High Court after hearing both the parties and with the consent of both the parties appointed Shri R.J. Bakhru (Retd. Chief Engineer) as Sole Arbitrator. It is pertinent to point out that the said order dated 27th October, 2009 was a consented order and had not been challenged before any forum and infact has been acted upon by both the parties without any reservation/protests. The petitioner never raised the jurisdiction issue before the Arbitrator. The petitioner after the appointment of the sole Arbitrator has conceded to his arbitration and

have filed their counter statement of facts and other relevant documents and have also attended all hearings in the matter, the petitioners have also filed their written submissions before the said Arbitrator for the purposes of adjudication upon the matter. Therefore, the objection raised by the petitioner is not tenable.

17. The learned Arbitrator has published his award after giving opportunity to both the parties and has reached the conclusions after taking into cognizance all documents, case laws and authorities referred by both the parties.

18. The learned Arbitrator has passed the speaking award dealing claims of the respondent, details of the same are:

a) Claim No.1ùAward of Rs. 17,58,576/- for balance due in final bill. The learned Arbitrator has given detailed reasons in four pages i.e., page 7 and 10 of the award. Learned Arbitrator is a technically expert person being retired Chief Engineer of CPWD. The Court cannot re-appreciate the evidence on merits. Referred to **Himachal Pradesh State Electricity Board v. R.J. Shah & Co.,** 1999 (2) Arbitration Law Reporter 316.

The learned Arbitrator noted that the Ex.R-55 to R-57 relied by the petitioner clearly shows that even the R/A Bills were accepted under protest. No final bill was paid by the petitioner. The final bill was paid only during the Arbitration proceedings. The petitioner never issued exhibit R-51 & R-58 and these exhibits were denied by the respondent. Moreover, the petitioner could not establish/prove that R-51 or R-58 were ever dispatched or issued to the respondent. The learned Arbitrator has also held: .The payment of interim bills and final bill was delayed after making heavy reductions and illegal recoveries. The bills with details of measurements submitted by claimants were ignored and the bills prepared by the respondents were based on incomplete measurements recorded unilaterally by respondent inspite of protests by the claimants at each stage..

The respondent has notified the petitioner in regard to the rates being charged by it for the extra items at the time of commencement of work along with its analysis. The nomenclature

of the structural steel item being item no. 10 clearly shows that the cost/element of welding is not included in item and is to be paid separately. That is why the agreement contains item of welding separately being item No.25. Had the cost/element of welding being included in item No.10, then there would not have been any occasion of agreement containing welding item separately being item No.25.

The learned Arbitrator has held that the substituted item no.1 is correctly payable as per the agreement item no.10. There was no occasion of making a substituted item as the item was already there in the agreement. In regard to the compensation for delay the Supreme Court has in its recent decision in the case of **J.G. Engineers Pvt. Ltd. v. Union of India and Anr.,** Civil Appeal No.3349 of 2005, decided on 28th April, 2011, Manu/SC/0527/2011, has held:

> "In view of the finding of the arbitrator that the Appellant was not responsible for the delay and that the Respondents were responsible for the delay, the question of Respondents levying liquidated damages or claiming the excess cost in getting the work completed as damages, does not arise. Once it is held that the contractor was not responsible for the delay and the delay occurred only on account of the omissions and commissions on the part of the Respondents, it follows that provisions which make the decision of the Superintending Engineer or the Engineer-in-Charge final and conclusive, will be irrelevant."

In the instant case also after perusing the records, the learned Arbitrator has held:

> "The delay in completion of work and recording of completion certificate was exclusively and fully due to failure to perform reciprocal contractual obligations on part of respondents."

The learned Arbitrator has reached to the finding of the fact that it was petitioner who was responsible for delay and therefore the question of levy of compensation by the petitioner does not arise. Moreover the respondent never recognized the recovery of

amount by the petitioner for delay in completion. The petitioner has made and shown only one recovery i.e. of Rs. 1,82,760/- in their alleged final bill on the basis of notice/letter dated 23rd July, 2007 from S.E. (Ext. R/54), which was never issued to the claimants. The respondent denied the receipt of the letter (Ext R/54). The petitioner could not prove that it ever dispatched the Ext R/54 to the respondent. No show cause notice for levy of recovery was given by respondents.

b) Claim No.2 - This claim has not been allowed by the learned Arbitrator as the learned Arbitrator has considered the compensation of damages for T&P, Staff, Overheads, Market rate/escalation of labour, material, watch and ward under claim No.3, 4 and 5.

c) Claim no.3 - Learned Arbitrator awarded Rs. 17,28,724/-. This award has been made under Section 73 of the Contract Act, 1870 in terms of which if a breach has been committed the other party has to be compensated. The learned Arbitrator held that various areas of work were given in stages during period 4th March, 2002 to 22nd September, 2003, no working drawings were issued by the petitioner, old grills were issued after 9th May, 2002 for part of work. The work in pocket A and issue of old grill was not contemplated in the agreement. Old grills had to be removed from other site, transported and repaired before fixing by respondents. The supply of cement/stipulate material was irregular and in small quantities, in spite of protests by the respondents, the payment of interim bills and final bill were delayed after making heavy reductions and illegal recoveries. The bills with details of measurements submitted by claimants were ignored and the bills prepared by the respondents were based on incomplete measurements recorded unilaterally by respondent inspite of protests by the claimants at each stage, there was delay due to electric cables and provision of gates.

d) The learned Arbitrator has come to the finding of the fact that the petitioner was responsible for delay and is thus liable for reimbursing the losses suffered by the respondent

for the delayed period. The learned Arbitrator on page No. 4 to 7 of the award has discussed and concluded that the delay was on the part of the petitioner. The learned Arbitrator also held that it was petitioner who did not fulfill its part of the obligation and was responsible for delay as well as the consequence for such delay. He has calculated the losses for the main items of T&P required and has only allowed for part of the delayed period and not for the whole of the delayed period i.e. allowed only for 20 months against delay of 45.50 months. Similarly for the staff the learned Arbitrator has allowed for salary of staff for 24 months only. The overheads have been allowed @0.50% only against 2.50% admitted by the petitioner. Even the calculation with details have been given by the learned Arbitrator in the award.

e) Claim No.4 - Award of Rs. 90,730/-. This Award has been made under Section 73 of the Contract Act, 1870 in terms of which if a breach has been committed then the other party has to be compensated. The Arbitrator has calculated net cost of work, after deduction of stipulated material, for the delayed period as Rs. 22,68,174/- and has only allowed 4% as average increase in cost of labour and material against 40% claimed by the respondent and has therefore allowed only 4% of Rs. 22,68,174/- which comes to Rs. 90,730/-.

f) Claim No.5 - Award of Rs. 7,28000/-. This award has been made under Section 73 of the Contract Act, 1870 in terms of which if a breach has been committed then the other party has to be compensated. The learned Arbitrator after study of documents on record held that the delay was on the part of the petitioner and claimant was forced to stay at site and thereafter the Arbitrator has awarded only for four chowkidars against 10 for each 12 hr shift i.e. 20 nos. claimed by the respondent. The respondent has exhibited the wages sheet as exhibit C-75 on page 126 to 141. The petitioner has not forwarded any objection against this claim. The petitioner has not forwarded any objection against this claim in their claim petition under

Section 34.

g) Claim No.6 - This claim was disallowed by the learned Arbitrator as the learned Arbitrator has compensated the respondent in claim no.5.

h) Claim No.7 - Learned Arbitrator has awarded cost of arbitration in favour of the respondent.

i) Claim No.8, 9 & 10 - Learned Arbitrator has awarded presuit, pendentelite & future interest @12% P.A against 24% P.A claimed by the respondent. The respondent has also enclosed exhibit C-172 being the certificate from the bankers of the respondent, certifying that the interest being charged by the bankers from the respondent was 16%. Further it is submitted that in clause 10 B(iv) the petitioner is charging interest @18% P.A against the mobilization advance provided by it to the respondent against plant and machinery. Therefore if the petitioner wants to recover interest @18% on the mobilization advance given to the contractor, there could hardly be any justification in its grievance that rate of interest 12% as awarded by the learned Arbitrator is excessive, exorbitant and unsubstantiated.

19. In order to determine whether the Arbitrator has acted in excess of jurisdiction what has to be seen is whether the Claimant could raise a particular dispute or claim before an Arbitrator. If the answer is in the affirmative then it is clear that the Arbitrator would have the jurisdiction to deal with such a claim. On the other hand if the arbitration clause or a specific term in the contact or the law does not permit or give the Arbitrator the power to decide or to adjudicate on a dispute raised by the Claimant or there is a specific bar to the raising of a particular dispute or claim then any decision given by the Arbitrator in respect thereof would be clearly in excess of jurisdiction. Referred to **Himachal Pradesh State Electricity Board v. R.J. Shah & Co.,** 1999 (2) Arbitration Law Reporter 316.

20. This Court will not sit in appeal over the matter/award and re-appraise the evidence adduced by the parties as there is no error apparent on the face of the record of the award and the objections are frivolous, vexatious and are liable to be rejected forthwith as it fails to show any

error apparent on the fact of the award and/or any legal misconduct on the part of the learned Arbitrator. As per the settled law by the Supreme Court, the reasonability of the reasons of the award made by the learned Arbitrator will not be looked into or appreciated by this Court in any manner whatsoever.

21. In another judgment the Supreme Court stated .Even if the decision of the Arbitrator does not accord with the view of the Court, the award cannot be set aside on the sole ground that there is an error of law apparent on the face of it. Referred to **M/s. Tarapore & Co. v. Cochin Shipyard Ltd.,** AIR 1984 SC 1072.

22. There are decisions on this issue, the same are -

i) The Supreme Court in **Arosan Enterprises Ltd. v. Union of India & Anr.,** (1999) 9 SCC 499, it has clearly stated:

> "In any event, the issues raised in the matter on merits relate to default, time being the essence, damages – these are all issues of fact, and the Arbitrators are within their jurisdiction to decide the issue as they deem fit – the Court has no right or authority to interdict an award on a factual issue and it is on this score the Appellate Court has gone totally wrong and thus exercised jurisdiction which it did not have."
>
> It has been further held:
>
> "The common phraseology .error apparent on the face of the record. does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record. The Court as a matter of fact cannot substitute its evaluation and come to the conclusion that the Arbitrator had acted contrary to the bargain between the parties. If the view of the Arbitrator is a possible view the award or the reasoning contained therein cannot be examined."
>
> It has also been held:
>
> "The Arbitrators have, in fact, come to a conclusion on a closer scrutiny of the evidence in the matter and reappraisal of evidence by the Court is unknown to proceedings under Section 30 of the Arbitration Act."

ii) The Constitution Bench of the Supreme Court in **Goa Daman and Diu Housing Board v. Ramakant V.P. Darvotkar,** (1991) 4 SCC 293, had held:

> "There is nothing to show in this case that the Arbitrator misconducted himself of the proceedings in any other manner nor there is anything to show that the awards have been improperly procured. There is no allegation, far less any finding that the Arbitrator was biased or unfair or he has not heard both the parties or he has not fairly considered the submissions of the parties in making the awards on question. It is evident from the awards that the Arbitrator has considered all the specific issues raised by the parties in the arbitration proceedings and came to his finding after giving cogent reasons."

iii) This Court in **Delhi Development Authority v. Amita Nand Aggarwal Associates,** OMP No.115/2007, decided on 8th May, 2009, has held:

> "It is well settled that the jurisdiction of the court when called upon to decide the objection raised by a party against the arbitral award is limited as expressly indicated in the Arbitration and Conciliation Act, 1996. The court has no jurisdiction to sit in appeal and examine the correctness of the award on merits with reference to the materials produced before the arbitrator. It cannot sit in appeal over views of the arbitrator by re-examining and re-assessing the materials."

iv) This court in **Sanyukt Nirmata v. Delhi Development Authority,** 125 (2005) DLT 550, in para 12 has held:

> "Division bench of this Court in **Delhi Development Authority v. Bhagat Construction Co. (P) Ltd. and Anr.,** 2004 (3) Arb. LR 548 had observed that specially where a technical man like retired Chief Engineer of CPWD is called upon to act as an arbitrator, all that is required to be seen is that the arbitrator has applied his mind before awarding the claims and the arbitrator is not required to disclose the mathematical calculations in the award. Thus, until and unless the decision of the arbitrator is manifestly perverse or has been arrived at on the wrong application of law, the award would not call for any interference."

v) Division bench of this Court in **Pt. Munchi Ram & Associates (P) Ltd. v. Delhi Development Authority,** FAO(OS) 147/2002, decided on 12th August, 2011 has held:

> "We also agree with the submission of the learned counsel for the appellant that the very purpose of having an arbitrator (who is the chosen judge of the parties) and that too a specialist in the field, being a retired Director General of Works, CPWD, would be defeated if this Court was to scrutinize the mode and manner of calculations of all such claims. A Division Bench of this Court in **DDA v. Bhagat Construction Co. (P) Ltd. and Anr.,** 2004 (3) Arb.LR 548 had observed that where a technical man like a retired Chief Engineer of CPWD is called upon to act as an arbitrator, all that is required to be seen is that the arbitrator has applied his mind before awarding the claims and the arbitrator is not required to disclose the mathematical calculations in the award. Thus, until and unless the decision of the arbitrator is manifestly perverse or has been arrived at by the wrong application of law, the award would not call for any interference."

23. The submissions of the learned counsel appearing on behalf of petitioner has no force as the learned Arbitrator was appointed with the consent of the parties.

24. From the instant objections, it appears that the petitioner challenged the award merely on the ground that the learned Arbitral Tribunal had rejected the applicant's submissions on the interpretation of the Contract between the parties and the other tender documents after a perusal of the facts and circumstances presented by the applicant before the learned Tribunal.

25. A bare perusal of the objection shows that the petitioner has re-agitated its claims before this Court in an attempt to treat this Court as an appellate body, which is clearly not permissible under Section 34 or any other provisions of the Arbitration and Conciliation Act, 1996.

26. The petitioner has merely challenged the Award without having made any specific pleading to establish either manifest error apparent on the fact of the record and/or perversity.

27. The applicant has made out no case to bring the impugned Award within the fold of Section 34(2) of the Act whereupon this Court

may exercise its jurisdiction under Section 34 of the Act.

28. In view of aforesaid reasons, the objections filed by petitioner are not sustainable. This court hence upholds the award passed by the learned Arbitrator.

ILR (2013) II DELHI 1632
FAO (OS)

JHANG COOPERATIVE GROUP HOUSING SOCIETY LTD. ....APPELLANT

VERSUS

PT. MUNSHI RAM AND ASSOCIATES PVT. LTD. ....RESPONDENT

(SANJAY KISHAN KAUL & SANJEEV SACHDEVA, JJ.)

FAO (OS) NO. : 582/2012 DATE OF DECISION: 09.05.2013

(A) Arbitration & Conciliation Act, 1996—Section 2, 34 & 37—Respondent entered into agreement with appellant society for construction of 490 residential units in Rohini, New Delhi—Work was delayed and ultimately contract was rescinded by appellant society—Disputes arose between parties in matter of execution of work and respondent invoked Arbitration Clause—Appointed, Sole Arbitrator passed interim and final award—During pendency of arbitral proceedings, parties had consented to passing of interim award in respect of some of claims—Ld. Arbitrator by way of interim award granted relief of declaration holding appellant society responsible for non-performance of their obligation and consequently work was prolonged—He further held rescission/termination of contract was arbitrary and without jurisdiction—Also

Ld. Arbitrator directed appellant to pay undisputed amount mentioned in joint bill and with respect to disputed items decided to adjudicate the same in final award—Appellant though aggrieved, did not challenge interim award and it was only after Ld. Arbitrator passed final award, appellant filed petition U/s 34 of the Act objecting to both interim and final awards—Respondent objected, challenge to interim award was tie barred. Held:- The interim award is an award as defined under Section 3 (1) (c) of the Arbitration Act and thus a recourse to a Court against the said award had to be made within the period of three months or the condonable period of 30 days as stipulated in Section 34 (3) of the Act.

The stipulation in the final award that the interim award is part and parcel of the final award would not in any manner extend the period of limitation for making recourse to a court against the said interim award and as such we are in agreement with the learned Single Judge that the objections to the interim award were clearly barred by limitation and the Submission of the Learned Senior Counsel in this regard is thus rejected.

(Para 13)

(B) Arbitration & Conciliation Act, 1996—Section 2, 34 & 37—Respondent entered into agreement with appellant society for construction of 490 residential units in Rohini, New Delhi—Work was delayed and ultimately contract was rescinded by appellant society—Disputes arose between parties in matter of execution of work and respondent invoked Arbitration clause—Appointed, Sole Arbitrator passed interim and final award—During pendency of arbitral proceedings, parties had consented to passing of interim award in respect of some of claims—Final award was passed by Ld. Arbitrator on other disputed items between parties—Appellant by way of petition filed U/s 34 of the Act challenged both interim as well as final award. Held:- The jurisdiction under Section 34 is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the Court to interfere with the award merely because in the opinion of the Court, another view is possible. Under Section 37, the extent of judicial scrutiny and scope of interference is further narrower.

The duty of the court in these circumstances is to see whether the view taken by the Arbitrator is a plausible view on the facts, pleadings and evidence before the Arbitrator. Even if on the assessment of material, the court while considering the objections under Section 34 is of the view that there are two views possible and the Arbitral Tribunal has taken one of the possible views which could have been taken on the material before it, the court would be reluctant to interfere. The court is not to substitute its view with the view of the Arbitrator if the view taken by the Arbitrator is reasonable and plausible.

(Para 15)

Important Issue Involved: (A) The interim award is an award as defined under Section 2 (1) (c) of the Arbitration Act and thus a recourse to a Court against the said award had to be made within the period of three months or the condonable period of 30 days as stipulated in Section 34 (3) of the Act.

(B) The jurisdiction under Section 34 is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the Court to interfere with the award merely because in the opinion of the Court, another view is possible. Under Section 37, the extent of judicial scrutiny and scope of interference is further narrower.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. J.P. Sengh, Sr. Advocate with Mr. Sumeet Batra, Advocate.

FOR THE RESPONDENT : Ms. Anusuya Salwan and Ms. Renuka Arora, Advocate.

CASE REFERRED TO:

1. *McDermott Internation Inc.* vs. *Burn Standard Co. Ltc. and Others* (2006) 11 SCC 181.

RESULT: Appeal dismissed.

SANJEEV SACHDEVA, J.

1. This is an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Said Act') impugning the judgment dated 24th May, 2012, whereby the objections of the appellant under Section 34 of the Arbitration Act challenging the interim award dated 05th July, 2002 as well as final award dated 27th September, 2002 were dismissed. The objection petition under Section 34 of the Arbitration and Conciliation Act impugning both the interim and the final award was filed on 02.01.2003.

2. The respondent had entered into an agreement with the appellant society on dated 26th February, 1988 for construction of 490 residential units at Plot No. 40, Sector-13, Rohini, New Delhi. The date of start of construction stipulated in the work was 26th February, 1988 and the stipulated date for completion was 25th August, 1990. The work was delayed and ultimately the contract was rescinded by the appellant society on 13th January, 2000.

3. Pursuant of the rescission of contract certain disputes and doubts arose between the parties in the matter of execution of the said work. The respondent invoked the Arbitration clause and the Administrator of the appellant society, the Persona Designata appointed the Sole Arbitrator. On resignation of the Sole Arbitrator, the Administrator appointed Sh. D.N. Kathuria as the Sole Arbitrator who passed both the interim and the final award.

4. During the pendency of the arbitration proceedings, both the parties consented to passing of an interim award in respect of some of the claims raised by the claimant in the arbitration proceedings.

5. In the interim award, the Arbitrator granted the relief of Declaration holding that the appellant society was responsible for non-performance of their obligation and consequently the work was prolonged. The Arbitrator further held that the rescission/termination of contract was arbitrary and without jurisdiction and he thus declared the rescission as illegal.

6. With regard to the claim in respect of the payment for the work done in the 45th Running Account (RA) Bill and after the 45th R.A. Bill the Arbitrator directed both the parties to submit joint measurements for the remaining items and joint bill for the undisputed items. Consequent to the direction both the parties submitted their joint measurement and joint bill for undisputed items. The joint bill submitted by the parties indicated certain disputed items which were left to be adjudicated by the Arbitrator.

7. The Arbitrator in the interim award directed the appellant to pay the undisputed amount as mentioned in the joint bill and further with respect to the disputed items decided to adjudicate the same in his final award.

8. The appellant did not challenge the interim award made and published on 5th July, 2002 and it is only after the Arbitrator adjudicated upon the remaining disputes and passed the final award dated 27.09.2002 that the appellant filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996 objecting to both the interim award and the final award.

9. The learned Single Judge vide the impugned order dated 24.05.2012 has held that the challenge to the interim award dated 5.7.2002 was time barred and accordingly has rejected the same.

10. Section 2 (1) (c) of the Said Act defines arbitral award to include an interim award. Under Section 34 of the said Act recourse to a court against an arbitral award has to be made within three months from the date on which the party making the application receive the arbitral award. As per Section 34 (3) of the Act, the court has been

empowered to condone a maximum delay of 30 days, subject to the applicant showing sufficient cause which prevented the applicant from making the application within the said period of three months and not thereafter. In the present case, admittedly the objections to the interim award have neither been made within three months from the date as stipulated in Section 34 (3) or in the further period of 30 days as stipulated in the proviso thereto.

11. The learned Senior Counsel for the appellant has pointed out that the interim award itself stipulates that the interim award is without prejudice to the respective contentions of the parties, as stated in their pleadings and in the final award the arbitrator has mentioned that the interim award may be read in conjunction with the final award as the said interim award is part and parcel of this award too. The learned Senior Counsel thus submits that since the interim award is part of the final award, the same could be challenged along with the final award within the limitation prescribed for challenging the final award.

12. We find no merit in the submission of the learned Senior Counsel for the appellant and are in agreement with the reasoning and finding of the learned Single Judge in the impugned judgment. The interim award is an award as defined under Section 2 (1) (c) of the Arbitration Act and thus a recourse to a court against the said award had to be made within the period of three months or the condonable period of 30 days as stipulated in Section 34 (3) of the Act.

13. The relief of declaration granted by the Arbitrator of illegal rescission/termination of the contract became final since the same was never challenged within the stipulated period. The stipulation in the interim award that it is without prejudice to the respective contentions of the parties in our view was for the purpose of leaving the other claims to be decided in the final award on their own merit. The stipulation in the final award that the interim award is part and parcel of the final award would not in any manner extend the period of limitation for making recourse to a court against the said interim award and as such we are in agreement with the learned Single Judge that the objections to the interim award were clearly barred by limitation and the Submission of the Learned Senior Counsel in this regard is thus rejected.

14. With respect to the objections filed by the appellant against the final award dated 27.09.2002 we may note that the law laid down by the

Hon'ble Supreme Court restricts the supervisory role of the courts while testing the validity of an Arbitration Award. In the case of **McDERMOTT INTERNATION INC. vs. BURN STANDARD CO. LTD.AND OTHERS** (2006) 11 SCC 181, the Hon'ble Supreme Court has held as under:-

> "The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

It is in the parameters as laid down by the Apex Court vis-a-vis the scope of judicial intervention that the present appeal impugning the order dated 24.05.2012 has to be dealt with in respect to the final award published by the sole arbitrator dated 27.09.2002. It is seen that the Arbitrator has elaborately considered the various documents, submissions and evidence led by the parties in respect of each claim which was left to be adjudicated by the interim award. The Arbitrator has extensively gone into the evidence and evaluated the entire material before him and has published a detailed speaking award.

15. The law is no longer *res integra* and is settled that where the Arbitrator has assessed the material and evidence placed before him in detail, the court while considering the objections under Section 34 of the said Act does not sit as a court of appeal and is not expected to re-appreciate the entire evidence and reassess the case of the parties. The jurisdiction under Section 34 is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merley because in the opinion of the court, another view is possible. The duty of the court in these circumstances is to see whether the view taken by the Arbitrator is a plausible view on the facts, pleadings and evidence before the Arbitrator. Even if on the assessment of material, the court

while considering the objections under Section 34 is of the view that there are two views possible and the Arbitral Tribunal has taken one of the possible views which could have been taken on the material before it, the court would be reluctant to interfere. The court is not to substitute its view with the view of the Arbitrator if the view taken by the Arbitrator is reasonable and plausible.

16. If the Arbitrator has taken a view which the court finds reasonable and plausible, the court would certainly not interfere.

17. The extent of judicial scrutiny under Section 34 of the Arbitration Act 1996 is limited and scope of interference is narrow. Under Section 37, the extent of judicial scrutiny and scope of interference is further narrower. An appeal under Section 37 is like a second appeal, the first appeal being to the court by way of objections under Section 34. Where there are concurrent findings of facts and law, first by the Arbitral Tribunal which are then confirmed by the court while dealing with objections under Section 34, in an appeal under Section 37, the Appellate Court would be very cautious and reluctant to interfere in the findings returned in the award by the Arbitral Tribunal and confirmed by the court under Section 34.

18. As laid down by the Apex Court, the supervisory role of the court in arbitration proceedings has been kept at a minimum level and this is because the parties to the agreement make a conscious decision to exclude the courts jurisdiction by opting for arbitration as the parties prefer the expediency and finality offered by it.

19. The learned Single Judge has examined each claim awarded by the learned Arbitrator in detail and after scrutinizing the same has found the findings and reasoning to be justified and has declined to interfere in the findings arrived at by the learned Arbitrator in respect of each claim. Once the Arbitrator has returned a finding that delay in completion of the work was attributable to the appellant society and that the rescission and termination of the contract was illegal and more so since these findings are not challenged by making a recourse against the interim award, the findings arrived at by the learned Arbitrator in respect of the claims dealt with by the learned Arbitrator in the final award cannot be said to be erroneous and the learned Single Judge has rightly declined to interfere with the same.

20. The learned Single Judge has given detailed reasons for rejecting the application filed by the appellants with which we are in complete agreement more so in view of the fact that this court does not sit as a court of appeal to reassess and re-examine the evidence led before the Arbitrator. Even on examination of the material before us, we are of the view that the findings of the Arbitrator are reasonable and justified in the facts of the present case.

21. The learned Senior Counsel tried to make out a case of fraud and collusion between the Administrator and the contractor. We are unable to accept this submission of the learned Senior Counsel for the reason that there is neither such a plea raised before the Arbitrator or the learned Single Judge nor any material has been placed on record before us to substantiate this allegation. It is settled proposition of law that a plea or a ground not raised before the Arbitral Tribunal would not be permitted to be raised in objections against the award leave alone before the Appellate Court under Section 37 considering an appeal under Section 37 of the said Act. The submission in this regard is thus rejected.

22. We find no infirmity in the impugned order dated 24th May, 2012. The appeal is accordingly dismissed, leaving the parties to bear their own costs.

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(Containing cases determined by the High Court of Delhi)

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— Section 2, 34 & 37—Respondent entered into agreement with appellant society for construction of 490 residential units in Rohini, New Delhi—Work was delayed and ultimately contract was rescinded by appellant society—Disputes arose between parties in matter of execution of work and respondent invoked Arbitration clause—Appointed, Sole Arbitrator passed interim and final award—During pendency of arbitral proceedings, parties had consented to passing of interim award in respect of some of claims—Final award was passed by Ld. Arbitrator on other disputed items between parties—Appellant by way of petition filed U/s 34 of the Act challenged both interim as well as final award. Held:- The jurisdiction under Section 34 is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the Court to interfere with the award merely because in the opinion of the Court, another view is possible. Under Section 37, the extent of judicial scrutiny and scope of interference is further narrower.

Jhang Cooperative Group Housing Society Ltd. v. *Pt. Munshi Ram and Associates Pvt. Ltd.* *1632*

BORDER SECURITY FORCE RULES, 1969—Rule 49—Brief Facts—Petitioner, a Constable in the Border Security Force (BSF) was deployed for security aid duty to Dr. (Mrs.) Somy Dey Sarkar, who used to reside in the BSF Campus at Guwahati since 26.01.2004—It is stated that while on such duty, on 17.06.2005, Dr. (Mrs.) Somy Dey Sarkar instructed him at 07.45 PM to leave her quarters as she was about to bathe—He, therefore, left the quarters—Dr. Sarkar thereafter alleged that she found/noticed two camera flashes within a span of few seconds from the window of the bathroom where she was bathing—She immediately shouted for help: her mother, Smt. Dipali Dey Sarkar went outside and found nobody—It was alleged that the matter was immediately reported to the Chief Medical Officer, Dr. A.C. Karmakar over telephone; acting on his advice, she instructed the Gate

Commander to stop the petitioner from leaving the BSF Campus—The BSF authorities thereafter investigated the matter and ultimately recorded the petitioner's admission; a written report was prepared and a proceeding was drawn-up against the petitioner under Rule 49 of the BSF Rules, 1969—In the course of the proceedings, it was alleged that the BSF authorities seized one Kodak Camera make EC-300 with a photo reel from the house of Constable Kunnu Thamaria, adjacent to the quarters of Dr. Sarkar—The seizure memo stated that the camera was used to take pictures of Dr. Sarkar—The petitioner was placed under open arrest on 20.06.2005 and taken into custody by the BSF the same day—By order dated 21.06.2005, the Commandant of 128 BN BSF issued an order for recording of evidence, directing that the proceedings in that regard should be completed by 29.06.2005—Petitioner nominated one Sh. Anil Kumar, Assistant Commandant as friend of the accused; this was also approved by the appropriate authority on 22.07.2005—It is stated that even though an Assistant was nominated to the petitioner to defend his case, the Security Court which held the proceedings on 23.07.2005, did not permit him to ask any questions during the trial, investigated under Section 157 of the BSF Act, 1968—It is alleged that the Court on 23.07.2005 recorded the guilt, allegedly admitted by the petitioner, without complying with the mandatory provisions of the Act and Rules and proceeded to pronounce him "guilty" and sentenced him to dismissal from service—This order was questioned by the petitioner in an appeal preferred to the concerned authority, i.e. the Deputy Inspector General (DIG), on 29.08.2005—This appeal was apparently rejected subsequently—Hence the present Petition—Petitioner contended inter alia that he was denied a fair trial on account of various infirmities which obitiated the proceedings of the Security Force Court (Hereafter "the Court")—It was highlighted that the alleged confessional statement said to have been made by the accused whilst in custody could not be the basis of his guilt nor was

it admissible in evidence against him—None of the witnesses had actually seen him using the camera or its flash, nor even witnesse him fleeing the spot—It was submitted that this deposition entirely undermined the prosecution case and furthermore, neither was the camera or its contents sent for examination nor was it proved in any manner known to the law that it belonged to the petitioner or was connected with him—Respondent contended inter alia that the procedure prescribed by law was duly followed before imposing the punishment of dismissal upon the petitioner. Held—Petitioner's arguments are two fold, i.e. procedural infirmities in regard to recording of evidence, and that the evidence on record did not implicate him—Records produced during the hearing reveal that in this case, the Court was both convened and presided over by, the petitioner/accused's Commanding Officer, i.e. Commandant Ghanshyam Puruswami—This serious infirmity would, in the opinion of this Court, invalidate the GSC proceeding—The absolute bar in regard to the participation of the Commandant of the accused, who also convened the Court, was prescribed apparently with a purpose, i.e. to eliminate all semblance of bias—Entire structure of Rules 60 and 61 is to ensure a degree of impartially, by requiring officials of different battalians to man the Courts—If the Commandant, who is in charge of the unit, and is expected to be in the know of such matters, is prohibited from participating in the Court, the rationale obviously is to ensure that bias—Real or perceived is eliminated altogether—The violation of this rule, in the opinion of the court, invalidates the proceedings. Entire finding of guilt was based on the confessional statement extracted under duress, and not given with due knowledge of the petitioner's rights—On the evidence led, there was no occasion for the petitioner to have reasonably given a confessional statement—A close analysis of the evidence would highlight the following circumstances: (1) PW-1 noticed two camera flashes, whilst she was bathing, around 7-45 PM on 17th June, 2005, after she asked the petitioner

to leave the premises. Despite her alert, no one was caught. PW-2 corroborated this. PW-3 who reached the spot, also could not see anyone (2)—The petitioner was asked to report back immediately; he did so. During the intervening period, he went to Const. Kunnu's house, and borrowed boots. This was verified from the latter's wife and sister in law (PW-9) the same day. PW-9 did not mention anything about any camera or the petitioner having asked her to hide it, when officials enquired from her (3) No incriminating object or article including the camera was seized from the petitioner's possession. It is unclear as to who owned the camera seized by the respondents (4) The petitioner was placed under open arrest the next day. He according to PW-7, PW-8 and another witness, confessed to having clicked with the camera and having hidden it with PW-9. The next day, PW-9 made another statement, leading to recovery of the camera. This internal contradiction between the version of PW-9 assumes importance because in her first statement, she never said anything about the camera. Her deposition in the Record of Evidence proceeding was over a week later, i.e. 25.06.2005 (5) No written record of the confession said to have been made on 18th June, 2005 exists; (6) Most importantly, the camera reel (though recovered on 18th June, 2005) was never developed. It was the best evidence of the petitioner's culpability.

Jogeswar Swain v. *Union of India & Ors.*..... *1419*

CODE OF CIVIL PROCEDURE, 1973—Order XXII—Rule 3 & 10—Plaintiff filed suit claiming money decree, defendants raised plea of suit being time barred and moved application for rejection of plaint—Application dismissed and order confirmed in appeal—During pendency of suit, plaintiff Bank-Kriess merged with YAPI KREDI BANK (appellant)—As a result, Yapi Kredi Bank took over all assets and liabilities of bank Kreiss AG and plaintiff bank ceased to exist—One of the defendants filed application for dismissal of suit on account

of non-existence of plaintiff urging that application U/o XXII Rule 3 not moved, suit abated—On other hand, appellant moved application U/o XXII Rule 10 seeking leave of Court to continue suit in its name being successor of Bank Kreiss—Appellant urged, by virtue of merger it look over all assets and liabilities of original plaintiff and therefore became its successor-in-interest—Ld. Single Judge dismissed application of appellant and suit was ordered to have abated—Aggrieved appellant filed appeal—During pendency C.H. Financial Investments moved application for being substituted as appellant as it succeeded to claims in suit by virtue of transfer deed executed by Yapi Kredi Bank—Application was resisted by defendants/respondents. Held: There is distinction between corporate death, as a consequence of final winding up order, U/s 481 of the Companies Act, and on the other hand, the extinguishment of corporate personality of the transferee as a result of amalgamation of companies. A corporate plaintiff does not die but it may cease to exist and suit cannot be abated by virtue of order XXII Rule 3. Order XXII Rule 10 CPC applicable to embark on an enquiry about successor entitled to continue with the suit.

Yapi Kredi Bank (Deutschland) AG v. *Ashok K. Chauhan and Ors.* *841*

— Order XXXVIII Rule 5 and Order XXV—Attachment before Judgment. Whether the impugned orders are supportable on the principles underlying the grant of an order of 'attachment before judgment'? Held—Power of the Court under Order XXXVIII Rule 5 is drastic and extraordinary and is to be used sparingly and strictly in accordance with the Rule. Order of the Tribunal requiring furnishing of security for monetary amount of claim has to satisfy the requirements of Order XXXVIII Rule 5. Order XXV Rule 1 only enables the Court to require the Plaintiff to furnish security for payment of costs incurred or likely to be incurred by defendant. The discretion is to be exercised as per merits of each case, depending upon its own circumstances. Arbitration Tribunal Appeal allowed.

Intertoll ICS Cecons O & M Co. Pvt. Ltd. v. *National Highways Authority of India* *1018*

— Section 482—Inherent power—Quashing—Companies Act, 1956—Section 159—Section 162—Non compliance of the provisions of the Act—Liability of Director —Resignation before initiation of prosecution—Whether offences under Section 159 read with Section 162 continuing—M/s AKG Acoustics (India) Ltd. incorporated on 7.3.1988 as public limited company—Petitioner inducted as director on 30.01.1997—Resigned on 28.07.1997—Notice dated 17.02.2000 issued by R2 Registrar of Companies (ROC) to AKG Acoustics and its director—for non compliance of some provisions of the Act—Notice also addressed to the petitioner showing him as a director—Petitioner replied on 25.04.2000 regarding his resignation—Petitioner sent another reply on 28.08.2000 enclosing the copy of resignation—ROC filed 6 cases on 05.07.2007 against AKG Acoustics and directors including petitioner—contended—Resignation was in the knowledge of respondent no.2—He could not have been prosecuted as director—Moved an application on 23.04.2009 in the Court of ACMM for dropping of the proceedings—R2 failed to respond to the application for more than three years—Approached the High Court—No counter affidavit filed—Deputy Registrar examined in respect of averment—Admitted the reply to the notice—R2 argued unless Form 32 is received—It is difficult to accept that the petitioner has resigned—Held—The resignation was intimated to ROC—ROC in two complaints not preferred to prosecute the petitioner as one of its directors accepting the averments of petitioner about resignation—Factum of resignation has come to the notice of ROC on 25.04.2000—Petitioner could not have been prosecuted for violation under Section 159 and Section 162 of the Act—Petition allowed—Prosecution quashed—However, the Court did not express any opinion whether the

offence under Section 159 read with Section 162 are continuing offences or not.

Ganesh Krishnamurthy v. *The State (NCT of Delhi) & Anr.* *1354*

— Section 482—Quashing of complaint—Negotiable Instruments Act, 1881—Sections 138 and 141—Complaint—Code of Criminal Procedure Section 251—Notice—Complaint under section 138 NIA—Sought to prosecute as partners—The firm prosecuted through its proprietor/partner and respondent no.2 prosecuted as proprietor/partner/authorised signatory—Averred that the firm is a partnership firm and accused no.2 to 5 were its partners were incharge of and responsible for conduct of day to day business—Notice under section 251 Cr. P.C. served on respondent no.3—Stated that his father and younger brother had nothing to do with the firm and accused Bharat was merely an employee—Petition filed for quashing of the complaint—Pleaded—Documents placed showing that the firm is a proprietorship firm—Not taken into consideration—respondents pleaded that averments contained in the complaint have to be accepted—Documents relied upon by the accused not to be considered while framing charge—Held—Complainant was not sure whether the firm is a proprietorship or a partnership firm—Genuineness of the documents issued by the Government Departments not disputed by respondents—The firm was a proprietorship firm-filing of complaint u/s. 138 with aid of Section 141 not permissible—Proceedings against the petitioner quashed.

Madan Singh & Anr. v. *Vee Pee International Pvt. Ltd. & Ors.* *1465*

— Section 482—Quashing of complaint—Indian Penal Code, 1860 (IPC)—Sections 174 and 175—Customs Act, 1968—Section 108—M/s. Kartik Traders imported 22400 kg and 400 kg medical herb—Reached Inland Container Depot Tuglakabad on 07.01.2008—Examined by the officials of DRI on 08.01.2008—Petitioner summoned to appear on 11.01.2008—

Petitioner out of town—Expressed his inability to appear on that day—Expressed his willingness to appear after 5-7 days—Another summons issued for appearance on 22.01.2008—Petitioner sought 10 days time—Complaint filed under section 174 and 175 IPC—Alleged intentionally omitted to appear and failed to produce documents though legally bound to appear and produce the documents—Summoned to appear vide order dated 16.07.2011—Petitioner u/s. 482 Cr. P.C. filed to quash the complaint—Plea taken u/s. 108 Customs Act only a Gazetted Officer of customs duly empowered by the Central Government in this behalf is competent to issue summons—Notification dated 20.08.2008 whereby the words 'duly empowered by the Central Government in this behalf omitted came into force on 10.05.2008—The custom officer who issued the summons on 11.01.2008 and 22.01.2008 was not duly empowered by the Central Government—Not competent to issue the summons—Held an action punishable retrospectively by an amendment in the Statute hit by Art. 20 of the Constitution of India—Complaint and summoning order dated 16.07.2011 quashed.

Saket Aggarwal v. *Directorate of Revenue* *1474*

— Section 482 inherent powers—Section 311—Recalling of witness—Application for recalling PW4 Dr. P.C. Prabhakar for further cross examination—Alleged discrepancies in the testimonies of PW4 and PW13 (I.O.)—Held—PW4 cross examined at length—Contradiction in the testimony of two witness—No ground for recalling PW4—Application dismissed aggrieved petitioner/applicant filed the petition for quashing the order—Held—Petitioner was at liberty to challenge the testimony of PW4 by putting appropriate questions in cross examination—Power u/s. 311 has to be exercised when a specified justification is shown for recalling for witness application rightly—Petition dismissed.

Ashok Kumar v. *The State (Govt. of NCT of Delhi)* *1485*

— Section 482 quashing of FIR—FIR No. 86/2011 under sections 471/420/463/468 IPC registered—Civil suit for cancellation of sale deed filed by the petitioner against respondent no.2—Alleged respondent no.2 fraudulently got the sale deed executed—Rent receipt signed by respondent no.2 as a tenant placed on record—Signing of rent receipts denied by respondent no.2—On the complaint of respondent no.2 FIR registered—FSL report—Signatures on the rent receipts do not tally with admitted signature of respondent no.2— Petition for quashing of FIR filed—Plea taken that there is no evidence that signature of respondent no.2 forged by petitioner—Registration of FIR is an abuse of the process of Court—Respondent contended complaint specifically states that rent agreement and rent receipts forget by the petitioner to make false ground—who has forget the documents is to be gone into during the trial—Held—It cannot be said that the allegations made in the FIR do not disclose commission of a cognizable offence—Plea of the petitioner cannot be accepted at this stage—Not able to show that FIR is an abuse of the process of the Court—Petition dismissed.

Sanagul v. *State NCT of Delhi & Anr.* *1514*

— Section 482—Inherent power—Quashing of FIR—Defence of the Accused—Negotiable Instrument Act—Section 138—Territorial Jurisdiction of Court at Delhi—Complaint filed by the R2 for dishonour of the cheque against petitioner—Petition filed for quashing of complaint—Contended—Cheque issued towards delivery of TATA safari car required to be returned on actual delivery—Cheque delivered in Lucknow drawn on ICICI Bank, Gomti Nagar, Lucknow—Presentation of the Cheque at Delhi Bank does not confer jurisdiction—Observed—complaint under S. 138 NI Act read with 420 IPC-averred-cheque for Rs. 9,70,000/- issued to R2 in discharge of petitioner's liability towards a friendly loan of Rs. 9,50,000/- doanoblained in Delhi in May, 2010—Cheque included amount of Rs. 20,000/- towards interest-handed over in

Delhi—Held—Petitioner's averment—Cheque was towards the amount of TATA safari, won by R2 as a result of bonus point in respect of business deal and have no connection with Delhi could not be looked into—Further held—Power of quashing could be exercised where allegations made in the FIR—Even if taken on its face value and accepted in entirety—Do not prima facie constitute any offence—Petition dismissed.

Madhumita Kaur v. *Zile Singh* *1335*

— Section 366—Indian Penal Code, 1860—Section 302—Death Reference—Appeal against conviction—Circumstantial evidence—Sentencing—As per prosecution, accused strangulated his 70 years old father, severed his head and removed entrails and some organs from body—Relying on testimony of his mother (PW3), sister (PW4) and brother (PW16), trial Court convicted u/s 302 and sentenced him to death—Held, circumstances prove guilt of accused beyond reasonable doubt—Rarest of rare principle is an attempt to streamline sentencing and bring uniformity in judicial approach—When drawing a balance sheet of aggravating and mitigating circumstances for sentencing, full weight had to be given to mitigating circumstances—State of mind of accused at the relevant time, his capacity to realize consequences of crime are relevant—Although accused did not take plea of insanity, circumstances point to his alienation from surroundings, family, near relatives and others—If unusual or peculier features there in allegations which excite suspicion of judge at preliminary stage, that there is possibility of accused laboring under mental disorder, Court bound under Article 21 and 39A to record so and send accused for psychiatric or mental evaluation—Accused indulged in ritual human sacrifice of father—Unusual nature of facts relevant to making sentencing choice—Aggravating circumstancing of killing an aged defenceless person coupled with mutilation of body and its beheading has to be balanced with factors like his social alienation, no known record of violent behavior,

young age (25 years)—Accused not beyond pale of reformation—Death sentence not confirmed and substituted with life imprisonment—Direction that in cases of serious crimes where accused indulged in unusual behaviour indicative of mental disorder (specially ritual or sacrifice killing), magistrate taking cognizance of offence shall refer accused for medical check-up to evaluate if mental condition might entitle him to defence of insanity—This procedure integral part of legal aid and right to fair trial under Article 21—Death Reference No. 1/2011 not confirmed—Criminal Appeal 912/2011 partly allowed.

State v. *Jitender* *1168*

— Section 482—Exercise of extraordinary power of High Court—Petitioner seeking quashing of FIR under Sections 506/34/380/448 IPC—Investigation not complete—Averments in the FIR prima facie constitute the offence—Allegations to be gone into during investigation—FIR cannot be quashed at this stage. HELD: The power of quashing of FIR should be exercised very sparingly with circumspection and in rare cases—The Court is not justified in embarking upon an enquiry as to the reliability, genuineness or otherwise of the allegations made in the FIR. The Court will not normally interfere with an investigation and will permit an inquiry into the alleged offence to be completed—The parameters laid down in *State of Haryana v. Ch. Bhajan Lal & Ors.* need to be satisfied—The averments made in the FIR cannot be said that do not constitute any offence or make out any case against the Petitioner—The Petitioner's defence and veracity of allegations made by the complaint is to be gone into by the police during the investigation—The FIR should not be quashed at this stage.

Ravi Nigam v. *The State (NCT of Delhi)*..... *827*

— Section 482—Complainants invoked inherent powers of Court to seek exemption from their personal appearance in the

complaint case as they were residents of Mumbai and therefore inconvenient to appear in the Court at Delhi on each and every date of hearing. It was also urged that since they had undertaken to be represented through their counsel and their identity was not in dispute, their request for grant of exemption from personal appearance ought to have been allowed. Held —Relying on the case of *S.V. Muzumdar and Ors. v. Gujarat State Fertilizer Co. Ltd. and Anr.* (2005) 4 SCC 173, wherein the Supreme Court held that the Court must consider whether any useful purpose would be served by requiring personal attendance of the accused or whether progress of the trial was likely to be hampered on account of their absence granted exemption from personal appearance, exemption of the petitioners from attending every hearing was allowed subject to their filing an undertaking that they shall appear before the Trial Court through their counsel duly authorized.

Narendra Keshavji Shah & Ors. v. *The State NCT of Delhi*..... *1060*

— Section 125—Petitions arise out of an order dated 09.12.2011 passed in C.R. No. 43/2011, whereby an interim maintenance of 12,000/- granted in favour of wife and 5,000/- granted in favour of Baby was reduced to 9,500/- and 3,000/- respectively. In Crl. M.C. 75/2012, the husband alleges that the overall maintenance of 12,500/- is excessive and arbitrary whereas the wife and the child in Crl. M.C. 2227/2012 says that the maintenance awarded is on the lower side. Held: There is not strict formula to award a particular percentage of the husband's income towards maintenance of the wife; normally the Courts have been taking 1/3rd of the husband's income towards maintenance of the wife. This may be increased keeping in view the circumstances of each case, like the number of persons to be maintained by the husband and other liabilities. The husband's income is claimed to be from three sources. First, the salary; second rental income from the

property; and third, income by way of interest from the FDs left by the mother of the husband. Therefore the interim maintenance awarded can neither be said to be excessive nor on the lower side, and held to be reasonable.

Lalit Bhola v. *Nidhi Bhola & Anr.* *1067*

— Section 482—Petitioner seeks quashing of FIR and charge sheet as filed by CBI in the Court of Special Judge, Delhi on the ground that this being the second FIR cannot be given effect to. Held: The first FIR was closed only on the technical ground that the complainant had told the IO that he did not lodge any report with P.S. Hasanganj. The complainant further informed the IO that he was not aware as to who were the culprits, that is, persons responsible for forging his letter head and signatures. The present Petitioner was not an accused in the first FIR, whereas on the basis of the second FIR, the investigation has been completed and a charge sheet has been filed against the Petitioner for forging the letter head and signatures of Mr. Kalraj Mishra. In the instant case it cannot be said that the second FIR and the charge sheet on the basis of the same is an abuse of the process of Court.

Amar Nath Mishra v. *State (C.B.I.)* *1076*

— Section 313 and Indian Evidence Act, 1872—Section 106—Whether recovery of the dead body at the instance of the accused is sufficient to hold that he had concealed the same?-Held, accused has not furnished any explanation whatsoever as regards his knowledge about the place from where the dead body was recovery. Thus, a presumption could be drawn that he concealed such a fact.

Hardayal Singh v. *State NCT of Delhi* *1062*

— Section 377—Appeal against Conviction and Indian Evidence Act, 1872—Sections 106, 146 and 138—Whether contradiction in testimony of witness dents the case of prosecution?—Held—Normal discrepancies do not corrode the credibility of parties' case, material discrepancies do so.

Further, evident contradiction in testimony to be specifically put to witness in order to enable the witness to explain the same. The same is rule of professional practice in the conduct of the case, but it is essential to fair play and fair dealing of the witness.

Mehboob Ahmed v. *State* *1003*

— Section 482—Prevention of Corruption Act, 1988—Section 19 (3) (c)—Special Judge framed charges against petitioner—Writ Petition filed praying for quashing of charges—Stay of proceedings before Trial Court also prayed—Plea taken, in several cases which were relied upon by petitioner, proceedings in cases under PC Act were stayed by SC—Per contra plea taken, *Arun Kumar Sharma* is not applicable to facts of instant case as it is not borne out from said case if same was under PC Act—In rest of cases cited by counsel for petitioner, provisions of PC Act which specifically bar Court from staying proceedings before Trial Court were not considered—Held—In *Satya Narayan Sharma* contention raised before SC that bar under Section 19(3) (c) of Act would not exclude inherent power of HC to stay proceedings under PC Act was negated holding if enactment contains a specific bar then inherent jurisdiction cannot be exercised to get over that bar—In *Arun Kumar Jain,* a DB of this Court while analyzing provision of Section 19 about maintainability of a Revision Petition against order of framing charge under PC Act has held that Section 19(3) (c) clearly bars Revision against interlocutory order and framing of charge being interlocutory order, a Revision will not be maintainable—Even if a Petition under Section 482 of Cr. P.C. or a Writ Petition under Article 227 of Constitution of India is entertained by HC, under no circumstance order of stay should be passed regard being had to prohibition contained in Section 19(3) (c) of PC Act—Petitioner's prayer for stay of proceedings before Trial Court cannot be entertained—Application dismissed.

S. Kalyani v. *Central Bureau of Investigation* *1055*

— Section 378—Dying Declaration—As per prosecution, deceased harassed, abused and beaten for dowry since beginning of marriage—Deceased pushed from roof by mother-in-law—Dying declaration of deceased Ex. PW1/B recorded by PW14 in which she implicated husband and in-laws for injuries—Trial Court acquitted all accused of charges u/s 304B, 498A, 406 & 120B—Held, no evidence about mental and physical condition of deceased when statement/dying declaration recorded—No evidence to support claim of prosecution that deceased in fit state of mind to make statement—Despite IO having sufficient time, SDM not called to record Dying Declaration—Language in Dying Declaration not that of deceased but of police authorities—Despite deceased being educated, her thumb impression obtained on Dying Declaration—Dying Declaration only has allegations that mother-in-law wanted to get husband re-married—Allegations regarding dowry, harassment made in belated complaint—Neither deceased nor her other relatives had any grievance against respondents since no complaint against deceased's husband and in-laws till her death and change of heart occurred subsequently-Statements of material prosecution witnesses suffer from improvements and contradictions in material particulars—Appeal dismissed.

State v. *Dilbagh Rai Bhola and Ors.* *1254*

COMPANIES ACT, 1956—Sections 391 and 394—Scheme of arrangement—Section 392—Company (Court) Rules 1959—Rule 9—Sanction and modification of scheme—Real Lifestyle Broadcasting Pvt. Ltd. (RLB) and Real Global Broadcasting Pvt. Ltd. (RGB) whose 50% shares held by Turner Asia Pacific Ventures Inc. (Turner), entered into a Scheme of Arrangement on 01st July 2010—Jointly filed petition for sanction of the scheme on 10th January 2011—Joint affidavit filed by RLB and RGB—Scheme sanctioned vide order dated 29th March, 2011—Contempt application Cony. case (C) no.

230/2012 filed by Turner alleged RGB failed to comply with obligation under Scheme—Full payment not made—RLB directed to deposit the balance amount payable to Turner vide order dated 24th September 2012—Present application seeking cancellation of scheme filed on 30.10.2012—Also filed LPA No. 748/2012 against the order dated 24th September issued—Held—Proper forum is the company judge seized of present application directions issued—The Co. application no. 2076/2012 alleged—Turner acted malafide in failling transfer or activate STBs—Turner willfully cheated RLB/ABE by not transferring decryption key and the commercial viability of a channel—Contempt application filed by Turner is an abuse of process of law—Turner contended the application to be an after thought filed after ordered to pay the balance amount under the Scheme—All properties and assets required to be transferred by Turner already transferred to RGB—No dispute ever raised by RLB the present application is malafide—STBs are properties of RGB now belonging to RLB—No assurance given for transfer of decryption code notice demanding outstanding amount was served and signal switched off after about three months—Held no time limit prescribed for moving application for modification—Modification as are necessary for proper working of the scheme can be made seven months had elapsed between entering of the scheme and moving of petition for sanction no allegation of facing difficulties in getting Turner to comply no explanation for not stating non compliance of obligation by Turner while seeking sanction of the scheme not development subsequent to sanctioning of the scheme—No specific mention of transfer of the distribution network in the list of assets—No specific statement for providing decryption code/key by Turner—No agreement on providing decryption code/key by Turner no agreement on providing decryption keys to RLB—The scheme has to be read as commercial document—Company Court not permitted do modify the basic fabric of the scheme—Accepting the prayer

of RLB would amount to ordering specific performance of agreement that has already worked itself out and reading into the scheme clauses and obligation which did not exist when the scheme was sanctioned—Prayer for winding up required detailed examination of several factors which are not before the Court—application dismissed with cost of Rs. 20,000/-.

Real Lifestyle Broadcasting Pvt. Ltd. v. *Turner Asia Pacific Ventures Inc. & Anr.* *1222*

— Section 10F, Section 169, Section 171 Section 186, Section 189 Section 283(1)(i), Section 295, Section 299, Section 300, Section 397, Section 398, Section 402 and Section 403; Code of Civil Procedure (CPC), 1908—Rule 1, Rule 2 and Section 151. What is the scope of interference by Court in Appeal under Section 10F of the Companies Act, 1956? Held: The scope of interference by the Court in an appeal under Section 10F of the Act is limited to examining substantial questions of law that arise from the order of the CLB. Further, the only other basis on which the appellate Court would interfere under Section 10F was if such conclusion was (a) against law or (b) arose from consideration of irrelevant material or (c) omission to consider relevant materials. Whether the impugned order of the CLB overlooks the mandatory requirement of law under Section 169 and 186 of the Companies Act, 1956? Held-There is nothing to indicate that while exercising the powers under Sections 402 or 403 of the Act, the CLB has to necessarily account for the mandatory requirements or other provisions like Sections 169 or 186 of the Act. The language in fact appears to indicate to the contrary. It permits the CLB to pass orders as long as it is in the interests of the proper conduct of the affairs of the company and it is "just and equitable" to pass such order. Thus, it is untenable that the requirement of a group of shareholders desiring the convening of an EGM having to first make a requisition to the BOD is mandatory and in circumstance can be dispensed

with, even by the CLB while making an order under Section 403 of the Act. Appeal dismissed.

Sanjay Gambhir & Ors. v. *D.D. Industries Limited & Ors.* *1038*

— Section 391 & Section 394: Both petitions have been filed as second motion petitions seeking sanction to the Scheme of Arrangement involving amalgamation of BSMCL ('Transferor company') with PSPL ('Transferee company') with effect from 1st April 2010. Held: Apart from the objections of a minority share-holder, whose objections have been found to be without merit, there is no other objection to the sanctioning of the Scheme. Consequently Scheme sanctioned and upon the sanctioning of the Scheme, all the properties, rights and powers of BSMCL will be transferred to and will vest in PSPL without any further act or deed. BSMCL will be taken to be dissolved without winding up and without any formal petition being filed for that purposes.

Phenil Sugars Private Ltd. v. *Basti Sugar Mills Company Ltd.* *1134*

— Winding up of a company—Section 433—Petition filed by two share holders for winding up of the Appellant company—Vide a single order dated 16/2/2009, the Ld. Single Judge (a) admitted the petition; (b) directed the company to be wound up; (c) appointed the liquidator and (d) directed the citation to be published in the newspapers—Appellant challenged the said order on the ground that the order of winding up could not have been passed before publishing of the citation. Held: An order for winding up of a company cannot be passed before getting published, the advertisement of the winding up petition. The impugned judgment has also denied the appellant company an opportunity to invoke the inherent powers of the Court, codified by Rule 9 of Companies (Court) Rules, 1959, to show to the company Court why an advertisement should not automatically follow the admission of the petition. The order

of the learned Single Judge is set aside and the company application is remanded with the direction that it may be disposed of in accordance with law and with the further direction that in case an application is moved by the company under Rule 9 within seven days from today, the same may also be decided in accordance with law.

Indo Rolhard Industries Ltd. v. *M.K. Mahajan and Anr.* *1282*

— Refund of share application amount—R1 company floated prospectus for public issue of 30 lakh equity shares of a face value of Rs. 10/- each, for cash at par aggregating to a total sum of Rs. 3 crore—Public Issue opened on 26.2.96 and closing date was 8.3.96 and by the closing date, R1 received 51,37,100 applications 23,13,800 share applications were withdrawn and 3,25,700 share applications were rejected by the Registrar—Thence, on closure date, public issue of R1 was over subscribed 1.71 times and if rejected applications taken into consideration, the public issue was over-subscribed by 1.60 times and taking both the rejected applications and withdrawal applications into consideration, the subscription to the public issue fell to 83% of the total public issue made by R1 company—SEBI directed refund of the entire share application amount, since as per SEBI, R1 company had failed to achieve the minimum subscription as provided in its prospectus—In appeal, the Securities Appellate Tribunal reversed the order of SEBI—Challenged—R1 company defended the order of SAT on the ground that prospectus constitutes offer and once application is made, contract is complete, so it cannot be revoked by seeking withdrawal of application and that withdrawal of share application money can only be accepted by the company concerned and not by the Registrar—Held, share application is like an offer and not acceptance of offer, and the contract is completed only on allotment of shares, which need not necessarily occur, therefore R1 is wrong to contend that on receipt of share

applications, concluded contract came into existance and vide Rule 2(e)(i)(iii)(b) SEBi Rules the Registrar has power to finalise the list, which power has implicit in it the power to direct refund qua withdrawal requests—Further held, if minimum subscription amount is not reached, then surely no allotment can be made in view of Sec. 69, Companies Act and the minimum subscription has to be arrived at by taking into account the number of withdrawal applications, therefore order of SAT in this case not tenable.

The Securities & Exchange Board of India v. *A.P.L. Industries Ltd. & Ors.* *1295*

— Sec. 433, 434—Seeking winding up of the Respondent—Held, a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company—A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed—The principles on which the Court acts are firstly, that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly, the company adduces *prima facie* proof of the facts on which the defence depends. Held, The response of the Respondent to the lllegal notice issued by the Petitioner raises disputed questions of fact, which will require examination of evidence in other appropriate proceedings. It is not possible to conclude that the defence of the Respondent is a mere "moonshine" and not *bonafide*.

CBZ Chemicals Ltd. v. *Kee Pharma Ltd.* *1368*

— Sections 433(e)/434 & 439—Seeking winding up of the Respondent—Issuance of a notice in a winding up petition is not automatic and the Court has discretion not to issue notice if it feels no case is made out by the petitioner. The petitioner cannot contend that the burden of proof is on the respondent to show that its defence is likely to succeed on a point of law, and that it has to prima facie prove the facts on which

its defence depends. This stage would arrive after the petitioner is able to satisfy the Court, even prima facie, that the debt is undisputed and the respondent is unable to pay its debt. A winding up petition cannot be converted into one for recovery of money without the essential conditions of Section 433 of the Act being satisfied.

Capt. Vijender Singh Chauhan v. *Parsvnath Developers Ltd.* *1508*

— Sections 433(e) & 434 of the Seeking winding up of the Respondent—Mere refusal or unwillingness to pay debts should not be understood as 'inability' of the Respondent to pay its debts, and does not automatically lead to the inference of inability to pay its debts.—Under Section 434 of the Act, even if it is proved to the satisfaction of the Court that the Respondent company is unable to pay its debts, the Petitioner would also have to show that the company "neglected to pay the sum or to secure or compound for it to the reasonable satisfaction" of the Petitioner—It is also observed that the pendency of a suit will not *per se* preclude the exercise of the winding up jurisdiction of the Company Court under Sections 433(e) & 434 of the Act.

Zhuhai Hansen Technology C. Ltd. v. *Shilpi Cable Technologies Ltd.* *1519*

— Section 391, 394, 394A—Petitioners no.1, 2 & 3 (transferor companies) along with petitioners no. 4 (transferee company) jointly filed petition seeking sanction of Scheme of Arrangement amongst them and their respective shareholders and creditors—Certain objections were raised by Income Tax Department (ITD) averring that no separate notice was issued to Central Government as contemplated U/s 394A of Act. Held:- For may years now the practice of the RD accepting notices in petitions under Section 384A of the Act on behalf of both the MCA and the Central Government has had the statutory backing by way of the notifications issued under the

Act. The very purport of the notification under Section 637 (1) of the Act is to obviate multiple notices having to be issued to different departments and Ministries of the Central Government.

In the matter of Vodafone Infrastructure Ltd. & Ors. *1561*

— Section 391, 394, 394A—Petitioners no. 1, 2 & 3 (transferor companies) along with petitioner no. 4 (transferee company) jointly filed petition seeking sanction of scheme of arrangement amongst them and their respective shareholders and creditors—Certain objections were raised by Income Tax Department (ITD) contending that ITD should be permitted to proceed with recovery in respect of any existing or future liability of transferrer company or transferor company in respect of assets sought to be transferred under the scheme. Held:- It is not open to his Court, in the exercise of company jurisdiction, to sit over the views of the shareholders and board of directors of the Petitioner companies, unless their views were against the framework of law and public policy. The grant of sanction of the Scheme by way of the present judgment will not defeat the right of the ITD to take appropriate recourse for recovery of the previous liabilities of any of the Transferor companies or Transferee company.

In the matter of Vodafone Infrastructure Ltd. & Ors. *1561*

— Section 159—Section 162—Non compliance of the provisions of the Act—Liability of Director —Resignation before initiation of prosecution—Whether offences under Section 159 read with Section 162 continuing—M/s AKG Acoustics (India) Ltd. incorporated on 7.3.1988 as public limited company—Petitioner inducted as director on 30.01.1997—Resigned on 28.07.1997—Notice dated 17.02.2000 issued by R2 Registrar of Companies (ROC) to AKG Acoustics and its director—for non compliance of some provisions of the Act—Notice also

addressed to the petitioner showing him as a director—Petitioner replied on 25.04.2000 regarding his resignation—Petitioner sent another reply on 28.08.2000 enclosing the copy of resignation—ROC filed 6 cases on 05.07.2007 against AKG Acoustics and directors including petitioner—contended—Resignation was in the knowledge of respondent no.2—He could not have been prosecuted as director—Moved an application on 23.04.2009 in the Court of ACMM for dropping of the proceedings—R2 failed to respond to the application for more than three years—Approached the High Court—No counter affidavit filed—Deputy Registrar examined in respect of averment—Admitted the reply to the notice—R2 argued unless Form 32 is received—It is difficult to accept that the petitioner has resigned—Held—The resignation was intimated to ROC—ROC in two complaints not preferred to prosecute the petitioner as one of its directors accepting the averments of petitioner about resignation—Factum of resignation has come to the notice of ROC on 25.04.2000—Petitioner could not have been prosecuted for violation under Section 159 and Section 162 of the Act—Petition allowed—Prosecution quashed—However, the Court did not express any opinion whether the offence under Section 159 read with Section 162 are continuing offences or not.

Ganesh Krishnamurthy v. *The State (NCT of Delhi) & Anr.* *1354*

CONSTITUTION OF INDIA, 1950—Article 227—Indian Navy, Medical Board—Whether the Petitioner is right in stating that the Respondents failed to conduct the re-survey Medical Board of the Petitioner even though he was granted disability pension for 2 years at the time of invalidation on 28th February, 1972 from the Indian Navy on medical ground? Held—That the Base Hospital, Delhi will conduct the re-survey Medical Board and date and time of the same should be communicated to the Petitioner for his medical examination at the address tendered by him. Further, result of medical examination shall be

forthwith communicated to him and he is entitled to service element and pension benefit. Petition allowed.

Ex. Sailor Ishwar Singh v. *UOI and Ors.* *795*

— Article 227—Code of Criminal Procedure, 1973—Section 482—Prevention of Corruption Act, 1988—Section 19 (3) (c)—Special Judge framed charges against petitioner—Writ Petition filed praying for quashing of charges—Stay of proceedings before Trial Court also prayed—Plea taken, in several cases which were relied upon by petitioner, proceedings in cases under PC Act were stayed by SC—Per contra plea taken, *Arun Kumar Sharma* is not applicable to facts of instant case as it is not borne out from said case if same was under PC Act—In rest of cases cited by counsel for petitioner, provisions of PC Act which specifically bar Court from staying proceedings before Trial Court were not considered—Held—In *Satya Narayan Sharma* contention raised before SC that bar under Section 19(3) (c) of Act would not exclude inherent power of HC to stay proceedings under PC Act was negated holding if enactment contains a specific bar then inherent jurisdiction cannot be exercised to get over that bar—In *Arun Kumar Jain,* a DB of this Court while analyzing provision of Section 19 about maintainability of a Revision Petition against order of framing charge under PC Act has held that Section 19(3) (c) clearly bars Revision against interlocutory order and framing of charge being interlocutory order, a Revision will not be maintainable—Even if a Petition under Section 482 of Cr. P.C. or a Writ Petition under Article 227 of Constitution of India is entertained by HC, under no circumstance order of stay should be passed regard being had to prohibition contained in Section 19(3) (c) of PC Act—Petitioner's prayer for stay of proceedings before Trial Court cannot be entertained—Application dismissed.

S. Kalyani v. *Central Bureau of Investigation* *1055*

— Article 227, Service Matter—Border Roads Engineering Service Group 'A' Rules—Whether disallowing promotion to

an official citing that he does not meet the required benchmark and citing a Court of Inquiry matter against him, which was not instituted in the year for which promotion is applicable, be held valid?- Held, that not allowing the petitioner a chance for representation for reviewing his performance by a higher authority than his senior is an unjustified act of the respondents. Also held, that due to the non-availability of any records of the relevant year for which promotion was to be granted, the petitioner shall not be granted any benefit of that fact and shall not be allowed any pay/salary retrospectively as he has not worked in that post, but only pension and other retiral benefits shall be given with retrospective effect.

Dev Dutt v. *Union of India & Ors.* *1099*

— Article 227—Service Matter—Armed Forces Tribunal—Whether the Petitioner be empanelled for the post of Brigadier by the Selection Board and whether his batch of 1979 requires consideration for promotion without being clubbed with persons belonging to 1982 batch? Held- That normal review cases cannot be considered in isolation but have to be considered along with fresh cases of the next available batch who would be otherwise deprived of being considered. The review cases were already considered as fresh cases for vacancies available, but could not be empanelled based on quantified merit.

Col. T.S. Sachdeva v. *Union of India & Others* *1119*

— Article 227, Armed Forces Tribunal Whether admission of all the candidates, to a Post-Graduate Medical course, who have cleared the eligibility criteria be held compulsory, according to the vacancies announced by the governing body?-Held, that admission shall be granted according to the student-teacher ratio only. Hence, if fewer faculties are employed, then the proportional number of candidates shall be admitted, as has been clearly mentioned in the course brochure. The petitioner-candidates cannot contend that they were not aware of such

terms, which had been laid down in the brochure and communicated to them. Whether the application for condonation of delay holds any merit and to rectify this, should any admission be made to future batch?-Held, that scheme of admissions has been completely revamped and a centralized examination is conducted, the same has already been conducted for 2013-14 batch. Also, Supreme Court in many rulings has prohibited admissions to future courses based on entrance examinations conducted for a particular academic year. Petition Dismissed.

Sunil Bhardwaj and Ors. v. *UOI and Ors.* *1150*

— Article 226 – Petitioners seeking transfer of investigation of FIR – not expecting fair and proper investigation – allegations & counter allegations by the petitioner no. 1 and the police officials of concerned police station – whether investigation requires to be transferred? Held: It would be fair and instill confidence to both the parties and the public that the investigation is done by the Crime Branch of Delhi Police.

Harminder Singh & Ors. v. *State of Delhi & Ors.* ... *811*

— Articles 21 & 39A—Rights to legal-aid and fair trial—Code of Criminal Procedure, 1973—Section 366—Indian Penal Code, 1860—Section 302—Death Reference—Appeal against conviction—Circumstantial evidence—Sentencing—As per prosecution, accused strangulated his 70 years old father, severed his head and removed entrails and some organs from body—Relying on testimony of his mother (PW3), sister (PW4) and brother (PW16), trial Court convicted u/s 302 and sentenced him to death—Held, circumstances prove guilt of accused beyond reasonable doubt—Rarest of rare principle is an attempt to streamline sentencing and bring uniformity in judicial approach—When drawing a balance sheet of aggravating and mitigating circumstances for sentencing, full weight had to be given to mitigating circumstances—State of mind of accused at the relevant time, his capacity to realize consequences of crime are relevant—Although accused did

not take plea of insanity, circumstances point to his alienation from surroundings, family, near relatives and others—If unusual or peculier features there in allegations which excite suspicion of judge at preliminary stage, that there is possibility of accused laboring under mental disorder, Court bound under Article 21 and 39A to record so and send accused for psychiatric or mental evaluation—Accused indulged in ritual human sacrifice of father—Unusual nature of facts relevant to making sentencing choice—Aggravating circumstancing of killing an aged defenceless person coupled with mutilation of body and its beheading has to be balanced with factors like his social alienation, no known record of violent behavior, young age (25 years)—Accused not beyond pale of reformation—Death sentence not confirmed and substituted with life imprisonment—Direction that in cases of serious crimes where accused indulged in unusual behaviour indicative of mental disorder (specially ritual or sacrifice killing), magistrate taking cognizance of offence shall refer accused for medical check-up to evaluate if mental condition might entitle him to defence of insanity—This procedure integral part of legal aid and right to fair trial under Article 21—Death Reference No. 1/2011 not confirmed—Criminal Appeal 912/2011 partly allowed.

State v. *Jitender* *1168*

— Article 227—R-3, incorporated as a foreign company provided loan to petitioner by taking recourse to bill discounting facility and by availing bank guarantee limits in 1990—Thereafter business of R-3 was restructures and it got merged with another Japanese bank in 1995 and merger was approved on 01.04.1996 and hence new entity emerged with which another bank got merged, making the R-3 as per R-3, requisite filings were made before the concerned authority—Form 49 was filled as per R-3 with the RoC and requisite filings were done with RBI to bring on record change of name—RBI carried out change of name of R-3 and thereafter authorized R-3 to

open a branch in Bombay as per R-3, Form 49 was filed with ROC on 05.08.1996 but this fact was denied by the petitioner contending that no filing was done by R-3 with the RoC on 05.08.1996 and that Form 49 was filed with ROC by R-3 on 03.04.02, that too in pursuance of an application filed in the recovery proceedings before DRT Bangalore—Petitioner also filed criminal complaint under Section 156(3) Cr.P.C. in which the Magistrate ordered investigation but the investigation conducted twice revealed that no cognizable offence was committed by R-3 or its officers, so the Magistrate dismissed the complaint, against which the petitioner filed revision petition which also was dismissed by way of present petition, petitioner sought writ of mandamus directing R-1 & R-2 to treat the filings of R-3 as null and void and writ of mandamus directing R-1 & R-2 to initiate prosecution against R-3 to R-5 under IPC and Companies Act—From records, it emerged that ROC seems to have no record of filings made by R-3 as contended on 05.08.1996; that non-compliance with Section 593 Companies Act was brought to the notice of R-3 by ROC vide letters dated 05.09.01 and 03.12.01; that thereafter R-3 realized that the filings made in the record of ROC were missing, so after satisfying the ROC that it had in fact originally filed Form 49 on 05.08.1996, officers of R-3 reconstructed the record of ROC alongwith various documents like forwarding letter, copy of E-receipt and copy of letter intimating name change—Held, in view of documents on record, it is quite possible that having received letter of ROC, a revised duplicate form was filed by R-3 and so long as there is nothing to suggest that Form-49 was not filed on 05.08.1996, the subsequent filings, which were allowed by ROC by way of rectification and curing of deficiencies, would not carry the matter any further so far as petitioner is concerned, as such prayers sought by petitioner cannot be granted.

Klen & Marshalls Manufactures & Exporters Ltd. v. *Union of India and Ors.* *1265*

— Article 227—Indian Penal Code, 1860—Criminal Procedure Code, 1973—Section 482—Inherent power—Quashing of FIR—Defence of the Accused—Negotiable Instrument Act—Section 138—Territorial Jurisdiction of Court at Delhi—Complaint filed by the R2 for dishonour of the cheque against petitioner—Petition filed for quashing of complaint—Contended—Cheque issued towards delivery of TATA safari car required to be returned on actual delivery—Cheque delivered in Lucknow drawn on ICICI Bank, Gomti Nagar, Lucknow—Presentation of the Cheque at Delhi Bank does not confer jurisdiction—Observed—complaint under S. 138 NI Act read with 420 IPC-averred-cheque for Rs. 9,70,000/- issued to R2 in discharge of petitioner's liability towards a friendly loan of Rs. 9,50,000/- doanoblained in Delhi in May, 2010—Cheque included amount of Rs. 20,000/- towards interest-handed over in Delhi—Held—Petitioner's averment—Cheque was towards the amount of TATA safari, won by R2 as a result of bonus point in respect of business deal and have no connection with Delhi could not be looked into—Further held—Power of quashing could be exercised where allegations made in the FIR—Even if taken on its face value and accepted in entirety—Do not prima facie constitute any offence—Petition dismissed.

Madhumita Kaur v. *Zile Singh* *1335*

— Article 226—Recruitment Guidelines—Disciplinary Proceedings—Brief Facts—An advertisement issued in September 2000 for recruitment of Constables/General Duty (CT/GD) in the Central Reserve Police Force (CRPF)—Petitioner posted at Lucknow and was initially inducted as a member of the Lucknow Recruitment Board—Petitioner assigned specific duties to the various members of the Lucknow Recruitment Board vide a communication dated 19th December, 2003—A merit list compiled by the Recruitment Board was sent on 29th February, 2004 to the

ADIGP, CRPF for his scrutiny as per instructions—One day after the submission of the merit list, the ADIGP gave directions on 1st March, 2004 for dispersal of the Recruitment Board and returned the members to their respective units—Instant case raises a controversy with regard to the interpretation of Clause XV(C) of the Recruitment Guidelines issued by the Directorate General, CRPF on 9th September, 2000 and the implementation thereof—Clause (C) stipulated that the result of all the shortlisted candidates who were medically examined and interviewed shall be compiled on the last day of the recruitment programme by each center and category wise merit lists for each centre would be prepared by the recruitment board authority of the centre in a state designated by ADG Zone/IGP sector—Petitioner with Sh. C.M. Thomas had compiled such result of the Lucknow Recruitment Board which was sent to the ADIGP on 29th February, 2004—No objections were received with regard to the compilation submitted by the Lucknow Recruitment Board which was presided over by the petitioner—A charge sheet dated 18th May, 2007 was issued to the Petitioner whereby it was alleged that while posted and functioning as Presiding Officer of the rectt. Board of Ct/GD Male/Female at GC, CRPF, Lucknow centre held during December 2003 to February 2004, Petitioner committed an act of remissness in discharging his duties in that the while preparing and submitting the merit list of selected personnel for enlistment as Ct/GD, ignored the instructions issued in connection with preparation of merit list of short listed candidates, by the Directorate General, CRPF vide letter No. R.II-15/2000-Pers-II dated 09.09.2000, which resulted into inclusion of 23 unqualified candidates of SC/ST categories in the merit list and issue of offer of appointment to them—Respondents appointed an enquiry officer who after conducting detailed enquiry exonerated the Petitioner of the charges—However Disciplinary Authority disagreed with the findings of enquiry officer and inflicted the penalty of withholding of one

increment for a period of one year without cumulative effect—Petitioner assails the disciplinary proceedings and the punishment awarded to him—It is the contention of the Petitioner that the Petitioner's responsibility was only the compilation of the said list, that too jointly and recommending the same to the ADIGP while the checking of the list as per the instructions was the responsibility of the ADIGP alone. Held—Confusion on correct interpretation of Para XIV and XV of the Dte. Genl., CRPF letter No. R.II.15/2000-Pers-II dated 9/9/2000, which persisted not only in the mind of Lucknow Board members, but also in the Rampur and Allahabad Board members, led to inclusion of 23 candidates having less than cut-off marks in the merit list submitted by the Lucknow Rectt. Board presided by Petitioner and due to non scrutiny of the merit lists submitted by the Lucknow Board at ADIG GC CRPF Lucknow level which was otherwise mandatory before issuing offer of appointment—This led to issuance of offer of appointment to 23 ineligible candidates—Above mistakes cannot be construed as an act of remissness on the part of Petitioner in discharging his duties as Presiding Officer of Rectt. Board—This mistake had occurred only due to different interpretation of ambiguous instructions issued by the Dte.—Further had the scrutiny work at ADIG GC CRPF office level been done, the above mistake could have easily been detected and rectified before issue of offer of appointment to 23 ineligible SC/ST candidates by GC Lucknow—On a consideration of the entire matter and the evidence placed before it, the enquiry officer held that the charge contained in the Article-1 that charged officer has committed an act of remissions in discharging his duties and has failed to maintain absolute devotion to duty stands not proved.

Dinesh Uniyal v. *Union of India & Anr.* *1490*

— In para 3.2.1 of the advice tendered by the UPSC dated 31st March, 2010 in the case of Sh. Jaidev Kesri, the UPSC has

specifically observed that Members of the Board, including the CO, cannot be held responsible for any such discrepancy and that the mistake, occurred not only at level of the Recruitment Board but also subsequently, UPSC makes a reference to the mistake occurring at the first stage thereafter by the order passed by the ADIG on 1st March, 2004 dispersing the Board without ensuring that the proceedings have been drawn up properly and thereafter repeating mistake by issuing offers of appointment to those SC/ST candidates who had secured less than cut off marks of 33% prescribed for appointment—These recommendations were accepted without any reservation by the respondents—The charge against the petitioner was identical to the charge levied against Sh. Jaidev Kesri. The respondents held that Sh. Keshri was not guilty of the charge—In this background, the finding that the petitioner was guilty of misconduct is certainly devoid of any legal merit—The respondents are unable to explain if the Recruitment Board was guilty of misconduct why no proceedings were drawn against Sh. C.M. Thomas and also as to how all other members of the Board against whom disciplinary proceedings were conducted, have been exonerated of charges—The disciplinary proceedings initiated against him pursuant to a charge sheet dated 18th May, 2007; the disagreement note dated 2nd March, 2009 issued by the disciplinary authority; a final order dated 21st May, 2010 and order dated 9th June, 2011 are hereby set aside—As a result, the petitioner shall be entitled to all consequential reliefs as if the aforesaid orders had never been passed—This writ petition is allowed in the above terms.

Dinesh Uniyal v. *Union of India & Anr.* *1490*

— Article 226—Brief Facts—Petitioner was appointed on the 27th of September 1996 as a Constable in the Railway Protection Special Force ("RPSF" for brevity) and was posted at different places thereafter—Petitioner has claimed that he was suffering from behavioral disorder and had applied for transfer

on recommendation of doctors—Yet he was transferred to different places in Orissa, Maharashtra, Punjab, etc.—Petitioner was also treated over this period at various Railway hospitals—On the 14th of September 2009, the Petitioner was sent to the 6th Battalion Dayabasti to undertake the punishment of extra fatigue duty—Medical Board Report of the examination of Petitioner stated that the patient suffers from paranoid schizophrenia—However he is asymptomatic currently and is fit to join duty without arms—He is also advised to continue treatment on OPD basis—No other medical record or opinion is forthcoming on record—Charges were framed against the petitioner vide charge sheet dated 30th September, 2009 which was served upon Petitioner on 4th October, 2009 directing him to appear before the inquiry officer on the 5th of October, 2009—Petitioner assails the disciplinary proceedings conducted against him pursuant to the charge-sheet; inquiry report and; the order of the disciplinary authority agreeing with the recommendations of the inquiry officer and holding that the petitioner was guilty of the charge and imposing the penalty of compulsory retirement upon him—Petitioner has claimed that he was suffering from behavioural disorder and had applied for transfer on recommendation of doctors—Charge-sheet was issued to him in regard to an alleged incident, in violation of Rule 153.5 of the RPF Rules, 1987—It was also contended that the respondents proceeded post haste with the inquiry proceedings and six witnesses were examined in support of the charges and also that the petitioner was not given any opportunity to engage the services of the defending officer—Held—In the instant case, on 4th October, 2009 the communication was served upon the petitioner enclosing the allegations against the petitioner as well as the charge sheet—By the same communication, the petitioner was informed of the commencement of the inquiry proceedings on the 5th of October 2009 thus giving the petitioner not even twenty hours

to prepare his defence—This was not only in violation of the well settled principles of natural justice but of the specific requirements of the provision of Rule 153.5 of the RPF Rules which goes to the root of exercise of jurisdiction by the respondents—The same is an illegality which would vitiate the conduct of the disciplinary proceedings against the petitioner—It is trite that in the disciplinary proceedings it is the duty of the disciplinary authority to ensure that adequate opportunity is given to the charged official to conduct his defence and that the same would include an opportunity to engage the defence officer—Given the facts and circumstances of the instant case, especially the mental condition of the petitioner, it is difficult to believe that the petitioner was conscious that he had a right to seek the assistance of a defence officer—In all fairness as well as to ensure compliance of the principles of natural justice, it was for the respondents to ensure that the petitioner was made aware of his rights as well as procedural safeguards—The same was essential to ensure that the petitioner had an adequate opportunity to defend the charges made against him—Failure to ensure such opportunity also vitiates the proceedings conducted against the petitioner—In this background, the recommendation dated 6th February, 2010 of the inquiry officer as well as the orders dated 10th August, 2010 passed by the Disciplinary Authority finding the petitioner guilty of the charge; 28th September, 2010 of the Appellate Authority and the order dated 18th March, 2011 of the Revisional Authority are not sustainable in law—Petitioner shall be reinstated in service by the shall not be entitled to any back wages.

Babu Khan v. *Union of India & Anr.* *1546*

— Article 226—Disciplinary proceedings initiated against the appellant by the respondent in June, 1997 with respect to some advertisement published in the Accountancy Journal in August, 1996—Disciplinary Committee appointed by

respondent exonerated the appellant in January 2001—In the writ petition filed before this Ld. Single Judge, appellant claimed that vide a communication dated 8/3/2013 the respondent is seeking to re-open the issue by causing further inquiry on the same allegations and prayed for a stay of the said communication pending the writ proceedings—Ld. Single Judge refused to stay the said communication on the ground that the appellant had suppressed a letter dated 18/4/2002 vide which he had been informed about the decision of the respondent for referring the matter back to the Disciplinary Committee for further inquiry. Held The document dated 18/4/2002 does not go to the root of the matter and given the unexplained delay in re-initiating the matter and the prejudice that would be caused to the appellant due to pendency of the disciplinary proceedings, respondent not to proceed with the inquiry till the pendency of the main writ petition.

Vipin Malik v. *The Institute of Chartered Accountant of India* *1583*

CUSTOMS ACT, 1968—Section 108—M/s. Kartik Traders imported 22400 kg and 400 kg medical herb—Reached Inland Container Depot Tuglakabad on 07.01.2008—Examined by the officials of DRI on 08.01.2008—Petitioner summoned to appear on 11.01.2008—Petitioner out of town—Expressed his inability to appear on that day—Expressed his willingness to appear after 5-7 days—Another summons issued for appearance on 22.01.2008—Petitioner sought 10 days time—Complaint filed under section 174 and 175 IPC—Alleged intentionally omitted to appear and failed to produce documents though legally bound to appear and produce the documents—Summoned to appear vide order dated 16.07.2011—Petitioner u/s. 482 Cr. P.C. filed to quash the complaint—Plea taken u/s. 108 Customs Act only a Gazetted Officer of customs duly empowered by the Central Government in this behalf is competent to issue summons—Notification dated 20.08.2008

whereby the words 'duly empowered by the Central Government in this behalf omitted came into force on 10.05.2008—The custom officer who issued the summons on 11.01.2008 and 22.01.2008 was not duly empowered by the Central Government—Not competent to issue the summons—Held an action punishable retrospectively by an amendment in the Statute hit by Art. 20 of the Constitution of India—Complaint and summoning order dated 16.07.2011 quashed.

Saket Aggarwal v. *Directorate of Revenue* *1474*

DELHI SCHOOL EDUCATION ACT, 1973—Section 11 (6), Section 8 (3) read with Rule 121 of the Delhi School Education Rules, 1973—Appeal against the order of the Ld. Single Judge dated 30/05/2008 whereby the order dated 17/12/2007 of the Delhi School Tribunal was upheld—Vide the said order the Tribunal while reinstating the respondent with the appellant school directed the payment of back wages along with order consequential benefits with effect from the date of his illegal termination. Held: The impugned order to the extent of back wages cannot be sustained. The respondent failed to plead and prove that he was not gainfully employed for the period when he was not working with the appellant school. In the absence of any such averment or evidence, back wages and other benefits could not have been granted by the Tribunal.

Apeejay School v. *Suresh Chander Kalra* *1555*

DELHI VALUE ADDED TAX ACT, 2004—Sections 9 and 12 (4)—Input tax credit—Schedule VII—Non creditable goods-assessee/dealers engaged in business of leasing cars/motor vehicles-transfer the right to use, control and possession of vehicles to their customers—Claim for refund of input tax credit (ITC) on cars used for making taxable sales—Rejected objections filed before objection hearing authority under the DVAT Act-rejected-appeal filed before the Tribunal-set aside the dismissal of objections-remanded the matter to concerned

authority-directed to decided the objections afresh—Aggrieved revenue challenged the orders of the Tribunal cross objections also filed by one of the assessees-questions framed by the Court-revenue contended dealers not entitled to ITC on goods purchased for making a sale-motor vehicles are non creditable goods ineligible for ITC-leasing activity does not qualify as rebate in unmodified form—sale price/purchase price include just the hiring charges and not the price of the goods involved-not eligible for ITC—ITC available only for purchase acquired in the form of a right-dealers contended-motor vehicles were not non-creditable goods-fall within the exception-release has to be construed according to the definition of sale-includes transfer of the right to use goods—ITC would be available in respect of leasing activity—Observation that eligibility and availment of LTC are two different concepts is erroneous-no such distinction drawn under the Act-Held-motor vehicles fall within Sr. No.1 of the list in Schedule VII-sale includes transfer of right to use goods-leasing activity included in sale-provision of section 9 (1) apply-leasing activity amounts to resale-entry no.1 in schedule VII is subject to entry no.2 the articles fall within entry no.2 are creditable goods—Theory of proportionality has no statutory basis dealers entitled to input tax credit appeals of the revenue dismissed cross appeal of the assessee allowed.

Commissioner of Value Added Tax Delhi v. *Carzonrent India Pvt. Ltd.* *1306*

INCOME TAX ACT, 1961—Section 54F—Respondent assessee sold an ancestral property which gave rise to proportionate capital gains in his hands and in computing the same, he claimed deduction u/s 54F on the grounds that the sale proceeds were invested in the acquisition of a vacant plot and the purchase of a residential house in the name of his wife—Assessing Officer did not allow the deduction on the ground that the investment in the residential house had been made in the name of the wife of the assessee and not in his own

name—On appeal, CIT (Appeal) and the Income Tax Tribunal both accepted the assessee's contention. Held: For the purposes of Section 54F new residential house need not be purchased by the assessee in his own name nor is it necessary that it should be purchased exclusively in his name, the Section being a beneficial provision enacted for encouraging investment in residential houses should be liberally interpreted.

Commissioner of Income Tax-XII v. *Kamal Wahal* *1290*

— Section 54/54F—Respondent assessee, being the owner of a property in New Delhi entered into a collaboration agreement with the builder for developing the property and as per the agreement, in addition to the cost of construction incurred by the builder on the development of the property, further payment of Rs. Four crores was payable to the assessee and the builder was to get the third floor—Respondent assessee claimed the amount spent on the construction as deduction u/s 54F of the Act in computing the capital gains—Assessing Officer rejected the said claim on the footing that the building got constructed by the assessee contained two separate residential units having separate entrances and cannot qualify as a single residential unit and held assessee was eligible for the reduction u/s 54F only in respect of cost of construction incurred in one Unit, that was retained by her—On appeal, CIT and Tribunal allowed the deduction claimed by the assessee. Held: Section 54/54F use the expression 'residential house' and not a 'residential unit'. Section 54/54F requires the assessee to acquire a "residential house" and so long as the assessee acquires a building, which may be constructed, for the sake of convenience, in such a manner as to consist of several units which can, if the need arises, be conveniently and independently used as an independent residence, the requirement of the Section should be taken to have been satisfied and the reduction claimed has to be allowed.

Commissioner of Income Tax v. *Gita Duggal* *1410*

INDIAN EVIDENCE ACT, 1872—Section 32—Dying declaration – admissibility of the statement attributed to the deceased – court must satisfy that the person making the declaration was conscious and fit to make the statement – upon being so satisfied, even an uncorroborated dying declaration can be the basis for finding of conviction of murder.

State v. *Kumari Mubin Fatima & Ors.* *881*

— Section 32 – dying declaration – use of words like 'patni', 'niwasi', 'vivah', 'pati', 'dinak', 'sambandh' etc. in the dying declaration of an Urdu speaking person – whether claim of SDM having recorded the statement 'word by word' believable? Held: No. Words used by the victim, Muslim by religion, are not used in common parlance even by a Hindi speaking person.

State v. *Kumari Mubin Fatima & Ors.* *881*

— Section 32 – dying declaration is a substantive piece of evidence – can be relied upon – Medial evidence and surrounding circumstances – cannot be ignored or kept out of consideration.

State v. *Kumari Mubin Fatima & Ors.* *881*

— Section 106—Whether recovery of the dead body at the instance of the accused is sufficient to hold that he had concealed the same?- Held, accused has not furnished any explanation whatsoever as regards his knowledge about the place from where the dead body was recovery. Thus, a presumption could be drawn that he concealed such a fact.

Hardayal Singh v. *State NCT of Delhi* *1081*

— Sections 106, 146 and 138—Whether contradiction in testimony of witness dents the case of prosecution?—Held—Normal discrepancies do not corrode the credibility of parties' case, material discrepancies do so. Further, evident

contradiction in testimony to be specifically put to witness in order to enable the witness to explain the same. The same is rule of professional practice in the conduct of the case, but it is essential to fair play and fair dealing of the witness.

Mehboob Ahmed v. *State* *1003*

— Section 27—Relevancy of certain forms of admissions made by the persons accused of offences. Whether the Appellant was in the custody of the police or was he accused of an offence so as to make a disclosure as envisaged under Section 27 of the Evidence Act.?- Held, as a person may not be formally arrested/in custody but if he makes a disclosure before the police officials which eventually leads to recovery, then such a person is deemed to have surrendered before the police and that would tantamount that such a person is in constructive custody of police.

Hardayal Singh v. *State NCT of Delhi* *1081*

INDIAN PENAL CODE, 1860—Sections 302 and 34—Murder—PCR information received—DD registered—Police reached the spot—Injured already removed to hospital—Declared brought dead—Police reached hospital—Collected MLC—Came back to the spot—Recorded the statement of eye-witnesses—FIR registered—Injuries sufficient to cause death—injuries ante mortem—The complainant PW1 supported the prosecution case—Another eye-witness turned hostile—Held guilty of murder—Convicted and sentenced to undergo rigorous imprisonment for life and fine—Co-accused sent to juveline justice Board preferred appeal contended testimony of PW1 is not reliable and trustworthy discrepancies in the deposition of PW1—Conviction cannot be based on the sole testimony of PW1 when the other eye-witnesses has turned hostile prosecution has failed to establish motive against the appellant—Held—PW1 is a natural and normal witness presence at the spot cannot be doubted—Statement is clear and categorical and has not been demolished in cross

examination deposed on similar lines as was recorded by the police—Minor discrepancies as to the time and place of recording of statement—PW1 bore no animosity or ill will against the appellant—PW1 is a credible and truthful witness—Recovery of knife at the instance of appellant is disbelieved issue of motive loses significance in view of direct trustworthy testimony of PW1—Appellant possessed requisite intention and knowledge attacked in a brutal manner and caused death—Appeal dismissed—Conviction and sentence maintained.

Vinod v. *State* *1598*

— Criminal Procedure Code, 1973—Section 482—Inherent power—Quashing of FIR—Defence of the Accused—Negotiable Instrument Act—Section 138—Territorial Jurisdiction of Court at Delhi—Complaint filed by the R2 for dishonour of the cheque against petitioner—Petition filed for quashing of complaint—Contended—Cheque issued towards delivery of TATA safari car required to be returned on actual delivery—Cheque delivered in Lucknow drawn on ICICI Bank, Gomti Nagar, Lucknow—Presentation of the Cheque at Delhi Bank does not confer jurisdiction—Observed—complaint under S. 138 NI Act read with 420 IPC-averred-cheque for Rs. 9,70,000/- issued to R2 in discharge of petitioner's liability towards a friendly loan of Rs. 9,50,000/- doanoblained in Delhi in May, 2010—Cheque included amount of Rs. 20,000/- towards interest-handed over in Delhi—Held—Petitioner's averment—Cheque was towards the amount of TATA safari, won by R2 as a result of bonus point in respect of business deal and have no connection with Delhi could not be looked into—Further held—Power of quashing could be exercised where allegations made in the FIR—Even if taken on its face value and accepted in entirety—Do not prima facie constitute any offence—Petition dismissed.

Madhumita Kaur v. *Zile Singh* *1335*

— Sections 174 and 175—Customs Act, 1968—Section 108—

M/s. Kartik Traders imported 22400 kg and 400 kg medical herb—Reached Inland Container Depot Tuglakabad on 07.01.2008—Examined by the officials of DRI on 08.01.2008—Petitioner summoned to appear on 11.01.2008—Petitioner out of town—Expressed his inability to appear on that day—Expressed his willingness to appear after 5-7 days—Another summons issued for appearance on 22.01.2008—Petitioner sought 10 days time—Complaint filed under section 174 and 175 IPC—Alleged intentionally omitted to appear and failed to produce documents though legally bound to appear and produce the documents—Summoned to appear vide order dated 16.07.2011—Petitioner u/s. 482 Cr. P.C. filed to quash the complaint—Plea taken u/s. 108 Customs Act only a Gazetted Officer of customs duly empowered by the Central Government in this behalf is competent to issue summons—Notification dated 20.08.2008 whereby the words 'duly empowered by the Central Government in this behalf omitted came into force on 10.05.2008—The custom officer who issued the summons on 11.01.2008 and 22.01.2008 was not duly empowered by the Central Government—Not competent to issue the summons—Held an action punishable retrospectively by an amendment in the Statute hit by Art. 20 of the Constitution of India—Complaint and summoning order dated 16.07.2011 quashed.

Saket Aggarwal v. *Directorate of Revenue* *1474*

— Section 302/34 – Conviction based on dying declaration – material contradictions – gaps in the prosecution case – no evidence of struggle of any kind by the deceased – no sign of burning in the room – children continued to sleep in the immediate proximity – Held: Prosecution story implausible. Conviction not sustainable.

State v. *Kumari Mubin Fatima & Ors.* *881*

— Section 376, 342 & 506—As per prosecution, 'R' playing outside her house at about 3-4 p.m. when appellant asked her

in the present case prove the guilt of the accused beyond reasonable doubt?- Held, it stands proved by virtue of three circumstantial evidence namely, last seen evidence, recovery of the dead body effected upon by the disclosure made by the accused and point out memo prepared by the police at the instance of the appellant.

Hardayal Singh v. *State NCT of Delhi* *1081*

— Sections 304B, 498A, 406, 120B & 34—Criminal Procedure Code, 1973—Section 378—Dying Declaration—As per prosecution, deceased harassed, abused and beaten for dowry since beginning of marriage—Deceased pushed from roof by mother-in-law—Dying declaration of deceased Ex. PW1/B recorded by PW14 in which she implicated husband and in-laws for injuries—Trial Court acquitted all accused of charges u/s 304B, 498A, 406 & 120B—Held, no evidence about mental and physical condition of deceased when statement/dying declaration recorded—No evidence to support claim of prosecution that deceased in fit state of mind to make statement—Despite IO having sufficient time, SDM not called to record Dying Declaration—Language in Dying Declaration not that of deceased but of police authorities—Despite deceased being educated, her thumb impression obtained on Dying Declaration—Dying Declaration only has allegations that mother-in-law wanted to get husband re-married—Allegations regarding dowry, harassment made in belated complaint—Neither deceased nor her other relatives had any grievance against respondents since no complaint against deceased's husband and in-laws till her death and change of heart occurred subsequently-Statements of material prosecution witnesses suffer from improvements and contradictions in material particulars—Appeal dismissed.

State v. *Dilbagh Rai Bhola and Ors.* *1254*

— Section 302—Death Reference—Appeal against conviction—Circumstantial evidence—Sentencing—As per prosecution,

accused strangulated his 70 years old father, severed his head and removed entrails and some organs from body—Relying on testimony of his mother (PW3), sister (PW4) and brother (PW16), trial Court convicted u/s 302 and sentenced him to death—Held, circumstances prove guilt of accused beyond reasonable doubt—Rarest of rare principle is an attempt to streamline sentencing and bring uniformity in judicial approach—When drawing a balance sheet of aggravating and mitigating circumstances for sentencing, full weight had to be given to mitigating circumstances—State of mind of accused at the relevant time, his capacity to realize consequences of crime are relevant—Although accused did not take plea of insanity, circumstances point to his alienation from surroundings, family, near relatives and others—If unusual or peculier features there in allegations which excite suspicion of judge at preliminary stage, that there is possibility of accused laboring under mental disorder, Court bound under Article 21 and 39A to record so and send accused for psychiatric or mental evaluation—Accused indulged in ritual human sacrifice of father—Unusual nature of facts relevant to making sentencing choice—Aggravating circumstancing of killing an aged defenceless person coupled with mutilation of body and its beheading has to be balanced with factors like his social alienation, no known record of violent behavior, young age (25 years)—Accused not beyond pale of reformation—Death sentence not confirmed and substituted with life imprisonment—Direction that in cases of serious crimes where accused indulged in unusual behaviour indicative of mental disorder (specially ritual or sacrifice killing), magistrate taking cognizance of offence shall refer accused for medical check-up to evaluate if mental condition might entitle him to defence of insanity—This procedure integral part of legal aid and right to fair trial under Article 21—Death Reference No. 1/2011 not confirmed—Criminal Appeal 912/2011 partly allowed.

State v. *Jitender* *1168*

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000—Section 7A, 15 & 16—Juvenile Justice (Care and Protection of Children) Rules, 2007—Rule 12—Plea of Juvenility—Accused charged for offences u/s 366 & 376—Plea of Juvenility raised before ASJ—Despite report with regard to DOB certificate issued by Panchayat vide which accused juvenile, ASJ got ossification test done and on basis thereof without enquiry held accused not juvenile and convicted post trial—Held, under Rule 12 (3) certificates as mentioned, have to be relied in order of precedent—Clause B of Rule 12 (3) regarding medical evidence comes into operation only when three certificates mentioned in Rule 12 (3) (a) not available—Trial Court should not have got ossification test done when Panchayat certificate produced, without first holding enquiry—As per Panchayat certificate accused Juvenile on date of commission of offence—Accused already in custody for five years and nine months which is in excess of maximum period of three years under JJ Act—Accused directed to be released forthwith—Appeal allowed.

Chand Babu v. *The State (Govt. of NCT of Delhi)* *1123*

— Section 7A – Juvenile Justice (Care and Protection of Children) Rules, 2007 – Rule 12 – Scope of Application – Conduct of inquiry to determine age – Section 7A obliges the Court to make an inquiry and not an investigation or a trial under the Code of Criminal Procedure – Procedure as laid down under Rule 12 to be followed. HELD: As per Rule 12(3)(a), only three certificates are to be taken into consideration for purpose of determining juvenility – If Matriculation (or equivalent) certificate is not available, only then the date of birth certificate from the school other than the play school first attended is to be seen, and if that too is not available, then the birth certificate given by Corporation or Municipal Authority or a Panchayat is to be seen – Only in cases where these documents or certificates are found to be manipulated or

fabricated should the court or the JJB or the Committee need to go for medical report for age determination. Petitioner held to be juvenile by the Juvenile Justice Board – order reserved by the Sessions Court – Held: Petitioner's date of birth certificate issued by the school first attended was an undisputed document – No need for JJB to look into the genuineness of the certificate issued by Municipal Corporation – ASJ committed an error of law in relying on the opinion of Medical Board since, precedence had to be given to the date of birth certificate as per Rule 12(3)(a).

Aakash Juvenile through his father Malkan Singh v. *NCT of Delhi & Anr.* *799*

LIMITATION ACT, 1963—Section 5—Condonation of Delay—Sufficient cause—Complaint under Section 138 N.I. Act dismissed on non appearance of the complainant—None appeared on 14.07.2010 and none appeared even on 12.11.2009—Petition for leave preferred alongwith application for condonation of delay of 404 days—Contended—Junior counsel appearing for the main counsel did not inform about the dismissal of the complaint—Petition contested—Contended—Sufficient cause must be shown with proper explanation—delay not properly explained—Certain right accrued in favour of opposite party—Cannot be taken away—Court observed— junior counsel noted wrong date as 15.07.2010 instead of 14.07.2010—Even if there was wrong noting of date by junior counsel there is not whisper as to why complainant would not appear on 15.07.2010—The application in the High Court filed on 21.10.2011 after about one year and four months of the said date—There is no whisper as to when complainant contacted the counsel—The certified copy of the order was prepared on 25.03.2011 yet the leave petition filed on 21.10.2011—No explanation given—Held—Petitioners failed to show sufficient cause for condonation of delay—Petitions dismissed.

Fincap Portfolio Ltd. v. *State & Ors.* *1345*

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985—Section 20 – Appeals against conviction under Section 20(b)(ii)(c) – the entire quantity of Charas would govern the fact whether it was a small or a commercial quantity. The Appellant Rattan found in possession of 1 kg of Charas and Appellant Bilal found in possession of 2 kgs of Charas – the same held to be clearly commercial quantities.

Rattan @ Ratan Singh v. *State (Govt. of NCT of Delhi)* *867*

— Section 50 – discrepancy with regard to the language of the signatures on the notices recorded on the Rokka – whether material? – Held: No, since the same was not brought to the attention of the IO during cross examination. Narcotic Drugs and Psychotropic Substances Act, 1985 – Non-joining of Independent witnesses – whether the requirement is absolute? – Held: No. It is not always possible to find independent witnesses at all places at all the times – the obligation to join public witnesses is not absolute – The IO made genuine efforts to join independent witnesses on no less than three occasions – There is no reason to disbelieve the official witnesses even in the absence of any corroboration from independent witnesses.

Rattan @ Ratan Singh v. *State (Govt. of NCT of Delhi)* *867*

— Seizure Memos – whether mere writing of the FIR number on the arrest and search memos can entirely falsify those documents? – Held: No. Mere mentioning of the FIR on the seizure memos would not mean that the memos were prepared after the FIR came into existence.

Rattan @ Ratan Singh v. *State (Govt. of NCT of Delhi)* *867*

NARCOTICS AND PSYCHOTROPIC SUBSTANCES ACT, 1988—Sec. 37—Applicant convicted for offence under section

21(c) of the Act and sentenced to undergo RI for 10 years and to pay fine of Rs. 2,00,000/- already undergone the sentence of about 8 years and 2 months—Applicant during pendency of appeal sought to be released on bail only on the ground of long incarceration—Held, merely on the ground of long incarceration the applicant cannot be granted bail, as the twin test laid down under section 37 of the Act is not satisfied because the applicant has failed to satisfy the Court that there are reasonable grounds for believing that the applicant did not commit the offence under Sec. 21(c) and that he is not likely to commit any offence while on bail.

Gurmeet Lal v. *Narcotic Control Bureau* *1389*

NEGOTIABLE INSTRUMENTS ACT, 1881—Section 138 – Whether a fresh cause of action can arise on subsequent dishonour of cheques and non compliance of the legal notice – Yes. Assurance of payment to the payee by the drawer of the cheque on a future date may be one of the causes for deferring the prosecution under Section 138. HELD: The payee or the holder can defer prosecution till the cheque which is presented again gets dishonoured for the second or successive time - Respondent No 1. was well within its right to launch prosecution on the basis of the dishonour of cheques on 30.3.2001 which was followed by the issuance of the notices within 15 days of the dishonour of the cheques.

Vijay Singh v. *Hindustan Antibiotics Ltd. & Anr.* *941*

— Section 138 – Whether a cheque issued by the Client (the Borrower) in a Factoring Agreement is towards liability or security? – Factor filing complaints under Section 138 against borrower on failure of the debtor to pay – Metropolitan Magistrate taking cognizance and ordered issuance of summons – Issuance of summons challenged. Held: At this stage, it cannot be said that the cheques issued by the Petitioners were only towards security – Prima facie, the same

were towards the Petitioners' liability which was co-extensive with the Debtor.

Krish International P. Ltd. & Ors. v. *State & Anr.* *945*

— Section 138 – Territorial Jurisdiction – Whether a complaint can be presented at a place where the complainant deposited the cheque in his bank? HELD: No. Notice from any place does not confer territorial jurisdiction. To confer jurisdiction, one or the other act which constitute the offence must be done within the jurisdiction of the court where the complaint under Section 138 of the Act is filed. In the instant case all the acts, i.e. the handing over of the cheque to the payee, i.e. the respondent was at Kolkata; the cheque was drawn at IDBI Bank having its branch at Kolkata; the cheque was dishonoured by the earlier said branch at Kolkata which was the drawee of the cheque. The drawer of the cheque inspite of the receipt of notice at Kolkata failed to make the payment within the stipulated period. HELD: Complaint not maintainable at Delhi.

Gee Pee Foods Pvt. Ltd. & Ors. v. *Digvijay Singh* *819*

— Plaintiffs sought decree for possession and mesne profits in respect of second floor terrace with construction thereof of property at Asaf Ali Road, New Delhi—Suit decreed partially, claim for recovery of possession allowed and claim for recovery of mesne profit was denied—Parties to suit instituted four different appeals to challenge the judgment—Prior to this, Sh. Kavi Kumar brother of defendatns had filed a suit for partition against defendants being his sisters and mother Smt. Savitri Devi—During course of partition suit, parties agreed to refer disputes to arbitration—Award passed and made rule of Court—Subsequently, a Deed of Family Arrangement entered into between parties and suit property was also one of subject matter of Deed—Plaintiffs challenged the Family Arrangement being void nonest and ineffective in suit filed

possession—Defendants refuted claim raised by plaintiffs and urged, their deceased brother Sh. Kavi Kumar was predecessor in interest of the plaintiff's and was privy and party to Family Arrangement—Also, questioning legality of Family settlement was barred by limitation as filed 7 years after death of Kavi Kumar and Savitri Devi—They further urged to have acquired ownership of suit property by adverse possession. Held:- A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving honour. The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld.

Madhur Bhargava and Ors. v. *Arati Bhargava and Ors.* *959*

— Section 138—Limitation Act, 1963—Section 5—Condonation of Delay—Sufficient cause—Complaint under Section 138 N.I. Act dismissed on non appearance of the complainant—None appeared on 14.07.2010 and none appeared even on 12.11.2009—Petition for leave preferred alongwith application for condonation of delay of 404 days—Contended—Junior counsel appearing for the main counsel did not inform about the dismissal of the complaint—Petition contested—Contended—Sufficient cause must be shown with proper explanation—delay not properly explained—Certain right accrued in favour of opposite party—Cannot be taken away—Court observed— junior counsel noted wrong date as

15.07.2010 instead of 14.07.2010—Even if there was wrong noting of date by junior counsel there is not whisper as to why complainant would not appear on 15.07.2010—The application in the High Court filed on 21.10.2011 after about one year and four months of the said date—There is no whisper as to when complainant contacted the counsel—The certified copy of the order was prepared on 25.03.2011 yet the leave petition filed on 21.10.2011—No explanation given—Held—Petitioners failed to show sufficient cause for condonation of delay—Petitions dismissed.

Fincap Portfolio Ltd. v. *State & Ors.* *1345*

— Sections 138 and 141—Complaint—Code of Criminal Procedure Section 251—Notice—Complaint under section 138 NIA—Sought to prosecute as partners—The firm prosecuted through its proprietor/partner and respondent no.2 prosecuted as proprietor/partner/authorised signatory—Averred that the firm is a partnership firm and accused no.2 to 5 were its partners were incharge of and responsible for conduct of day to day business—Notice under section 251 Cr. P.C. served on respondent no.3—Stated that his father and younger brother had nothing to do with the firm and accused Bharat was merely an employee—Petition filed for quashing of the complaint—Pleaded—Documents placed showing that the firm is a proprietorship firm—Not taken into consideration—respondents pleaded that averments contained in the complaint have to be accepted—Documents relied upon by the accused not to be considered while framing charge—Held—Complainant was not sure whether the firm is a proprietorship or a partnership firm—Genuineness of the documents issued by the Government Departments not disputed by respondents—The firm was a proprietorship firm-filing of complaint u/s. 138 with aid of Section 141 not permissible—Proceedings against the petitioner quashed.

Madan Singh & Anr. v. *Vee Pee International Pvt. Ltd. & Ors.* *1465*

PREVENTION OF CORRUPTION ACT, 1988—Section 19 (3) (c)—Special Judge framed charges against petitioner—Writ Petition filed praying for quashing of charges—Stay of proceedings before Trial Court also prayed—Plea taken, in several cases which were relied upon by petitioner, proceedings in cases under PC Act were stayed by SC—Per contra plea taken, *Arun Kumar Sharma* is not applicable to facts of instant case as it is not borne out from said case if same was under PC Act—In rest of cases cited by counsel for petitioner, provisions of PC Act which specifically bar Court from staying proceedings before Trial Court were not considered—Held—In *Satya Narayan Sharma* contention raised before SC that bar under Section 19(3) (c) of Act would not exclude inherent power of HC to stay proceedings under PC Act was negated holding if enactment contains a specific bar then inherent jurisdiction cannot be exercised to get over that bar—In *Arun Kumar Jain,* a DB of this Court while analyzing provision of Section 19 about maintainability of a Revision Petition against order of framing charge under PC Act has held that Section 19(3) (c) clearly bars Revision against interlocutory order and framing of charge being interlocutory order, a Revision will not be maintainable—Even if a Petition under Section 482 of Cr. P.C. or a Writ Petition under Article 227 of Constitution of India is entertained by HC, under no circumstance order of stay should be passed regard being had to prohibition contained in Section 19(3) (c) of PC Act—Petitioner's prayer for stay of proceedings before Trial Court cannot be entertained—Application dismissed.

S. Kalyani v. *Central Bureau of Investigation* *1055*

PREVENTION OF FOOD ADULTERATION ACT, 1954—Section 20—Consent is a condition precedent to a prosecution for an offence punishable under Section 16—Section 20A – Purpose defined – Petitioners were Directors of the accused manufacturer company and were accordingly, summoned under Section 20A – Purpose of Section 20A is to enable the

Court to prosecute the manufacturer, distributor or dealer of the adulterated article when it transpires during trial that the adulterated article had been manufactured or distributed by some person other than the one who has not been prosecuted – Manufacturer company was already impleaded as one of the accused. HELD: Section 305 of Code of Criminal Procedure, 1973 lays down the procedure when corporation is made an accused in a criminal case – Procedure mandates the issuance of summons to the accused company through its principal officer and it is for the company to decide as to through whom it is to be represented – Simply because there is no one to represent the accused company, the Directors of the company could not have been summoned to appear as accused – Section 20A could not have been used as an aid to issue summons to the Petitioners to face prosecution since Petitioners were neither manufacturer, dealers or distributors.

Puneet Gupta & Anr. v. *State* *834*

REGISTRATION ACT, 1908—Section 52 (1) (c) Delhi Registration Rules—Rule 29—Probate was granted on Will executed by late Smt. Shakuntala Kapur on petition filed by respondents—Objections filed by appellants dismissed—Aggrieved appellants preferred appeal mainly alleging, certified copy of will did not satisfy requirements of Act. Held:- If a Will is prepared in duplicate either by using a carbon or by printing the same twice from a computer and signed in duplicate and then the carbon copy duly signed in original or the computer printout duly signed in original is pasted in the records of the Sub-Registrar, it would satisfy the requirements of both Section 52 (1) (c) of the said Act, 1908 and Rule 29 of the said Rules, Further, a Will is not compulsorily registerable under the said Act and, thus a mere irregularity in the certified copy would not render the original Will invalid.

Sushoban Luthra & Anr. v. *Major Ravindra Mohan Kapur & Ors.* *1590*

— Service Tax—Chapter V of Finance Act, 1994—Export of Service Rules, 2005—Appellant being in the business of rendering IT enabled services, through a Business Process Outsourcing (BPO) unit was exporting the said services by way of providing telephonic assistance to customers of overseas companies and was thus liable to pay service tax—Notification No. 12/2005-ST issued on 19/4/2005 in pursuance of Rule 5 of Export of Service Rules, 2005 granted rebate of the whole of the duty paid on excisable inputs or the whole of the service tax and cess paid on all taxable input services used in providing taxable service exported out of India—The notification also required filing of a declaration providing description, quantity, value, rate of duty and amount of duty payable on inputs actually required to be used in providing taxable service to be exported—Appellant in terms of notification claimed rebate in respect of service tax paid on input services used by it. However claiming that the nature of its business is such that it is not possible to predict the inputs actually required, the appellant did not file declarations but provided complete details and documentation at the time of filing for refund—Both Dy. Commissioner, Service Tax and Commissioner of Central Excise (Appeals) rejected the claims for rebate holding that the requirement to file a declaration prior to the date of export of service was essential to prevent evasion of duty and since appellant had not filed such a declaration, the rebate would not be admissible—Further appeals filed before the CESTAT led to the matters being remanded back to the original adjudicating authority for *de novo* decision with Tribunal agreeing that the requirement to filed declaration could not be waived. Held: Nature of service of appellant is such that they are rendered on a continuous basis making it a seamless service. Unlike manufacture and export of physical products like bicycles, the nature of BPO services is such that it is impossible to anticipate the date of export and with precision demarcate the point in the prior to export and also determine the point in time when the export

may be said to have been completed. Requirement to file declaration in advance is impossible to comply with. Further, no irregularity or inaccuracy of falsity alleged in rebate claims. Appeal allowed with clarification that the decision rests on the peculiar facts of the case and the peculiar nature of the appellant's business.

Wipro Limited v. *Union of India* *1374*

SERVICE LAW—Constitution of India, 1950—Article 227—Indian Navy, Medical Board—Whether the Petitioner is right in stating that the Respondents failed to conduct the re-survey Medical Board of the Petitioner even though he was granted disability pension for 2 years at the time of invalidation on 28th February, 1972 from the Indian Navy on medical ground? Held—That the Base Hospital, Delhi will conduct the re-survey Medical Board and date and time of the same should be communicated to the Petitioner for his medical examination at the address tendered by him. Further, result of medical examination shall be forthwith communicated to him and he is entitled to service element and pension benefit. Petition allowed.

Ex. Sailor Ishwar Singh v. *UOI and Ors.* *795*

— Sec. 7 r/w 16—Appellant convicted by learned Metropolitan Magistrate—In appeal, learned ASJ set aside conviction on the grounds that State had failed to prove that the presence of colour in the food article was to such an extent as to make the food article injurious to health and that the photo-chromatic test performed in this case was not a sure test to determine the presence of permitted metanil yellow coal tar dye and that delay of six days in signing of the analysis report by the Public Analyst made the report valueless—Appeal by State—Held, the reasoning given by the ASJ as regards the quantity of color being negligible goes beyond the standard laid down in Item A.18.06 read with A.18.06.09 of Appendix B and unless delay in signing report by the Public Analyst is shown to have

caused any prejudice to the accused, the delay is inconsequential and in view of the Supreme Court's judgment in the case of ***Dhian Singh*** the method of analysis applied could not be challenged by the accused—As such, held the learned ASJ fell in error on all the three counts.

Delhi Administration Through Designated Officer v. *Manohar Lal* *1395*

— Contributory Provident Fund (CPF) & Pension/General Provident Fund (GPF) Scheme—Office Memorandum No. F.4/1/87-PIC-I dated 01.05.1987—Brief Facts from WP (C) No. 8489/2011—Petitioner came to be appointed in the respondent National Council of Educational Research and Training (NCERT) on 08.02.1966—By an Office Memorandum No.F.4/1/87-PIC-I dated 01.05.1987 the Central Government on the recommendations of the Fourth Central Pay Commission notified that the Government employees subscribing to the existing Contributory Provident Fund (CPF) were being given an opportunity to switch over to the Pension/ General Provident Fund (GPF) Scheme—Cut-off date for exercising such an option was 30.09.1987—The terms also specified that in case an employee did not given any option he/she would be deemed to have opted for pension scheme—If an employee wanted to continue under the CPF scheme, he/she had to exercise the option for the CPF scheme—Petitioner exercised his option for continuing with the post retirement benefit under the CPF scheme—In the year 1993, in pursuance of the respondents' advertisement for recruitment to the post of Professor (Vocational Education) in Pandit Sunderlal Sharma Central Institute of Vocational Education (PSSCIVE) at Bhopal, petitioner along with other internal and external candidates applied for the said posts and were offered appointment for the said posts in Bhopal—By an order dated 26.04.1994, the NCERT issued a formal order of appointment w.e.f. 21.04.1994—In accordance with the terms and conditions of service, the petitioner along with other

appointees, were to be on probation for a period of two years—On 10.04.2001 and 24.08.2001, petitioner made representations to the respondent for change over from CPF scheme to the pension scheme—However, the said representations were not responded to by the respondent—Petitioner retired in the year 2004 on attaining the age of superannuation—However, since the respondent considered the petitioner as having been bound by the option exercised by him before his appointment as a Professor in PSSCIVE, Bhopal, the petitioner challenged the action of the respondent—In the original application filed before the Tribunal the petitioner stated that it had come to his knowledge that one Ms M. Chandra had joined NCERT, respondent, as a Professor of Chemistry in the year 1989 through direct recruitment and had opted for CPF while working in her erstwhile organization—Since, after 01.05.1987 all employees who were appointed afresh were deemed to be covered by the notification dated 01.05.1987, she could not be placed in the CPF scheme. Therefore, Ms Chandra made a representation to the respondent for being granted GPF/Pension scheme. Pursuant to that, after seeking advice from the Ministry of Human Resource Development, the respondent allowed Ms. Chandra to switch over from CPF scheme to GPF/Pension scheme—Similarly, the petitioner had urged in his application that one Ms. Pushplata Verma who was governed by CPF scheme while in her erstwhile department and similarly opted for being governed by the CPF scheme, was informed, that she would be entitled to get the benefit of pension-cum-gratuity as per the rules of the respondents—Plea of the petitioner for giving him benefit of the GPF/Pension scheme was rejected—Aggrieved by the said order of the competent authority dated 12.03.2010, the petitioner was constrained to file OA No.1160/2010—By the impugned order the Tribunal disposed of the said original application and held that the petitioner's service cannot be treated to have been begun afresh and there being only a technical break in his

service, he will not be entitled to exercise the option of which over at this stage—Aggrieved by the said common judgment and order dated 10.11.2010 the petitioners have preferred the present petitions. Held—In view of the fact the the respondent NCERT has permitted similarly placed appointees to switch over to the GPF scheme after being selected through the same recruitment process, a legitimate expectation is raised in favour of the petitioners to be treated in a similar manner—The expectation is further accentuated when the said appointees were permitted to derive the benefit of GPF scheme despite having exercised the option of CPF scheme even after they were absorbed in the service of the respondent NCERT—Therefore, when similarly placed employees of the respondent have been extended the benefit, of the GPF/Pension scheme merely because they were earlier engaged in the service of the respondent NCERT—Petitioners had been put on probation for a period of two years subsequent upon their appointment to the relevant post in PSSCIVE, Bhopal—The Tribunal failed to appreciate that it is settled law that once a person is appointed to a substantive post through direct recruitment in an open selection after competing with internal and external candidates the appointment on the said post is a fresh appointment—Petitioners have been subjected to hostile discrimination, although they were appointed by the same recruitment procedure as others, only because they were working with one of the establishments of the respondents earlier—Same constitutes unequal treatment amongst equals and is violative of Article 14 of the Constitution of India—Writ petitions are allowed and the order of the Tribunal is set aside—Consequently, the respondents are directed to extend all the benefits of the GPF/Pension Scheme after making necessary deductions to both the petitioners.

— Pension Regulations for the Navy—Regulation 23—Brief Facts—On 26th December, 1966, the Petitioner was granted regular commission in the Indian Navy and he sought voluntary retirement as he claimed that he had been wrongly superseded for the next higher rank of Commander in the navy—He was permitted to so retire on 31st March, 1983—Petitioner claims that he was permanently absorbed in the Shipping Corporation of India Ltd. on 30th November, 1982, when he had served for 16 years, 65 days in the Indian Navy—By way of this writ petition, the petitioner assails the order dated 22nd March, 2010 passed by the Armed Forces Tribunal in O.A. no.211/2009 rejecting the prayer of the petitioner for grant of pro-rata pension to him from the date of his discharge from the Indian Havy and a direction to the respondents to release service pension under Regulation 23 of the Pension Regulations for the Navy—Respondents contend that the petitioner had not joined the Shipping Corporation of India, the public sector undertaking, on deputation or otherwise with the consent of Naval authorities. Held—Petitioner places reliance on a circular dated 20th January, 1979 which shows that this circular only provided criteria for pre-mature retirement/resignation of Defence Services Officers and does not contain the mention of grant of pro-rata pension—Letter dated 20th January, 1979 or the policy letter dated 12th July, 1982 were not placed before the Armed Forces Tribunal by the petitioner—Policy letter dated 12th July, 1982 which refers to orders issued by the Ministry of Finance read with memos of the Ministry of Defence to the effect that: "Officers who have been permitted to be absorbed in the Public Sector Undertakings on or after 8th November 1968, are deemed to have retired from service from the date of such absorption and are eligible to draw the pay of the post in the Public Sector Enterprise in addition to pro-rata pension from the date of absorption, subject to fulfillment of the eligibility conditions for this purpose laid down in the orders issued by the BPE regarding the period of option etc.

Instant case does not relate to an officer who has been permitted by the respondents to be absorbed in the public sector undertaking—Respondents have placed reliance on a circular of the Government of India dated 19th February, 1987 which clarified the above noticed position—These communications and circulars were never placed before the Armed Forces Tribunal—Armed Forces Tribunal has found that the applicant was not entitled to pro-rata pension for the simple reason that the conditions mentioned in the circular dated 19th February, 1987 are not satisfied—Given the clear policy enunciation in the prior policy letter dated 12th July, 1982 noticed hereto before, which is relied upon by the petitioner, the position does not change whether reference is made to policy letter dated 12th July, 1982—Subsisting position has only been clarified by the letter dated 19th February, 1987—No fault in the order passed by the Armed Forces Tribunal—The present writ petition has no merit and is dismissed.

Narvir Singh v. *Union of India & Ors.* *1449*